This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

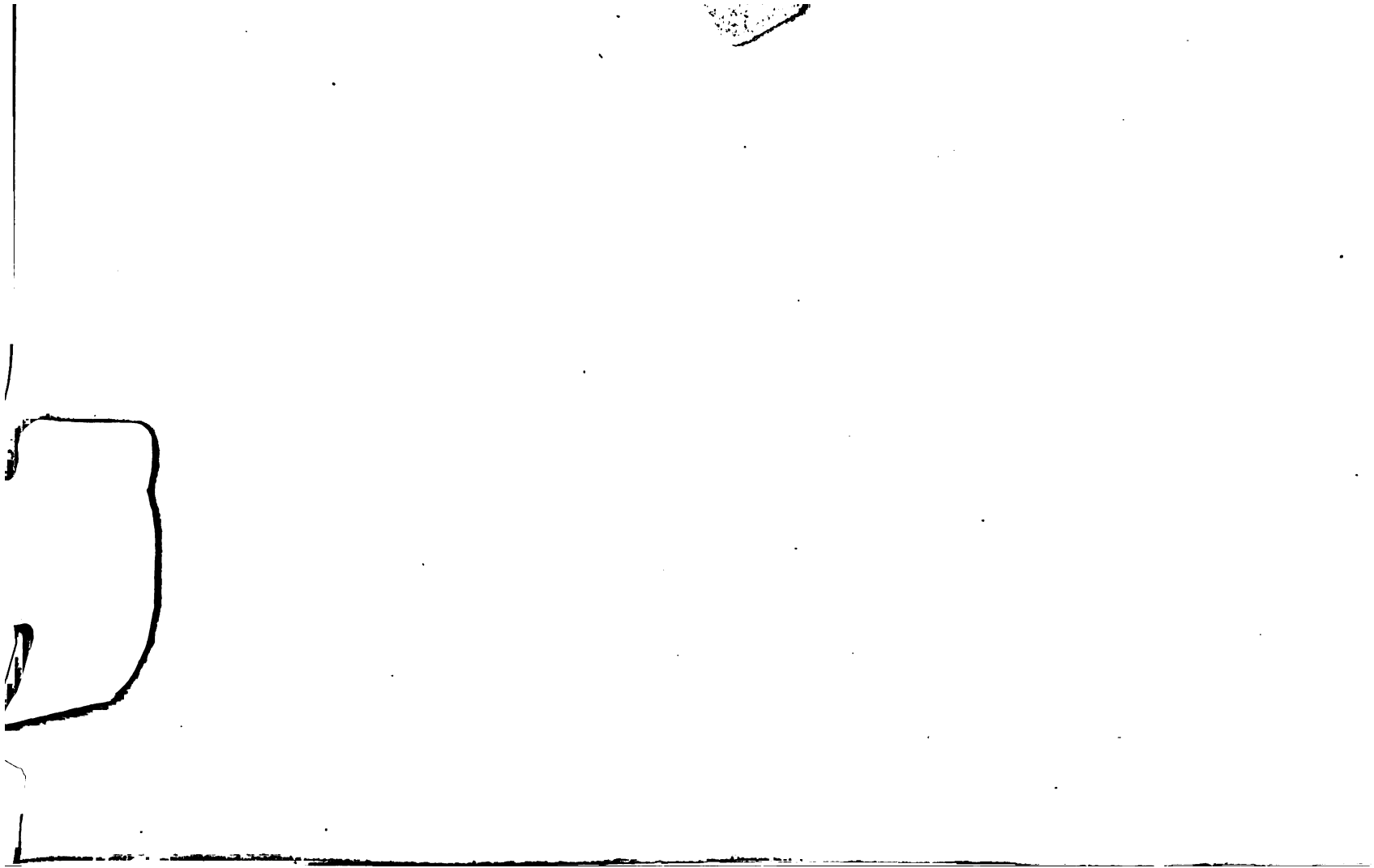
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



CIA

J. A. Bennion.

SHEPPARD'S

Touchstone

OF

COMMON ASSURANCES;

OR

A PLAIN AND FAMILIAR TREATISE,

OPENING

THE LEARNING OF THE COMMON ASSURANCES,

OR

Conveyances of the Kingdom.

THE SEVENTH EDITION,

INCLUDING ALL THE NOTES AND ADDITIONAL REFERENCES IN THE FORMER EDITIONS, AND IN THE IMPROVED MS. COPY OF

EDWARD HILLIARD, Esq.

ALSO,

AN ENLARGEMENT OF THE TEXT, &c. BY THE ADDITION OF VARIOUS CRITICISMS, DISTINCTIONS, &c. &c.

AND A COPIOUS INDEX;

By RICHARD PRESTON, Esq.

OF THE INNER TEMPLE.

LONDON:

PRINTED FOR J. & W. T. CLARKE, LAW-BOOKSELLERS,
PORTUGAL-STREET, LINCOLN'S-INN.

1820.

LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY
LAW DEPARTMENT.

a 7500 2

LAW LIBRARY

Printed by Luke Hansard & Sons,
near Lincoln's-Inn Fields.

MR. PRESTON'S ADDRESS

TO THE

READER.

SHEPPARD'S TOUCHSTONE ever has formed, and for a long series of years will form, an essential part of every well-selected law library.

For the soundness of its Propositions, its succinct Method, and its excellent Arrangement, this book is not surpassed by any work on the law. To the period of its date, it was a complete summary of the existing law on the modes of assurance, and on various subjects connected with titles. It is impossible to read the work and not to trace the mind of a profound lawyer, possessing extensive knowledge, founded on great experience.

It is a work which does honour even to the name of Doddridge, now confessedly its author; though additions were made to the work by Sheppard the first editor.

This Book was long neglected. The name of Sheppard had not any charms for the profession. It is evident, however, that the most eminent lawyers possessed this work, and were sensible of its value. In every copy of the earlier editions, which has fallen under the notice of the present Editor, the name of some eminent Judge or distinguished Lawyer was inscribed. In two copies which he possesses of the first edition, there are annotations, and proofs of the persevering industry of Fabyan Phillips, and of Serjeant Hill. That Chief Justice Willes possessed

this work, and that he drew from it a large portion of the sources of his information, is evident. See *Willes Rep.* p. 682. His commendation of the work, in his elaborate judgment in the case of *Roe* v. *Tranmer*, 2 *Wils. Rep.* 78, brought the work into general notice, after it had, like the other works which bear the name of Sheppard, been neglected or discarded. The favourable opinion expressed of this work by Chief Justice Willes, led to five successive editions, and they experienced extensive and rapid sales.

Mr. Hilliard enriched the Touchstone with various annotations and numerous references, and connected the work with modern decisions; thus supplying the information which these decisions afforded.

In 1795, 1796, the present Editor read the work to his pupils, and on that occasion he added the criticisms and explanations suggested by the course of study he was pursuing. Numerous copies of these notes found their way into the profession; and, on a moderate calculation, 300 copies are existing, and contain the inaccuracies of transcribers; and some of the copies are involved in confusion, from an attempt to abridge notes which, even in their origin, were only short hints. Besides, the original notes were not exempt from mistakes, originating in opinions which more mature judgment, extended research and practice have corrected.

An intention of publishing these notes, was many years since announced to the public.

Mr. Hilliard, although a perfect stranger to the present Editor, with a kindness and liberality which do infinite credit to his memory, brought to the Editor his large and valuable additions to the notes previously published; giving to the present Editor permission to engraft them into the edition he was preparing.

The present Editor never lost sight of this Work, or abandoned his intention of publishing a new edition; and

in his Preface to his edition of Watkins's Principles of Conveyancing, published in the year 1819, he renewed his pledge, and stated his plan. However, he would have deferred the publication of this edition of the Touchstone to a period more favourable to his views, as connected with the publication of other works, and the education of his second son; had he not been forced to change his arrangements. The appearance of a new edition, with the name of Mr. Atherly, invited his attention to that edition, and excited his surprise, not to say his indignation. He found many of his own manuscript observations embodied into that edition; even word for word; or with an immaterial change in the language introducing the proposition. In short, the present Editor is bound by a regard to his own character, and to rescue it from the imputation to which it may be subject, (and it is only for the sake of his character that he invites the examination,) to express a wish that the public should compare that edition with the edition now submitted to them; and he has left his original manuscript with the publishers; or at least in their power; that the public may have access to it, and judge, if it be worth their while, whether the present Editor has, in any instance, condescended to become a plagiarist!!

In justice to Mr. Hilliard, rather than from choice, the present Editor has given all the annotations of Mr. Hilliard in their corrected and enlarged form; and in a few, though not in many instances, he has added, among the text or the notes, observations to prevent any erroneous conclusions, which might arise out of some of those valuable notes. Had not Mr. Hilliard's liberality rendered the insertion of his labours an act of justice and of duty, the present Editor would, in the prosecution of his own plan, have discarded the annotations as such, and embodied their substance among the text. His opinion, formed on the most mature reflection, is, that the number of law books, increasing as they are from day to day, is an evil of great magnitude, rendering the study of the law more perplexing from the diversity of opinions, induced by diversity of language; besides dividing and harassing the memory.

In the communication of the same principles in different terms, and with different qualifications, as suits the temper and judgment of each expounder of the law, or each commentator or text writer, there arises a source for infinite litigation; increasing in a multiplied progression as the law library increases; while the law would be more intelligible, more accessible, and more completely a standard of the rules of property, if there were only a few books of acknowledged merit, and these works were illustrated by examples, criticisms and comments. Thus the rules would be fixed, and their application only, and not their terms, would be the subject of succeeding works: and the time must arrive in this Country, as it has arrived in other States, when the Laws must, of necessity, be digested, and brought into a system more definite, and less capable of that diversity of opinion which leads to infinite and uncertain litigation; affording to each successive Judge the same right of acting on his own conclusions, as was exercised by his predecessor, in opposition to prior decisions.

The system also of editing works of acknowledged merit, with ample and extended annotations, engrafting treatise on treatise, and even treatises on new and different subjects, has, in common with many advantages (advantages which no one is more ready than the present Editor to acknowledge) great and numerous disadvantages. The mind of the student is distracted; it is withdrawn from the original author, and diverted step by step into a new pursuit. *Lord Coke*, in his commentary on Littleton, though so competent, as we know by his other works, to have composed methodical and well-digested treatises, paved the way for this unfortunate system of criticism on the Laws. He seems to have taken for his prototype, the criticisms on the more favourite classical authors, in which a word or a name becomes a thesis for a dissertation, altogether foreign to the text on which the criticism is offered. Thus, dissertation is heaped on dissertation, and the original work becomes a passport to the works of successive editors; works, which, though highly valuable in themselves, are injurious to the law as a science; for of all the sciences, none, more than the law, imperiously stands in need of a connected system,

which, by its arrangement, may aid the memory and facilitate research.

The conviction, derived from experience in the education of youth, of the confusion generated by this system, to the extent in which it is now carrying, determined the present Editor, as far as it should be in his power, to introduce a mode of exhibiting new editions of a few approved works, by enlarging and correcting them, in like manner as the authors themselves would in all probability have done, had they lived to witness the changes in the law, or the necessity of enlargement; with this difference only; in this mode of editing these works, it was due to the authors and to the public, to keep the text entire, and to distinguish by brackets, or some other mode, the corrections, the annotations, and the additions; a plan closely and faithfully observed in this edition. By this arrangement, the text remains uncorrupted; and the reader has the opportunity, if he think fit, to pursue without distraction, the corrections which are suggested, and the additions which are presented to him; or he may discard them as his judgment may dictate. —The choice is in his power; and different editions, by different editors, may, with propriety and utility, become valuable parts of the same library. The text will be the same identically, and the race for fame will be, to add the most valuable corrections, and the most useful additions, in explanation of the text. In this mode a few standard books would be the foundation of the knowledge of every lawyer.

In the present edition, the Editor has adopted the same course as he adopted in editing Mr. Watkins's Principles of Conveyancing. He has corrected or expounded the original text only when, in his opinion, it required correction or explanation; and he has added such additional annotations only as would prevent erroneous conclusions from the text; or as would elucidate the text by showing its principles, its application, an exception, or a distinction. It was altogether foreign to his purpose to render each chapter a complete treatise, by the addition of all the matter of which it was capable. That the Touchstone should supersede, or should compete with works which treat of any

subject distinctly, was not a part of his plan. On Recoveries, for instance, or on Fines, or on Powers, Uses, &c. he would, on all occasions, recommend the student to read that treatise which is acknowledged by the profession to be the most useful work on the subject. His aim has been to retain the Touchstone in the lawyer's library as a text book; and a systematical work of great utility; and to render it more valuable by guarding the inexperienced from adopting all the conclusions of this work, without the qualifications suggested by the decisions and professional experience which have taken place in the long interval of the 172 years which have elapsed since the publication of the first edition. The Author indeed paid the debt of nature in the year 1628, and consequently, two centuries are nearly completed, since the work was compiled by him; and in that interval the lawyer's library has increased as twenty at least to one; although, fortunately for society, the changes which have taken place in the fundamental principles of Law, are comparatively very few.

THIS VOLUME

OF A NEW EDITION

OF

SHEPPARD'S TOUCHSTONE

OF

Common Assurances,

IS INSCRIBED

TO

CHARLES BUTLER,

OF LINCOLN'S-INN, ESQ.

AS A TRIBUTE OF

INCREASED ADMIRATION AND RESPECT

FOR HIS EMINENT TALENTS AND PROFOUND KNOWLEDGE;

AND OF ESTEEM AND GRATITUDE FOR

THE FRIENDSHIP

BY WHICH HE HAS ALWAYS DISTINGUISHED

THE EDITOR.

THE

CONTENTS

OF THE

CHAPTERS.

CHAP. I.

Of Common Assurances in general - - - p. 1

CHAP. II.

Of a Fine.

1. DEFINITION of a fine - - - - - - - - - 2
2. The parts of it - - - - - - - - - - 3
3. Different kinds of fines - - - - - - - - - ib.
4. The manner and order of levying a fine - - - - - - 5
5. The nature, use and fruit of a fine - - - - - - - 6
6. What shall be said a good fine, or not; and how - - - - ib.

1st. In respect of the persons thereunto, and their capacity; and by or to whom a fine may be levied, and who may be conusors or conusees; and by what names - - - - - - - - - p. 6–8

2dly. In respect of the persons before whom it is acknowledged; and the persons and place before whom, and where it is recorded; and what persons may take conusance of fines, or record them, and where, and how, and the duty of such persons therein p. 8–10

3dly. In respect of the thing whereof the fine is levied, and of what things a fine may be levied, or not, and by what names p. 10–13

4thly. In respect of the estate of the parties thereunto - 13–15

5thly. In respect of the concord and matters touching it; and what concord or agreement may be made by fine or not 15–18

6thly. In respect of the manner and order of levying it, and other matters - - - - - - - - - - p. 18–19

7. How the concord of a fine shall be expounded and taken - p. 19
8. What person shall be barred by a fine, or a fine and non-claim; and in what time, or not, and how - - - - - - - p. 20–24
1st. Issue in tail barred by the fine of his ancestor or some other p. 24–28
2dly. Wife barred by the fine of her husband, or some other - 28
3dly. Disseisee and the like barred by the fine of the disseisor, &c. 29
9. Where a fine shall be a bar as to one person, and not to another; or as to one part of the land, and not to another - - - - - p. 29
10. The time of claim, and within what time he that hath right to land must make his claim, &c. to prevent the bar of the fine - - - p. 30
Estrangers:
1st. That have present right and no impediment - - - 30
2dly. That have present right and impediment - - - 31
3dly. That have divers defects - - - - - - 32
4thly. That are without impediment, having future right upon cause precedent - - - - - - - - - p. 32
5thly. That have future right and impediment - - - 33
6thly. That have no right for any cause before the fine - - ib.
7thly. That have future rights by divers titles - - - 34
11. How a fine shall enure and work - - - - - - ib.
Where a fine may be avoided, or not; and how - - - ib.
By a writ of error - - - - - - - - ib.
By a claim, entry, &c. and by whom a claim, &c. may be made 35
By a plea - - - - - - - - - - 36
By a vacat - - - - - - - - - ib.

CHAP. III.

Of a Common Recovery.

1. Definition of a common recovery - - - - - - p. 37
2. Different kinds of common recoveries - - - - - ib.
3. The manner and order of suffering a common recovery - - ib.
4. The use, nature and operation of it - - - - - - 40
5. What shall be said a good common recovery; and who shall be barred and bound thereby, or not - - - - - - - p. 41
6. The remedy of recoverors against the lesees for rents and services and upon waste done - - - - - - - - - p. 48
7. Where a recovery may be avoided, or not; and how - - - ib.

CHAP. IV.

Of a Deed.

1. Definition of a deed - - - - - - - - p. 50
2. Different kinds of deeds - - - - - - - - ib.
3. The parts of a deed - - - - - - - - - 52
4. The nature of a deed indented, and a deed poll and the difference between them - - - - - - - - - p. 52
5. When and where a deed shall be said to be good and sufficient; and when and where not; but void or voidable *ab initio* - - - - p. 53
1st. In respect of the writing of it - - - - - 54
2dly. In respect of the persons parties thereunto and matter therein 56
3dly. In respect of the reading of it - - - - - ib.

4thly. In respect of the sealing of it - - - - - ib.
5thly. In respect of the delivery of it; and what shall be said a good delivery, or not - - - p. 57
1. In respect of the person that doth make it - - - ib.
2. In respect of him to whom it is made - - - - ib.
3. In respect of the time - - - - - - - 58
4. In respect of the manner and order of delivery - - ib.
6thly. In respect of the ground and end of it - - - - 60
Collusion in fraudulent conveyances - - - - 63
1. To deceive purchasers - - - - - - - ib.
2. To deceive creditors and others of debt and such like duties 64
3. To deceive lords of their wardships, &c. - - - 67
6. Where a deed good in its creation may become void by matter *ex post facto:* and what will make such a deed void or not - - - p. 68
1st. By rasure - - - - - - - - - ib.
2dly. By breaking or defacing of the seal - - - - 69
3dly. By delivery or by cancelling it - - - - - 70
4thly. By disagreement - - - - - - - - ib.
5thly. By judgment of a court - - - - - - - ib.
7. When and where a deed may be good in part and void in part; or good against one person and void against another, or not - - p. 70
8. How and to what time a deed shall have relation: and when it shall begin to take effect - - - - - - - - - - p. 72
9. When and where a deed must be shewn in court; and how long it shall abide there; and who may take advantage of it - - - p. 73
10. Where one may say his deed was delivered at another time, or in another place - - - - - - - - - - - - p. 73

CHAP. V.

Exposition of Deeds.

1. Premises - - - - - - - - - - - p. 74
2. *Habendum* - - - - - - - - - - - ib.
3. Recital - - - - - - - - - - - - 76
4. Where it is needful; or not - - - - - - - - ib.
5. Where mis-recital will hurt a deed; or not - - - - - ib.
6. Exception - - - - - - - - - - - 77
7. What shall be said a good exception; or not - - - - ib.
8. *Tenendum* - - - - - - - - - - - 79
9. Reservation or *reddendum* - - - - - - - - ib.
10. What shall be said a good reservation; and what not - - - 80
11. Condition - - - - - - - - - - - 81
12. Warranty - - - - - - - - - - - ib.
13. Covenant - - - - - - - - - - - ib.
14. How and to what purpose a deed of grant in gross shall enure, and be construed and taken - - - - - - - - - p. 81
15. How a deed of grant shall be construed and taken in all the parts and branches thereof; the exposition of the several parts of the deeds of grant; and how the words and sentences therein shall be taken; in the exception; and how that shall be taken - - - p. 86–89
1st. In the thing excepted - - - - - - - - 100
2dly. In the time - - - - - - - - - - - ib.

CHAP. VI.

Of a Condition.

1. Definition of a condition - - - - - - - - - 117
2. Different kinds of conditions - - - - - - - - ib.
3. What things may be made and done upon condition - - - 119
and to what things a condition may be annexed, or not - - ib.
and how it may be made and annexed thereunto - - - ib.
4. The nature of a condition in deed, and of a limitation - - - 120
5. When an estate shall be conditional, and what words will make a condition, and what not; and how a condition may be known from a covenant, or limitation - - - - - - - - - p. 121
6. What shall be said a condition in law, and when an estate shall be subject to such a condition - - - - - - - - p. 125
7. What shall be said a good condition in deed or limitation in its original creation; and what not - - - - - - - - - p. 126
1st. For the manner, frame, and order of making it - - ib.
2dly. For the manner and substance of it - - - - 129
8. How a condition in deed or a limitation shall be taken and expounded; and how it must and ought to be performed - - - p. 133
1st. In respect of persons - - - - - - - - ib.
2dly. In respect of time - - - - - - - - 134
3dly. In respect of place - - - - - - - - 136
4thly. In respect of other matters - - - - - - 137
9. When and how a condition or limitation shall be said to be performed, or not - - - - - - - - - - - p. 139
1st. When the act is to be done between the parties themselves - ib.
2dly. When the act is to be done by a stranger - - - 144
3dly. When the act is to be done to a stranger - - - ib.
10. What act shall be a breach of a condition in deed; and when a condition in deed shall be said to be broken, or not - - - - p. 144
11. When a condition in law shall be said to be broken, or not - - 148
12. Who may enter for a condition broken;
and what persons shall take advantage of a condition or a limitation; and what not - - - - - - - - - p. 149
13. Where entry or claim is needful to avoid an estate on condition;
and where a man may take advantage of a condition without entry, or claim, and where not - - - - - - - - p. 153
14. When a condition broken shall make the estate, &c. void *ab initio*; and when not; and to what intents the lessor, feoffor, &c. shall be adjudged by his re-entry to be in of his first estate, and to what intents not, p. 154
15. When and by what means a condition shall be discharged and extinguished for ever, or suspended for a time, or not - - - - p. 157
1st. By the act of God - - - - - - - - ib.
2dly. By the act of law - - - - - - - - ib.
3dly. By the act of parties - - - - - - - - ib.
4thly. By the act of a stranger - - - - - - 159

CHAP. VII.

Of a Covenant.

1. Definition of a covenant - - - - - - - - p. 160
2. Different kinds of covenants - - - - - - - - ib.
3. The use and operation of it - - - - - - - - 161

4. What shall be said a good covenant in a deed, upon which an action of covenant may be had; and what not - - - - - p. 162
1st. In respect of the manner of making it - - - - - ib.
2dly. In respect of the matter or substance of it - - - 163
5. What shall be said a good covenant in law, upon which an action of covenant may be had; and when not - - - - - - - 165
6. How a covenant in deed or law shall be taken and expounded; and how it shall be performed - - - - - - - - p. 166
7. When a covenant in deed or law shall be said to be broken; and when not; and how - - - - - - - - - p. 170
8. Who shall or may have advantage of a covenant in deed or law, and bring a writ of covenant upon the breach of it; or not - p. 175
9. Who shall be bound and charged by a covenant; and against whom a writ of covenant doth lie; and where, or not - - - - 177
10. When a covenant shall be said to be gone and discharged; and when not; and how - - - - - - - - - - - 180

CHAP. VIII.

Of a Warranty.

1. Definition of a warranty - - - - - - - - p. 181
2. Different kinds of warranties - - - - - - - - ib.
3. The fruit and effect of it, and what use may be made of it - - 182
4. What words and clauses in a deed will make a warranty; or not - 184
5. To what things a warranty may be annexed and extended; and to what not; and how - - - - - - - - - p. 184
6. What shall be a good warranty in law; and how it shall bar and bind, 185
7. What shall be said a good warranty in deed; or not; and how it shall bar and bind - - - - - - - 186
8. What shall be said a lineal warranty; and how such warranty shall bar - - - - - - - - - - - - p. 190
9. What shall be said a collateral warranty; and how such a warranty shall bar - - - - - - - - - - - - p. 192
10. What shall be said a warranty that doth begin by disseisin; and what such a warranty doth work - - - - - - - - p. 194
11. How a warranty shall be taken - - - - - - - 196
12. Who may take advantage of a warranty; and how and against whom it may be taken - - - - - - - - - p. 198
13. When a warranty shall be said to be defeated, determined, or avoided; and how; or not - - - - - - - - - - p. 201

CHAP. IX.

Of a Feoffment.

1. Definition of a feoffment - - - - - - - - p. 203
2. Different kinds of feoffments - - - - - - - - ib.
3. The nature and operation of it - - - - - - - - ib.
4. Who may make, or take by feoffment; and what shall be said a good feoffment, or not; and what things are requisite thereunto - - p. 204
1st. In respect of the persons thereunto, and the quality of their estate - - - - - - - - - - - p. 204
2dly. In respect of the matter whereof it is made - - - 205
3dly. In respect of the premises, or possession of other persons on the land at the time of the feoffment made - - - p. 206
4thly. In respect of the manner of making of it - - - 208

5. Livery of seisin, what it is - - - - - - p. 209
6. The different kinds - - - - - - - - - ib.
7. The nature and operation of it - - - - - - - - 210
8. Where and in what cases it is requisite; or not - - - - ib.
9. How it may be and must be made; and what shall be said a good livery of seisin; or not - - - - - - - - - p. 211
1st. In respect of the persons that make it, and to whom it is made, and the quality of their estate - - - - - - p. 211
2dly. In respectof the time when it is made - - - - 212
3dly. In respect of the place or thing wherein it is made - ib.
4thly. In respect of the presence or possession of others - - 213
5thly. In respect of the matter whereof it is to be made - - 214
6thly. In respect of the manner and order of making it - ib.
10. Where livery of seisin made or taken by an attorney shall be good; and where not; and what warrant is sufficient - - - p. 217
11. How it shall enure, and be taken and construed - - - - 218

CHAP. X.

Of a Bargain and Sale.

1. Definition of a bargain and sale - - - - - p. 221
2. Different kinds of bargains and sales - - - - - - ib.
3. The effect of it - - - - - - - - - - ib.
4. Of what things a bargain and sale may be, or not - - - 222
What shall be said a good bargain and sale;
and what things are requisite to make such a bargain and sale; or not - - - - - - - - - - p. 222
How a bargain and sale shall be taken - - - - - 225.
How and to what purpose a deed of bargain and sale of lands, and the inrolment thereupon, shall relate;
and how and to what purpose not - - - - p. 226

CHAP. XI.

Of a Gift - - - - p. 227

MR. HILLIARD'S ADDRESS.

(PREFIXED TO THE FOURTH EDITION.)

THE fate of the book, now reprinted, has been somewhat singular. For a long time the *Touchstone* lay on the stalls of the second-hand booksellers in *Moorfields* unnoticed, and of no repute. The late Lord Chief Justice *Willes* was the person who rescued it from unmerited neglect, by the high character he gave it in the court where he presided: his powerful encomium, together with the importance of the subject-matter of the book, the method observed in it, and the authorities upon which its doctrine is established, have contributed to give the work that reputation which is fully confirmed by its present scarcity. Though this treatise bears the name of *Sheppard*, yet doubts have arisen whether it be really his performance; if we consider that this was given as Mr. *Sheppard*'s first publication, and compare it with *his subsequent* productions, the earliest work will be found to bear the marks of the maturest judgment. This circumstance, together with the report which has prevailed even to this day, that he is not entitled to the credit he has assumed, seems to justify the doubt; and the assurances made by the friends of the late Judge *Doderidge*, that the manuscript, so congenial to his abilities, was found among his papers, favour the supposition long entertained, that Mr. Justice *Doderidge* was really the author of the *Touchstone*. From a printed copy of this work, which belonged to that very eminent conveyancer, the late Mr. *Booth*, and is now in the possession of Mr. *Holliday* of *Lincoln's Inn*, the editor has been permitted, for the information of the curious reader, to transcribe the following note, written in Mr. *Booth*'s own hand in the title-page: "*No part of* "*this book is* Sheppard's *but the title, for it was originally wrote by* "*Justice* Doderidge, *whose library* Sheppard *purchased, where, among* "*other books, he found the original manuscript of this treatise, and* "*afterwards published it as his own. Sir* Creswell Levinz *had seen the* "*manuscript in Justice* Doderidge's *hands, and from him Mr.* Pigott, "*who was my author, had this information.*"—A report, propagated by persons so respectable, amounts almost to a certainty. Be this as it may, the credit of the work is now so well established, that, were its presumptive lineage indisputably proved, it could not easily increase in reputation. Mr. *Pigott*, the author of the celebrated *Treatise on Recoveries*, had so just a sense of the merit of the *Touchstone*, that he took the pains to compile a copious and correct index

thereto, now first published, but with some additions. The original, in Mr. *Pigott's* own hand-writing, is also in the possession of the gentleman above named. It is not within the bounds of this address, nor the intention of the editor, to specify the various subsequent writers who have availed themselves of the *Touchstone*, by making liberal extracts therefrom, though they have not had the gratitude to acknowledge the source of their information. Those who will take the pains to compare any of the chapters in this work, with later treatises on the same subjects, will find the truth of this observation, which is intended rather to mark the authority of this book, than to depreciate that of others. On a thorough examination, it is presumed this work will be found to contain as excellent a *Theory of Conveyancing* as any extant; it is therefore now printed on the same sized paper with *Horseman's Precedents*, in order that such gentlemen in that particular branch, who incline to the opinion just mentioned, may, by adding this volume to those precedents, form a complete body of conveyancing. The universal esteem in which the *Touchstone* has been held, not only by conveyancers, but by the profession in general, principally induced the editor to reprint it. The humble merit of an editor is chiefly confined to correctness; but he has found it necessary to alter the old orthography, by omitting the "e" final, which in the former editions was sometimes inserted and sometimes omitted, even where the particular word happened to be repeated in the same period. The public will not require an apology for being presented with what has been long wanted, a new edition of so valuable and excellent a work; but an apology is due from the editor for submitting to the inspection of the learned, though not without the approbation of some friends, the few notes which he has ventured to subjoin, and which originally were intended for his private use. He assumes to himself no merit from this addition; but as the law, and particularly this branch of it, has received many material alterations and improvements since the last edition of this work, it is now become the duty of an editor to endeavour to point out the most important of such changes: he is therefore led to hope, that the student may find among the notes some that are useful. It has been his chief aim to make them clear and concise, and to render them serviceable by referring to the general books on the subject, and occasionally to cases and statutes. He does not pretend to have compared the numerous references of the original, though there are some which he has occasionally rectified; but he has endeavoured to be peculiarly attentive to the correctness of those he has added. Though no pains or attention have been spared to render this edition as correct and useful as possible, yet the editor is convinced, from the consciousness of his own inability, and the extensive variety of matter comprehended in this work, how much he stands in need of the utmost candour of the public.

EDWARD HILLIARD.

Lincoln's Inn, Jan. 12, 1780.

(DEDICATION TO THE FORMER EDITIONS.)

TO THE

RIGHT WORSHIPFUL

THE

BENCHERS OF THE MIDDLE TEMPLE,

AND TO THE REST OF

THE GENTLEMEN OF THAT SOCIETY.

GENTLEMEN,

I MAY perhaps have been so long out of your sight, that I may be also by this *time* out of your mind. Nevertheless, it is not out of my mind, that I, having received the seed and growth of that little knowledge in the laws of this kingdom which God hath given me in the seed-plot of your ancient and honourable SOCIETY, do no less (by a natural equity) owe the fruit thereof to you, than the rivers do their tribute to the ocean, and the trees their fruit to the planters and pruners. This therefore (such as it is) although unworthy of so great a name, I am bold to dedicate to you, and put forth under the shelter of your favourable wings; beseeching you to accept thereof, and my well meaning therein, and to honour it with your patronage and countenance, and it will much oblige,

GENTLEMEN,
Your most humble Servant,
W. S.

PREFACE

TO THE

FORMER EDITIONS.

TO THE READER.

COURTEOUS READER, I do desire in all plainness to be understood, that having, in the time of my study of the LAWS of this Realm, collected some confused NOTES and OBSERVATIONS out of the same: and being afterwards willing (for God knows I had no further end or aim at first in them) for mine own private help and better readiness, to digest them into some order and method, such as my understanding could best contrive. The which things, thus prepared and lying by me, came by chance to the view of some more learned than myself, who seemed to give some good approbation thereunto. Whereupon I first of all began to bethink myself of making some part thereof public. And having to that purpose advised with some of my more judicious friends, and being encouraged by some, and not discouraged by others, I did at last resolve to attempt to publish and put in print the same. And calling to mind that the COMMON ASSURANCES and CONVEYANCES of the kingdom (whereupon the whole estates, and consequently the livelihoods, of very many depend) are matters of great importance, and that concern most men; and that therefore the legal learning thereof must needs be of great and daily use. And considering withal the mischief arising every where by the rash adventures of sundry ignorant men that meddle so much in these weighty matters, there being now almost in every parish an unlearned, and yet confident, pragmatical attorney, (not that I think them all to be such,) or a lawless scrivener, that may perhaps have some law books in their houses, but never read more law than is on the backside of *Littleton*, or an ignorant vicar, or it may be a blacksmith, carpenter, or weaver, that have no more books of law in their houses, than they have law in their heads, and yet as apt and able (if you will believe themselves) either to judge of a conveyance, and by the rules of law (of all which they are utterly ignorant) to determine of the strength and goodness of a title or estate already made, or to make a conveyance to transfer the property of things from man to man, as the most learned and best counsellor of them all; and therefore undertake with great confidence, and dispatch, without any scruple, any business whatsoever offered to their hands: wherein they deal with men in their estates, as many that are called physicians (but in truth empiricks) deal with men in their bodies, (an evil fit for the consideration of parliament.) How they come to this their supposed dexterity and skill is a wonder, except that saying be false, *Nemo nascitur artifex.* Either it must be born with them, or they must

must have it by education, or they must not have it at all. But if they will tell me they have good precedents, I will tell them that a good conveyancer must be as well able to judge of the validity of the title, and primitive estate of him that is to convey, (which a man can never do without knowledge of the rules of law, no more than a blind man can judge of colours,) as to make a derivative estate and conveyance by a good precedent; for *scire est per causas scire*, as the philosopher speaks. And as well, for aught I know, may a man be an able physician by certain medicines only, that never read so much as the grounds of physic, as such men be able conveyancers by their precedents only, that never read so much as the maxims of law: *Nullum medicamentum idem est in omnibus.* For my part I must ingenuously profess that I can scarce look into a title or meddle with a conveyance of weight, wherein I cannot make and move more doubts and questions, than I am able to resolve and answer; and therefore these men have gotten the start of me much. And yet much marvel it is to see how these empiricks of the law (if I may so call them) are sought unto and made use of, and that not only in lesser, but oft-times in greater and more weighty businesses, and that without the assistance of any others more able and sufficient; the which is not for lack of opportunity of finding more learned men in the law, for there is a sufficient store of them in all places: nor do those that employ these empiricks of the law, always save (if they think it saved) money hereby; for, besides the great mischief which is oft-times done themselves by the unskilfulness of these workmen, some of them, by reason of their much custom, are grown more chargeable than an ordinary counsellor, whose fee is certain and known. But of these empiricks of the law, and those that make use of them, I might say as sometime our blessed Saviour said, *Let them alone, the blind leaders of the blind.* Howbeit, being now called (as I conceive) hereunto, I chuse rather to admonish them, and to tell the first sort, that I conceive them to be usurpers upon, and intruders into, other men's callings, and that they thrust their sickles into other men's harvest, and that they have not yet learned that rule of divinity, *To abide in the calling wherein they are called*, but exercise themselves in things too high for them; nor yet have they learned this, *Ne sutor ultra crepidam*, let not the cobler go beyond his last; nor have they learned that, *In quo quisque norit in hoc se exerceat*; and let me tell the latter sort, that they heed not enough this saying, *Caveat emptor*; nor believe that saying, *Cuique in arte sua credendum*, that every man is to be believed in his own art. But if you will say to me, that these men do their work well, and their work doth succeed well; I will say to you, that the blind may happily hit the mark; and it may fall out that sometimes they do their work well, and it doth succeed well, but oft-times woeful experience showeth the contrary, and that many men have been much mischieved every where by the ignorance of these men. Wherefore I wish both sorts of them to doubt more and to be well advised in these affairs, as the law doth presume every one will be; for therefore is it indeed that a will hath a more favourable interpretation than a deed, because men's wills are oft-times made in haste, and it is presumed men take who they can to make them; but men for the making of their deeds are not put upon those straits, but they take advice of learned men therein. And the more to move men herein, and to redress the evil before discovered, I have herein set forth, under certain general titles or common places,

the greatest part of the judgments, statutes, resolutions, and cases that do contain or concern the learning of the COMMON ASSURANCES of the kingdom; so as I think I may truly say, under reformation, that there are few material things, as touching this subject, to be found any where dispersed in the volumes of the law, but they are to be found some where herein; and that there shall not happen one case of a hundred, but a hundred to one the diligent reader may here find the case itself, or some case that by good inference may be applied to it. Not that I would have men now to rest upon this help, and be less careful and more careless to take advice of the lawyer than heretofore, (for this is the disease I labour to cure,) for although it may be that hereby these matters are made in some measure conspicuous, yet to say the very truth, besides that the subject matter of law is somewhat transcendent, and too high for ordinary capacities, the manner of putting of cases is so concise, the distinctions and differences of law are so many, that it is hard for any man, not well read in the laws in general, to judge or make use of any part of them in particular, and rightly and fully to apprehend and apply the things herein set forth: and therefore I dare not advise men to rest altogether hereupon, nor can I forbear to tell them it is very dangerous so to do. But my aims and ends, being also the uses and commodities I expect and look after from this work, are, first of all, that such men, before spoken of, may see by the view of the infinite variety of cases, points, and questions, as touching these matters, discovering also so many by-ways wherein men conversant therein may walk, how much there goes to making up of an able conveyancer, and that it is not so easy a matter to judge of a title, give advice upon a conveyance, and make these common assurances, as men dream of, and that therefore men learn more to suspect themselves and others herein; and to these it may serve as a light in a dark place. Secondly, that by this the lawyer and student may in some measure readily find together what he desires touching these matters; and to him it may serve for a table or remembrancer. And lastly, that every man may be the better able by the help thereof to understand, open and put his own case to his lawyer, and to move more pertinent questions to him: and other uses I would have no man to make of it. In the use of this work therefore I must give thee two advertisements or caveats: First, that if thou desire to find any thing in particular therein contained, that thou read the whole chapter, or at least the whole question and division of the chapter, wherein that thing is contained. And secondly, that thou dost not confidently build and rely upon any thing therein alone without advice from the learned lawyer also, or at least without a serious and judicious perusal of the authorities and books themselves to which thou art therein referred: *Melius est petere fontes quam sectari rivulos.* Some other things there are also here inserted, as falling aptly under the title, albeit they be not altogether pertinent to the subject matter. And all these sweet flowers of the law, growing *sparsim* in the great fields of the volumes of the common and statute laws, have I thus painfully gathered, bound up and commended to thy charitable censure: no doubt but, in my desire to grasp and take up so much, I have taken and bound up some grass withal, which I hope shall not offend. If so be that I find it have a fragrant smell with thee, I shall think I have recompense enough for my pains. But if any man think me too presumptuous to attempt this enterprise, let

him know first, that there is nothing of mine in it but the method, (and that not mine neither altogether) the matter thereof being nothing else but the judgments, resolutions and opinions of the judges of the law in succeeding times: and then as I have not trusted myself, so they shall not trust me altogether in these things. For I do freely acknowledge mine own weakness and want of judgment, and that I am the unmeetest and unworthiest of all men to undertake such a work, not one of a thousand, but the meanest of ten thousand. And this I have done is a poor something sufficient only to give them that are more learned, occasion to do something more exactly in this kind. If any man dislike the publishing of it in the English tongue, and think perhaps it may make the law to be the more despised, and the practitioner of the law the less regarded and used, I do wonder at the dislike of such a man; for to me there appears no more reason why to keep the laws in an unknown language that they may be kept from the knowledge of the people, than papists have to keep the scriptures and their prayers in a language unknown to the people; these being the laws by which the people are to be governed, and the law being the best inheritance of the subject. The wisdom of the parliament hath thought fit to commend all the statute laws to the people in English, and to appoint that the pleadings should be in English. And have we not many books of law in English already, as *Littleton's Tenures, Doctor and Student, Finche's Law,* Justice *Doderidge's Treatises, Coke upon Littleton,* the *Woman's Lawyer,* and many others? and are not these useful and profitable? and besides the greatest part of the proceedings in Chancery, (the court of greatest employment within the kingdom,) are in English. And if it be meet any part of the law be in the native tongue, it should seem it is meet this part should be so, because it concerneth so many men, and them also so much, that they may see and understand somewhat in their own evidences. And therefore as we have turned their deeds from Latin to English, so let us turn some of the law touching these deeds out of French into English. *Bonum quo communius, eo melius.* And I see no reason why in law, more than in physic, the discovery of the art should make the art or artists the less regarded. But (under correction) I should think that it will rather make them both the more esteemed, as a jewel whose properties are known, and that it will make them the more, and other men we have before spoken of the less, to be used and employed in their affairs; for the more men know, the less they think they know, and the more they doubt; and nothing moves men to be so bold and confident in these matters as their ignorance, according to the proverb, *Who so bold as blind Bayard?* And for further answer to this, I wish men to see the Preface of the Lord *Coke upon Littleton.* And if any man have any thing else to object and except, (for some there are that will neither put forth their own strength to do good, nor bear with others that do so,) I wish them to undertake the same subject, and to perfect and supply my defects. And so committing thee to God, and this work to thy favourable censure,

I am thy true friend,

W. S.

THE

TOUCH-STONE

OF

COMMON ASSURANCES.

CHAP. I.

Of Common Assurances in general.

THE common or general assurances or conveyances of the kingdom (being those by which commonly the property of things is made, [*read* created,] or changed, [*read* transferred or aliened]) are of two sorts, or are made two manner of ways, *viz.* either by matter of record, or by matter of deed. Those that are made by matter of record also are made either by matter of record of a more high nature and extraordinary way; or by matter of record of a more low nature and ordinary way. Those assurances that are made by matter of record of a more high nature, are such as are made by act of parliament, of which we intend not to treat at all; [being a subject amply discussed by *Powell* in his introductory chapter to his edition of *Wood;*] neither do we intend to meddle with those assurances, that are made by the King unto his subjects, as being matters more transcendant and intricate; [on which *Sheppard* in his, more properly *Dodderidge's, Abridgment*, title *Prerogative*, and *Comyns* in his *Digest, Grant*, (G. 1.) afford the best and most ample information;] but those we intend to treat of are only the common assurances or conveyances that are made between subject and subject, and are of ordinary and daily use for the transferring of the property of lands, tenements and hereditaments [and also personal property] from one man to another (1); [or are for the con-

(1) The legal evidences of the translation of property are called, The *common assurances* of the kingdom, whereby every man's estate is assured to him, and all controversies, doubts

strangers not suing or claiming in due time (3). And in every fine there is a suit supposed, wherein the party that is to have the thing is called the plaintiff, and sometimes also in another respect the conusee or recognisee; and the other that doth depart with the thing, is called the deforceant (4); and sometimes, in another respect, the conusor or recognisor. And it is therefore said to be, *finalis concordia, quia finem ponit negotio* (5), *adeò ut neutra pars litigantium ab eo de cætero possit recedere*, [1 *Cruise*, p. 4.] And it was anciently the end of a suit indeed, [*viz.* a suit actually depending;] for after there had been some contention about the thing by suit, the parties became agreed who should have it, and so a fine was levied of it, and there was an end of the matter; and hence it is said to be, *fructus* or *effectus legis*, *because it gives a man the fruit or effect of his suit (6). And to this day, therefore, a writ doth always go [or ought to go] forth before a fine can be [duly and properly] levied, [so as to be free from error; for a fine without writ is erroneous, and voidable by writ of error. It is voidable only, and not void; for that reason, it may operate, *cæteris paribus*, in the mean time till voided, as a conveyance, and be a foundation for a valid recovery [*Lloyd* v. *Evelin*, 2 *Salk.* 568.]; and the right to maintain a writ of error may be released by means of such recovery, or by various other means; and though the fine might be avoided

Conusee or recognisee, conusor or recognisor.

Deforceant.

*P. 3.

(3) It is a *feoffment on record*, whereby a freehold may pass by the common law without any livery of seisin. *Co. Lit.* 50; but see 3 *Atk.* 141, where Lord *Coke*'s definition is considered. And a fine is there said to be a feoffment on record when the party has such an estate as will entitle him to levy a fine, that is, an estate of freehold; otherwise, a fine has no effect whatsoever with respect to a stranger, and operates as an estoppel only, and bars none but the party claiming under it.—In the case of *Hunt* v. *Bourne*, 1 *Salk.* 339, the court (of B. R.) denied a fine to be a feoffment of record, and said it was improperly so called, but that the meaning was, that it had the effects of a feoffment to some purposes, if he that levied the fine was seised of the freehold at the time of the fine levied.—In the case of *Smith*, on the dem. of *Dormer*, v. *Packhurst*, Lord C. J. *Willes*, in delivering the opinion of the judges, opposes the determinations of Lord C. J. *Holt* and Lord *Macclesfield* to the authority of Lord *Coke*, as to his definition of a fine stated above. See 3 *Atk.* 141.—According to Mr. *Blackstone* (in vol. 2. of his Commentary, 348.) a fine may with more accuracy be called an acknowledgment of a feoffment on record.

(4) Why he is so called, see 3 *Blackst. Com.* 174. *Deforcement* may be grounded on the non-performance of a covenant real, and therefore in levying a fine of lands the person against whom the fictitious action is brought, upon a supposed breach of covenant, is called the *deforceant*. 3 *Bl. Com.* 174.

(5) See *Glanville*, l. 8, c. 3, cited in note *b.* to p. 4 of the *Essay on Fines*.

(6) A fine, for its worthiness and the peace and quiet it brings with it, is termed *finis fructus exitus et effectus legis*. *Plow.* 358, a.

for error, the recovery would be free from objection as to the existence of a tenant to the writ of entry;] and this [fine] is now one of the common assurances of the kingdom (7); [Its utility, as the compromise of an actual suit, suggested the convenience of its adoption, in practice, as a common assurance.]

Co. 5. 38. 43. Stat. 5 H. 4. chap. 14.

The parts of it.

There are five essential parts of a fine: First, the original writ taken out against the conusor; for without this [writ] a fine cannot be levied [with effect, so as to be free from error; and a fine levied after a *retraxit*, is in the same condition as if no writ had been sued. 1 *Cruise*, 19. 1 *Prest. Convey.* p. 275.] Secondly, the king's licence for the levying of the fine, and for this the king is to have a fine or sum of money, which is called king's silver; for this is properly that money which is due to the king in the court of common pleas, in respect of a licence there granted to any man for passing a fine; and this is part of the revenues of the crown (8). [The king's silver is the post-fine, as distinguished from the præfine. *Cruise on Fines.* The præ-fine was due by common law on the writ, the post-fine on the licence to *accord.* though now it is collected on suing out the writ, and in fact the writ is not in general sued till the *concord* is taken. By the common law it could not be due, and therefore could not be paid, until the writ of covenant was returnable so as to bring the *deforceant* into court.] Thirdly, the conusance or concord itself, which is the very agreement between the parties that intend the levying of the fine, how and in what manner the thing shall pass [so as to express the nature and terms of the assurance,] and doth begin thus: *Et est concordia talis, &c.* And this is the foundation or substance of the fine; [it is, in form and in fact, the grant; in other words, the conveyance, while the other parts are auxiliary to that conveyance,] for if upon this the King's silver be entered, albeit the conusor die afterwards, yet the fine is good, [provided the writ of covenant was returnable prior to the death of the party, and there be an entry of payment of the King's silver,]

King's silver, quid.

Concord. Quid.

(7) See further as to the nature of a fine, *Spel. Gloss.* 228; 1 *Wood*, 531; *Wils.* 2.

(8) The quantum of the fines ascertained, and the reason why they are payable to the king, in 2 *Inst.* 511. *Chetw. Fines*, 10.

and the note or foot of the fine are but abstracts out of this (9). Fourthly, the note of the fine, which is an abstract of the original contract or concord, and doth begin thus: *Inter* A. *querentem* & B. & C. *deforcientes, &c.* Fifthly, the foot of the fine, which doth begin thus: *Hæc est finalis concordia, &c.* and containeth all the matter, the day, year, and place, and before what justices it was levied, which is therefore called the foot of the fine, because it is the last part of it; and when this is done, all is done. And of this there are [or may be, for they are not essential] indentures made by the chirographer, and delivered to the party to whom the conusance is made, which is called the ingrossing of a fine; for then a fine is said to be ingrossed, when the chirographer makes the indentures of the fine, and doth deliver them to the party to whom the conusance is made (10.) [The chirograph or indentures may be used as evidence of the fine. But the proclamations are not proved by the indentures. They must be proved by an examined copy. A fine may also be proved by an office copy (11).

Note of the fine. *Quid.*

Foot of the Fine. *Quid.*

F. N. B. 147. a. Co. 5. 39.

Ingrossing of the fine. *Quid.*

Quotuplex.

A fine is either without proclamations, which is also called a fine at the common law, and this is such a fine as is levied after such manner and form as fines were usually levied before 4 H. 7. upon which no proclamations were made; which fine doth still remain of the same force, as it was at the common law, to discontinue the estate of the cogni-

West. Symb. part 2. Sect. 19. Dyer, 216. Plowd. 265. Stat. 4 H. 7. chap. 24. 1 R. 3. ch. 7. Co. 3. 86. Stat. 32 H. 8. chap. 36.

(9.) By these acts all the essential parts of a fine are completed; and if the cognisor dies the next moment after the fine is acknowledged, *provided it be subsequent to the day on which the writ is made returnable*, still the fine shall be carried on in all its remaining parts. 2 *Bl. Com.* 351. *Comb.* 71. *Inst.* 511. *Barnes Supp.* 32.—If the king's silver is not entered before the conusor's death, (for thereby the defendant, in order to keep his covenant with the plaintiff of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. (2 *Bl. Com.* 352.) the fine may be reversed for error. 3 *Mod.* 140; but in 2 *Ld. Raym.* 850, where a fine is acknowledged before commissioners *in the country, in the long vacation*, and before the next term the conusor dies, though *no writ of covenant was sued out, nor king's silver entered*, yet the Common Pleas will permit the conusee to enter the fine as of the *Trinity* term preceding. See further, *Vin. Abr. Fine*, (F. b. 6.) *Chetw.* p. 11. 18. *Cruise's Essay on Fines*, 32.

(10) As to the parts of a fine, see *Bac. Abr. Fine*, (A.) *Vin. Abr. Fine*, (M. b. 2.) *Com. Dig. Fine*, (E.) 1 *Co. Read.* 1 *Wood*, 541. *Essay on Fines*, 14, very explicit.

(11) These parts of a fine are enumerated in the same order, and the reasons pointed out on which these proceedings are founded, in 2 *Bl. Com.* 350. The record of a fine, which remains in the possession of the chirographer, is the *principale recordum*, so that if there is any difference between it, and the record which remains with the *custos brevium*, then that which continues with the *chirographer* is considered as the true record. *Essay on Fines*, p. 25, and *vide* 3 *Leon.* 183.

sor, if it be executed, [as an estate tail in possession, &c. or as a conveyance of the estate of a married woman, or of any other person; or as a release or an estoppel to any individual, or to his general heirs as distinguished from his heirs in tail; and a fine may have its common law operation, although the proclamations are not made; or are, for some reason, irregular; but if the fine be voidable and be afterwards avoided, the proclamations will not, so far as the fine is void, or avoided, be of any avail; *debile fundamentum fallit opus.*] Or it is with proclamations, which is also called a fine according to the statute, and which is such a fine as is levied with proclamations after the form and manner ordained by the statute of 4 H. 7. c. 24. (12). (and such a fine shall every fine that is pleaded be intended to be, if it be not showed what fine it is) and of this sort were and are most fines since 4 H. 7. as being the best kind of fine of all; [and unless it be a fine with proclamations, it will not operate as a bar by nonclaim, or if levied by a tenant in tail, &c. it will not bar the issue in tail;] and it is in the election of him that sueth out the fine *as long as he liveth*, [or of his heirs after his death, 3 *Rep.* 86. b. *Cruise on Fines.*] to have it with or without proclamations; [and the proclamations must be proved in evidence in support of the title, when the proclamations are essential to the title, as to bar intails or operate by nonclaim.] (13.) A fine also, whether with or without proclamations, is either executed, which is such a fine as of its own force giveth a present possession [seisin in fact] (or at least in law) unto the cognisee, so * that he needeth no writ of *Habere facias seisinam*, or other means for the execution thereof; but he may enter: [*infra*, p. 9.] of which sort is a fine *sur cognisance de droit come ceo que il ad de son done*, which is in

*P. 4.

(12) Mr. J. *Blackstone*, in his legal history, treating of the alterations in the law during the reign of H. 7. says this statute was craftily and covertly contrived to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to alien. 4 vol. *Com.* 429, 7 ed.

(13) By the 4 H. 7. c. 24. it is ordained, "that every fine levied after that statute, in the same manner and form as fines were accustomed to be levied before that statute, shall have the same force and effect as fines so levied were before that statute;" and also, "that every person should be at liberty to levy fines thereafter, according to the form prescribed by 4 H. 7. c. 24. or according to the form aforetime used, at his pleasure; if the conusor dies before the proclamations are made, his heir may cause the fine to be proclaimed." *Wakefield* v. *Hodgson*, Cro. *Eliz.* 692. *Essay on Fines*, 30.

very deed [in truth] the best and surest kind of fine of all, [when the circumstances of the title will allow of its being levied; for in some cases, as of a fine by one or each of several tenants for life, the fine may occasion a forfeiture,] and is thus, *et est concordia talis, scilicet quod predict'* A. *recognoverit tenementa predict' cum pertinen' esse jus ipsius* B. *ut ill' que idem* B. *habet de dono prædic.'* A. [which the same B. hath of the gift of the aforesaid A. thus confessing or recognizing the former gift] *& ill' remisit, &c.* And this kind of fine doth always suppose a feoffment, or gift precedent, of the same thing whereof the fine is had, which the fine is to corroborate and strengthen; (14) [and hence it is said to be the acknowledgment on record of a prior feoffment or gift;] or it is executory; which is such a fine as of his [its] own force doth not execute the possession [*read* seisin] in the cognisee; and of this sort is a fine *sur cognisance de droit tantum*; when the party that doth levy the fine is seised of the thing, and he to whom the fine is levied hath no freehold therein, but it passeth by the fine; [and if there be no seisin in the conusor, and there be a seisin in the conusee, it operates as a release of *right*] (15). And a fine *sur done, grant, release, ou confirmation,* which is after this manner. *Et est concordia talis, sc. quod prædict'* A. *concessit et reddidit tenementa prædicta cum pertin' præfat'* B. *et hæred' suis durante vita ipsius* A. *Et prædict'* A. *warrant' præd' cum pertin' præfat'* B. *& hæred' suis tota vita ipsius* A. Or thus, *Et est, &c.* *quod præd'* A. *concessit præd'* B. *tenementa, &c. Habend' eidem* B. *pro termino vitæ suæ.* [These are fines *sur concesserunt.*] Or thus, *Et est, &c. quod præd'* A. *recognoverit, tenenementa prædict' cum pertinen' esse jus ipsius* B. *& illa* [read *illa tenementa*] *ei reddidit in eadem curia habend', &c.* Or a fine *sur done, ou grant et render.* [This form of fine is obsolete.]. Which is thus, *Et est concordia talis, sc. quod prædict'* A. *recognoverit, &c. ut ill' quæ idem* B. *habet de dono prædict'* A. *et ill' re-*

Co. 7. 32.

Vide infra.

(14) And in respect of the height of this fine, a fee simple may pass without the word *heirs*. *Co. Lit.* 9. b. *Vin. Abr. Fine,* (N. b. 3.) *post,* 19.

(15) And vests in the conusee before entry, *Co. Lit.* 266. b. This fine, being *sur conuzans de droit,* also conveys a fee simple, without the word *heirs,* 6 *Co. Read* 7. But a fine cannot be levied on an original in a personal action. *Salk.* 340. *Essay on Fines,* 16. See further as to the nature of a fine *sur cognuzance de droit tantum,* &c. 2 *Bl. Com.* 353. *Chet.* 4.

misit, &c. Et pro hac prædict' B. *concessit tenementa prædict' cum pertinen' præfat'* A. *Et ill' ei reddidit in eadem curia habendum et tenend', &c.* [This fine contains a conveyance and re-conveyance, or settlement; and the render confers a common law seisin.] And if these kind of fines be not levied, or such render made unto them that be in possession, [*viz.* in the seisin] at the time of the fines levied, the cognisees must enter, or have writs of *habere facias seisinam*, according to their several cases for the obtaining of their possessions. [*viz.* actual seisin.] But if at the time of levying of such an executory fine, the party unto whom the estate is limited be in possession [*viz.* seisin] of the lands passed, he shall not need any writ of execution to put him in possession [viz. seisin]; for then the fine will enure by way of extinguishment of right, and doth not alter the estate or possession [*read* seisin] of the cognisee; however, perchance it doth better it [and by such fine *sur grant* and *render* the seisin of the former owner is changed: for if a man seised *ex parte maternâ*, levy a fine, *sur grant et render*, and by the fine take back the fee, this fee will be descendible to his heirs generally, preferring his paternal heirs, while if he had levied a single fine, and declared the use to himself in fee, or the use of the fee had resulted to him, the course of the descent would not have been changed. 1 *Cruise*, 69. 2 *Prest. Convey.* 198. (16)]. (17) The fine *sur conusance de droit tantum*, also doth serve sometimes to make a surrender, and then it is therein recited, that the conusor hath an estate for life, and the conusee the reversion: and sometimes it doth serve to grant a reversion, (18) and then the particular estate is recited to be in another, and that the conusor willeth that the other shall have the reversion, or that the land shall remain to the other, after the particular estate spent. A fine

(16) For the distinction between a fine executed and executory, see 2 *Co. Read.* 2 *Inst.* 513. *Chetw.* 3. *Vin. Fine*, (N. 6.)

(17) Since the Statute of Uses, 27 H. 8. writs of possession are never sued out where fines are levied to uses, for the statute executing the possession to the use, the cognisee is immediately in possession without any attornment; and now by 4th and 5th *Ann*, c. 16. attornment after a fine is become unnecessary. *Pigot* 49. *Booth on Real Actions*, 250. *Essay on Fines*, 38.

(18) For of a reversion there can be no feoffment or donation with livery supposed, as the possession, during the particular estate, belongs to a third person. *Moor*, 629. 2 *Bl. Com.* 253. *Essay*, 41.

also is either single, which is such a fine by which an estate is granted to the cognisee and nothing granted or rendered back again to the cognisor by the cognisee. Or it is double, which is such a fine as doth contain a grant, and render back again
*P. 5. either of the land * itself, or of some rent, common or other thing out of it to the cognisor for some estate, [or even an estate in fee] limiting thereby many times remainders to strangers which be not named in the writ of covenant; which also is sometimes with reservation of rent, clause of distress, and grant of the same over (19); [and such new fee in the grantor will be a new seisin, descendible from him, as the first purchaser, although prior to the fine, he was seised by descent.] (20)

4. The manner and order of levying of a fine.

The manner and order of suing out or levying of a fine is thus (21):—First, there is an original writ sued out, and this may be a writ of *mesne, warrantia cartæ, de consuetudinibus et servitiis*, or any writ of right, (for upon these or any other writ whereby land is demanded or may be recovered, a fine may be levied), [1 *Cruise*, 18. 1 *Prest. Convey.* 268;] but the most usual writ whereupon a fine is levied is a writ of covenant (22). And while this writ is depending, (for howsoever it be the common practice to take out a *dedimus potestatem*, and have the conusance of a fine before any original writ be sued forth,) yet the original writ is always supposed in law to precede the *dedimus potestatem*, and therefore doth and must evermore bear *teste* before it; [or on the same day as the writ of covenant,] or else it is erroneous (23).

Experientia, Stat. de modo levandi Fines 18 E. 1. West. Sym. ut supra. 1 H. 7. 9 Bro. Fine 116.

(19) And this fine, *sur done, grant et render*, operates as a feoffment and re-enfeoffment, and is the only fine which gives a new estate. See *Essay on Fines*, 49. The cases there, and *post*, 18.

(20) See further, as to the different kinds of fines, *West. Symb. part* 2. § 19. *Vin. Abr. Fine*, (N. b.) For the nature and use of a fine *sur concessit*, which is a fine executory, and commonly used to grant estates for lives or years, see *Chet.* 5. 2 *Bl. Com.* 353.

(21) The curious reader will find the ancient manner of levying a fine in *Glan.* l. 8. c. 2, 3.

(22) See the form of it in *Wils.* 4. If there is no *original writ* sued out the fine is not void, but *voidable* only by writ of error, as is the case also where there is an original writ, and the fine is levied not only of that which is contained in the writ, but also of some other things not contained in the writ. 2 *Inst.* 513. *Vin. Abr. Fine*, (F. 2.) 3 *Co.* 5. *Plow.* 394. If the *sheriff* happens to be one of the deforceants, the writ must be directed to the coroner, otherwise it is not good. *Cro. Eliz.* 300.

(23) Accordingly *Cro. Eliz.* 740. *Goburn* v. *Wright*. But it seems, if the writ of covenant and *De. po.* both bear date on the same day, it is not error. *Arundel* v. *Arundel, ibid.* 677. *S. P. Herbert* v. *Binnon, Roll. Rep.* 223. *Essay on Fines*, 61. But it is said the writ of *De. po.* shall be good, although it bear test before the writ of covenant, and though

After the original writ sued forth, there is a *præcipe*, which is the tituling of the writ whereupon the fine is levied, [which is the summary of the writ of covenant,] and the concord and agreement of the parties, both which are fairly written, (and that most commonly in parchment:) after this, the party or parties that is or are to knowledge and levy the fine is or are to come in person before him or them that have power to take the same conusance; who are to take notice of the persons (24), [viz. *observe*, for the purpose of forming a judgment,] that if there be any woman that hath a husband amongst the conusors in the fine, they do examine her whether she be willing and do it freely without compulsion of her husband (25). After this, all the parties that are to levy the fine are to declare themselves before the judges or commissioners (having power to take the same conusance) to be willing to pass their right in the lands according to the agreement, and to subscribe their names or marks to the concord: and if it be taken by a special *dedimus potestatem*, it is to be returned and certified under the *hands and seals* of the commissioners into the court of Common Pleas, that it may be there recorded and finished. [And now by rule of court, one of the commissioners must make an affidavit authenticating the age, &c. unless there be special circumstances to induce the court to dispense with the rule. The rules and exceptions are collected by Mr. *Cruise on Fines*, p. 84. But though the writ of *dedimus potestatem* specifies in terms, that the return of the writ should be under the seals as well as the hands of the commissioners, yet, in practice, the commissioners do not affix their seals to the return.] And there the party conusee is first to compound with the king for his licence, for which he is to pay the king's silver, and thereof he is to have an entry on the back of his writ of covenant; and then he is to have it

---

it recites the writ of covenant to be depending. See 1 *Roll* 223. *Cro. Eliz.* 677. 3 *Com. Dig.* 350. *Contra*, *Cro. Eliz.* 740.—*Note.* In the several editions of *Cro. Eliz.* the number of the pages from 457 to 472 is repeated.

(24) That the conusors are of full age, sound mind, and out of prison. 2 *Bl. Com.* 351.

(25) In what cases a feme covert shall be examined, see *Vin. Abr. Fine*, (F. M.) and *Co. Lit.* 353. *a.* How she shall be examined, and when she shall be barred, though not examined, *Chet.* 52. When a year and a day have elapsed from the acknowledgment of a fine, an affidavit must be made that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. *Barnes*, 215.

inrolled by the *custos brevium*; and upon this roll the proclamations are to be indorsed; after this, it is to be brought to the chirographer, who is first to make that note thereof that is called the note of the fine (26): and hereupon if it be a remainder, reversion, rent or seigniory whereof the fine is levied, the writ of *quid juris clamat, per quæ servitia, quem redditum reddit*, as the case requireth, must be sued forth (27). [See these writs and comments on them, in *Booth's Real Actions*, 250.] And after this, the chirographer is to enter the fine of record to ingross it, and to make and to deliver the indentures thereof unto the conusee (28), and if it be a fine with proclamations, it is * to be proclaimed openly in the court of Common Pleas once every one of the four terms next after the ingrossing of it, (and it was to be proclaimed within the county where the land did lie at every assizes and sessions the next year after the ingrossing of it, but this it seems is not necessary now) and the next term after the ingrossing of it the contents thereof are to be recorded in a table (made for that purpose) to be set up in the court of Common Pleas at *Westminster* in an open place all the term time; and so also at every assizes. The fine may also be inrolled and exemplified.

*P. 6.

5. *The nature, use, and fruit of a fine.*

A fine is a record as of great antiquity (29), so of a high nature, great force, and much credit and esteem; and it is now become and serves for a formal conveyance of land, and one of the common assurances of the kingdom; for by this means a man may convey his land to another in fee simple, fee tail, for life or years, with reservation of rent also. It is therefore called a feoffment of record; [or the acknowledgment by record of a feoffment;] for it doth countervail [that is, is equivalent to] a feoffment with livery of seisin in

Statute of Fines 18. E. 1. Co. 1. 3. Plow. 358. 265.

(26) Which must be inrolled in the proper office, according to the statute of 5 H. 4. c. 14.

(27) By the conusee against the tenant to compel him to attorn; but by the stat. of 4 & 5 *Ann*, c. 16. § 9. fines are good, *without attornment*; and there is no occasion for suing out those writs. *Wils.* 44.

(28) Though it is usual to complete the indentures of the fine immediately on its being levied, yet there may be many years between the levying and ingrossing a fine. *Plow.* 366. *Chetw.* 13.

(29) Fines at the common law were frequent before the accession of *Will.* the 1st. 2 *Inst.* 511. *Vin. Abr. Fine*, (A. 1, 2.) And are supposed to have been coeval with our courts of record. See *Chet.* 2. As to the origin and antiquity of fines, see *Essay on Fines*, ch. 1.

the country, and it concludeth all that the feoffment doth; [under those circumstances in which a feoffment might have been made; and therefore a fine by tenant in tail in possession, operates by discontinuance of the seisin; and by a tenant for life seised of the immediate freehold without having the first estate inheritance, and attempting to convey the fee, operates to pass a fee by wrong or disseisin, and devests the remainder and reversion. *Goodright* v. *Forrester*, 1 *Taunt.* 578.] and worketh further of his [its] own nature, and it is indeed for many purposes the best and most excellent assurance of all others; for by the ancient common law it was so high a bar and of so great force, and of so strong a nature in itself, that it did conclude and bar not only such as were parties and privies thereto and their heirs, but all others of full age, out of prison, of good memory, and within the four seas the day of the fine levied, if they did not make their claim within a year and a day (30). And it is still of that [or like] force, [*Helps* v. *Hereford*, 2 *Barn. & Ald.* 242. *Sir W. Jones*, 456.] albeit it be somewhat enfeebled by some statutes, that either it passeth all the right and interest, [*viz.* estate, if any, or collateral interest as *rent*; or *right* or title, if the seisin be in the conusee] of the conusor to the conusee, or else it worketh by way of extinguishment [of rents, or of title to the seisin] and estoppel; [when the conusee has not any seisin; and the conusor has an expectancy as heir, or may acquire a future title,] and doth perpetually bar the conusor and his heirs of all present and future right and possibility of right or other collateral benefit to the thing whereof the fine is levied. And if it be a fine with proclamations, it doth in time become a perpetual bar to all others also, that have right, except they do take care to prevent the bar by their claim, action, or entry, within five years after the proclamations ended (31), [last proclamation; and their right to the possession commences]. And it

(30) And the stat. of 18 *Ed.* 1. says, that on these accounts such solemnity is required in passing a fine. 2 *Inst.* 513.

(31) The fine, with proclamations, if the conusee dies before the proclamations are completed, his heir may, if he pleases, cause them to be made. *Wakefield* v. *Hodgson*, *Cro. Eliz.* 692 & 708.

barreth intails peremptorily, whether the heir do claim within five years *or not*, if he make his claim [present or future, vested or contingent in estate or in title or possibility] by him, [*viz.* title by or through him] that levied the fine (32).

6. What shall be said a good fine, or not: and how. 1. In respect of the persons thereunto, and their capacity. And by, or to whom a fine may be levied, and who may be conusors or conusees. And by what names.

Any person male or female, body sole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a conusor therein; but there are certain persons prohibited by law, which the judges or commissioners that take the conusance of fines, ought not to admit or receive; and yet if they do admit them, and a fine be levied by such persons, the fine is good and unavoidable, *fieri non debet sed factum valet*; and of this sort are madmen, lunatics (33), villains, idiots, men that have the lethargy, doting old persons that want discretion, drunken men, and men that are forced to* it by threatening, imprisonment, or the like: also such as are born blind, deaf and dumb, but a man that becomes so accidentally may be received and ought not to be refused. Also persons attainted of felony or treason ought not to be received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the king and the lord of whom their lands whereof the fine is levied, are held, for their times (34): but persons waived or outlawed in personal actions only, ought not to be refused (35). And the king, lord, &c. may be benefited by such fine; since the fine may bar an intail, and thus exclude the issue: and though fines

West. Symb. in his Tract of Fines. 17 E. 3. 5. 17 Ass. pl. 17. Litt. Sect. 731. Perk. Sect. 24. Fits. Fines 120. See in Grant infra, chap. 12. Numb. 4.

*P. 7.

Persons attaint.

Non sanæ memoriæ.

(32) It is grown at this day to be the most common assurance or conveyance, and is the strength of almost every man's inheritance. *Wils. on Fines*, 2.

(33) This is true strictly at law; but where a man conveyed lands by deeds, fines and recoveries, under value, and by an inquisition was found to be a lunatic, the purchase was set aside, and the purchaser only allowed the money he had actually paid. 2 *Vern.* 678.

(34) See the case of *Stevens* v. *Winning*, 1 *Wils. Rep.* part 2. p. 219; where on a special verdict in *C. B.* the question was, whether a tenant in tail having committed murder, could afterwards, and *before conviction*, levy a fine, and bar the next heir in tail. The court inclined to think he could, but allowed a second argument, which the reporter never heard came on.—As to conveyances by felons, and whether attainder in a *premunire* shall have *relation* to the time of the offence, or only to the time of the judgment, to cause a forfeiture of lands. See *Cro. Car.* 172. *Grosse* v. *Gayer*, *Sir Wm. Jones*, 217.—Forfeitures for treason and felony arise only upon attainder, but they have *relation* to the time of the offence committed, so as to avoid all intermediate sales and incumbrances. 4 *Bl. Com.* 381 & 386. 7 ed.

(35) Fine levied by an outlaw in a personal action before seizure is good, and the conusee shall hold the land against the king; but if seizure be made before the fine is levied, it is otherwise. *Windsor* v. *Saywell*, 1 *Lev.* 33.

obtained from idiots, &c. may not be impeachable at law by averment of idiotcy, &c. or interposition of the court to vacate the fine [*Lister* v. *Lister*, *Barnes*, 218;] yet a court of equity may relieve against a fraud in obtaining a declaration of the uses of the fine.] [a] Also infants ought not to be received to levy a fine, and yet if an infant be admitted to levy a fine, and he do not avoid it by writ of error, during his minority (as he may if it be not a fine *sur grant & render*, in tail or for life) (36), the fine will be good for ever against him and all others, [but after a trial, by inspection during his minority, the fine may be reversed after he is adult]. [b] And if he die during his nonage, before he hath avoided it, [*read* and before trial by inspection,] it seems his heir can never avoid it, and yet upon this point the judges of the Common Pleas have been divided on a solemn argument, and of this *Just. Dod. in* 17 *Jac.* made a query (37). [However, at this day there does not appear to be any doubt on this point, and the court may dispense with its rules to enable infants, &c. who are trustees, mortgagees, &c. to levy fines, leaving the right to avoid the fine open to the general rules of law. The reason that the party himself cannot avoid the fine after he has attained his age of twenty-one years, is because it cannot appear by inspection, unless he was inspected during his infancy, that he was a minor. Therefore, where a minor dies before he has avoided the fine, and before trial of his age by inspection, the heir can-

Infants.

[a] 17 E. 3. 52. Cromp. Jur. 37. 10 E. 4. 13.

[b] Perk. Sect. 19. Dyer 220. and per Just. Bridgman's opinion in private.

(36) The parts within the parenthesis may be omitted. The distinction seems to be, he may avoid his grant in the fine by writ of error; and he may by disagreement, declaration, &c. avoid any estate granted to him by the fine. *Sed quære*, [R. P.]

(37) The law makes a distinction with respect to an infant, between *matters of record, and matters in fait*; *the latter* he may avoid either before or after he comes of full age, but *the former* only during his minority, because matters of record, as fines, &c. are judicial acts, and taken by a court or a judge, and therefore the nonage of the party, to avoid, the same shall be tried not by the country, but *by inspection of the person of the infant by the judge*, which cannot be done after his full age. The judges, it is said, may inform themselves in cases of this kind by means of witnesses, church-books, or any other kind of evidence. *Essay*, 75. But if on a writ of error, brought by the infant to reverse the fine for his nonage, proof thereof is made before he comes of age, and he afterwards dies before the fine is reversed, his heir may reverse it, or if he comes of full age before the reversal is complete, it may be reversed after his full age. *Co. Lit.* 131, *a.* 380, *b. Cro. Jac.* 230. 2 *Inst.* 483. What is to be tried by the court upon inspection, see *Bac. Abr. Trial*, (D.) and for the manner of reversing a fine for the nonage of the conusor by inspection, 3 *Bl. Comm.* 352. *Essay on Fines*, 75.

not avoid the fine, because he cannot make it appear, by any competent evidence, that his ancestor was a minor when he levied the fine.]

Women covert. [c] Also women that have husbands ought not to be admitted alone without their husbands to levy fines, and yet if such a woman alone [and as a feme sole, *viz.* without disclosing the fact of her coverture] levy a fine of her own land she hath in fee simple [or in fee tail,] and her husband do not avoid it (as he may if he will) by writ of error, entry or otherwise, during her life, or after her death during his own life, if he be tenant by the curtesy, [in this case it will be *pro interesse suo* only,] this is now a good fine and will bind her and heir heirs for ever (38), except she be an infant at the time of the fine levied, and her husband happen to die during her minority; for then, in that case, if it be not a fine *sur grant & render* to her in tail or for life, she may avoid it during her minority; but if the coverture continue until her full age, in that case she cannot avoid it, except her husband join with her in it; but the husband and wife ought to be received together to levy any fine of her land (39). [Under special circumstances the court will permit a married woman, for perfecting a sale made by her and *her husband*, to levy a fine as if she were a feme sole; not however giving validity to the fine, for the court cannot change the law, though it may regulate the practice; but leaving to the wife the right of avoiding the fine. Thus the court merely dispenses with those rules which the court introduced for the protection of the wife.]

[c] 17 E. 3. 52. 30 E. 3. 5. 23 Ass. pl. 53. Perk. Sect. 19, 20. Co. 7. 8.

Corporations. If such persons as are civilly dead [by devotion to the church,] as friars, monks, and the like, be admitted to levy a fine, the fine is void; [but though attainted persons are said to be civilly dead, their fines are not actually void.] But such civil bodies as have absolute estate in their possessions, as mayor and commonalty, dean

West. Symb. part 2. Sect. 9. Plow. 538. 575. Co. 11. 78. in Magdalen-College case.

---

(38) But if the husband avoid the fine, the whole estate which passed by it is defeated, the old estate of the wife becomes revested in her, the husband becomes again seised of the whole estate in her right, and neither the wife nor her heirs will be then barred by the fine. *Essay on Fines*, 70.

(39) The reason why fines are allowed to be of sufficient force to bind those whom the law generally disables in other cases, is, because the concord is made by leave of the king or his justices, and therefore all presumption of fraud and deceit is excluded; the king and his court of justice being supposed privy to the act. *Chet.* 2; *Bracton*, l. 5, c. 28.

and chapter, colleges, and other societies corporate, may levy fines of the lands they hold in common, even by the common law, and such fines are good; but ecclesiastical persons, as bishops, deans, masters of hospitals, parsons, vicars, prebends, and such like, [and even ecclesiastical corporations, as dean and chapter; and eleemosynary corporations, as masters and guardians of hospitals, &c.] (40) are by divers statutes restrained to levy fines of their spiritual [and eleemosynary] inheritances [so as to bind their successors] (41).

3 H. 6. 42.
41 E. 3. 7.
50 E. 3. 9.
24 E. 3. 62.

Any person that hath capacity to take by grant, or may be a grantee, by deed, may take by fine, and be a conusee therein; as any person male or female, of full age or under age, whether it be a *feme covert*, mad person, lunatic, idiot, any person in prison, or beyond the sea, also any person attainted of felony or treason, or outlawed in any personal action, a bastard, clerk, convict or alien, may be conusee in a fine, and a fine levied to such persons is good. [d] Also corporations spiritual and temporal may be conusees in fines, and fines *levied to them are good; but before the ingrossing of such fines there goeth always a writ to the justices of the Common Pleas, *Quod permittant finem illum levari.* But such persons as are civilly dead [by devotion to the church,] as fryars, monks, and the like, cannot be conusees in a fine; and therefore a fine levied to such persons is void.

[d] 5 H. 7. 25.
19 H. 6. 25.
Dyer 188.

*P. 8.

West. Symb. in his Tract of Fines.

The names of cognisors and cognisees in fines must be certainly set down, and they [the parties] must for the most part be described by their right names of baptism and surname, whether they be king, princes, dukes, marquesses, earls, viscounts, barons, lords or knights, which be names of dignity; but some of these are sometimes described without their surname, as *Georg' Comes Salop: Johannes Dux Lancastr.* or whether they be esquires or

(40) Who are seised in right of their churches, &c. and cannot levy a fine to the prejudice of their successors. *Chet.* 74.

(41) The queen may levy fines: an alien who hath purchased land cannot levy a fine if the court perceives it, but if the fine is levied it is good, and shall never be reversed. *Dyer. R.* on fines, 13. See further who may levy fines, *Vin. Abr. Fines*, (D. 10.) *Brown* 14. *Bac. Abr. Fines*, (C.) If any person levies a fine in the name of any other person who is not privy nor consenting thereto, and shall be lawfully convicted thereof, such person so levying the fine shall by statute 21 Jac. 1, c. 26, suffer death without benefit of clergy.

gentlemen, which be names of worship and honor. But these additions of names of dignity and honour given to such persons or any others, as bishops and the like, are used in fines rather of courtesy than of necessity, for they are not needful in fines. But in case where there be two of one name, it is safe to make some addition by way of distinction, as *senior* and *junior* and the like. [The omission however may be supplied by averment. It is certainly safe and proper to give the parties such addition as will distinguish them from all other persons of the same name; but though a person of the same name with his father is made a party to a deed, without any addition to distinguish him from his father, the absence of this addition will not vitiate the deed of grant.]

If a woman, living her first husband, take a second husband, and with him and by his name acknowledge a fine, it seems this is void [*read* voidable] because of this mistake; [but unless avoided by the rightful husband, it would remain in force against the wife and her heirs;] but if a woman with her right husband, by a wrong christian name, [but with the addition of his wife,] levy a fine, she is concluded by it, and cannot avoid it during her life; [nor can it be avoided after her death, for the addition his wife marks a sufficient certainty of her person. So a fine levied by a man and woman as his wife, though in point of fact she is only his reputed wife, will bind her and her heirs. So will a fine levied by a man and woman, being his wife *de facto*, though they are afterwards divorced. *Roll. Abr.* 20.] [a]And yet, if a fine be levied to a man and his wife by a wrong name, as to *A.* and *Sibill* his wife, when her name is *Isabell*, this is holden to be void, [a conclusion not to be adopted without great consideration, for neither the case to which reference is made, nor the principles of law, warrant this position. The addition of wife affords a sufficient description of the woman, and the mistake in the name will not vitiate. In *Terril* v. *Lucas*, 1 *Ass. pl.* 11, being the authority to which reference is made, the question was discussed on the pleadings, and the question was, Whether *Isabella* was estopped from showing her actual name and deny-

7 H. 4. 22.

[a] 1 Ass. pl. 11.

ing it was *Sybill*, by having accepted the fine levied to her by the name of *Sybill?*] [f] But if a fine be levied by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it seems this fine is a good fine, [provided she be called and known by one name as well as the other; or because the fine operates against her by estoppel. *Scrope*'s opinion in 1 *Ass.* 2.]

[f] F. N. B. 97. a. Lit. Broo. Sect. 344.

West. Symb. ubi supra.

THE persons or judges before whom a fine is to be levied are of two sorts, for some are judges only at the time of the cognisance, and certificate thereof, and others are judges to whom the cognisance is to be certified, and before whom it is to be recorded. The first sort are such as have power to take such cognisance, either *ex officio*, and by virtue of their offices, or by some commission, general or special, granted unto them by the king out of Chancery; [g] as all or any two of the justices of the Common Pleas may in open court take knowledge of fines, and record them by virtue of their office (42). [h] Or the chief justice of that court may by the prerogative of his place take cognisance of fines in any place out of the court, and certify the same without any writ of *dedimus potestatem* (43): [i] and so also as it seems may two of the justices of that Court with the consent of the rest: or one of them with a knight (but this is not usual at this day.) [k] Also justices of assize by the general words of their patents may take and certify cognisances of fines without any special *dedimus potestatem*, but at this day they do not use to certify them without a *special writ of *dedimus potestatem*. And fines have been levied before justices errants.

2. In respect of the persons before whom it is acknowledged, and the persons and place before whom and where it is recorded. And what persons may take cognisance of fines or record them. And where, and how, and the duty of such persons therein.

[g] Stat. 15 E. 2. Stat. de Carlil.

[h] Dyer 224. Cromp. Jur.

[i] Stat. 15 E. B. Broo. Fines 120.

[k] Dyer 224. Broo. Fines 120.

*P. 9.

Cromp. Jur. 92. F. N. B. 147. a. b. 146. F. G.

Also cognisances of fines are taken by a special writ issuing out of the Chancery called a *dedimus potestatem*, whereby commission is given in divers cases to a private man for the speeding of some act appertaining to a judge, upon a surmise that the parties that are to do the same are not able to

Dedimus potestatem, quid.

(42) By the stat. 18 Ed. I. *de modo levandi fines*, which directs fines to be levied in the Common Pleas, and *not elsewhere*. 2 *Inst.* 515. Except in a court of antient demeane. See 1 *Salk.* 340. *Hunt* v. *Bourne*, *Bac. Abr. Fine*, &c. (D.)

(43) But the Chief Justice of *England* cannot, nor any other of the justices, except the Chief Justice of the Common Pleas, who hath this special authority by custom, and not by any statute. 9 *Co. Read. Chet.* 19.

travel, and by this writ, upon such a surmise, power may be given to any serjeant at law alone, or to any knight and gentleman together, to take the conusance of such persons, and they may by virtue thereof take the same [l] either of all or some of the parties; [m] and that (as it seems) in any place accordingly (44), [and if the fine be acknowledged by some only of the intended conusors, or be taken irregularly as to some of the conusors, it may pass as the fine of those conusors who have duly acknowledged the fine.] [n] But a justice or other person being cognisee in a fine may not take the cognisance thereof himself, [on the rule that no man can be agent and patient, party and judge.] And all these that have power to take the conusances of fines are to take great heed of whom they do take the same, and whom they do admit to make such conusances before them; [o] and therefore, they are to see that they know the parties that are to be cognisors, that they suffer not one man to make a conusance in another man's name; [a crime which is punishable by the Statute of 21 Jas. c. 16.], and that they do not take any conusance from any person prohibited by law, for misdemeanors by such persons herein are punishable in the Star Chamber (45); [and now that court is abolished, by information, indictment, &c.] [p] And if there be any woman that hath a husband that doth join with her husband in the conusance, the judges or commissioners must take care they do examine her whether she be willing, and do part with her right in the land willingly or by compulsion of her husband, for albeit she be made to do it by compulsion of her husband, yet hath she no way to relieve herself when it is done; [unless

[l] Curia 39. & 40 El. 17.
[m] Dyer 220.
[n] H. 6. 21.
[o] 34 H. 6. 19. Broo. Fines 11. Cromp. Jur. 32. 92.
[p] 42 E. 3. 7. 3 H. 6. 42. Perk. Sect. 613. Doct. & St. 155. Cromp. Jur. 56.

(44) For the origin of the writ of *De. po.* see 2 *Inst.* 512. Its nature and operation, *Vin. Abr. Fine*, (M. b.) *Bac. Abr. Fines, &c.* (D.) *Essay on Fines*, 53. But custom hath now so far prevailed against the express words of the stat. of *Carlisle*, 15 Ed. II, that one judge may take conusance singly, or by the present practice it is sufficient if one of the commissioners be a knight, or though neither of them be a knight, if one of the judges gives his *allocatur* to the caption, by which means great abuses are said to happen in taking of fines. *Bac. Abr. Fines, &c.* (D.) *Cro. Eliz.* 469. *Essay*, 55.

(45) Commissioners ordered to be prosecuted for taking a fine from an infant feme, tenant in tail, with her baron, and the fine vacated *quoad* the feme only. *Hutchinson's case*, 3 *Lev.* 36. See also Serjeant *Buckley's case*, to the same effect, in *Skinn. Rep.* 23. For the rules made by the Court of C. B. touching the certificate by the commissioners, and of the oath to be made by the acknowledgment of the fine, see *Wils.* 81 to 90. *Barnes' notes, tit. Fine*, and the *Essay on Fines*, 56.

[s] Stat. 23 El. chap. 3. Dyer 320.

fraud be practised; for equity might relieve against fraud, 1 *Madd. Chan.* 212.] And after the commissioners have taken the same cognisances by *dedimus potestatem* they are to certify the same truly, and the day and year when it was taken,

[r] Dyer 220. Cromp. Jur. 92.

[r] and not another time (for this may be a misdemeanor punishable in Star Chamber) and to return the commission into the court of Common Pleas under their hands *and seals* [the seals are omitted in practice] within a year after the taking of the same conusance, at the farthest (46); [but it may be passed after the year and day, on an affidavit that the parties are alive, and a special motion to

[s] Regist. or. 68. F. N. B. 147. b.

the court for the purpose.] [s] And if they refuse to return or certify it, the party grieved may by a writ called *cognitionibus admittendis*, or a *certiorari*, compel that commissioner that hath it in his custody, or his executor or administrator, if he [the

[t] Dyer 246.

commissioner] be dead, to certify it (47). [t] But if any of the cognisors happen to die *before it be certified*, [now, before the king's silver be paid, and the writ of covenant be returnable,] then it cannot be certified at all, for it cannot now be made a good fine [as to those who are dead; but when several persons are conusors and some of them die,

[u] 1 H. 7. 9. Broo. Fines 124. [x] Dyer 220. Stat. 15 E. 2. 44. 44 E. 3. 38.

the fine may pass as to the survivors.] [u] And so also (as some hold) if *the king die* [now remedied by 1 Anne, c. 8.] [x]But if the king's silver be entered in paper or upon the back of the writ of covenant (as the use [practice] is), and the party die after this, in this case the fine may go on and will be a good fine notwithstanding the death of the party; [provided the death was after the return of the writ of covenant, &c. on which the fine was granted.]

Cognitionibus admittendis, quid

And the judges for the recording of fines be the justices of the Common Pleas only, and therefore all cognisances of fines must be certified thither, for in that court only, and not in any other of the courts* of record at Westminster, [except a fine

*P. 10.

(46) But although fines are now in fact almost always taken by *de. po.* yet they are recorded as taken in court, in order to prevent questions about captions. 10 *Mod.* 45. *Chet.* 19.

(47) And upon that the party may also have an *alias* and *pluries*, and then an attachment against them, if they will not certify it, or show cause why they do not. *F. N. B.* 345. *Chet.* 20.

acknowledged in the King's Bench on a writ of error depending in that court, in an action on the realty,] or in other inferior courts, or ancient demesne, are fines to be levied. [Fines at the common law may be levied in a court of ancient demesne; but no fine in that court can be proclaimed under the statutes, so as to bar an intail or operate by non-claim.] [x] But by special grant a fine may be levied in a base court. [y] And by certain acts of parliament fines may be and are levied in the county palatine of Chester, county palatine of Lancaster, and county palatine of Durham, of lands lying within those places, [also in Wales; and a fine may be levied in a court of ancient demesne of lands held in ancient demesne; and it will be a good fine to operate under the rules of the common law. It may pass the estate of a married woman; may create a discontinuance of an estate-tail. It will not bar an intail, or operate to protect a title by non-claim; since it cannot be with proclamations, according to the statute. To bar intails, &c. there must be a common recovery in the Lords' Court] (48). And if any persons do take conusance of fines other than such as before that have power, or any other persons or judges shall record fines, or they shall be levied in any other court or place than as before, such fines are void (49); [*viz.* all fines in courts not having jurisdiction to levy the fines are void. But a fine in the Common Pleas of lands in ancient demesne, is voidable only and not void; *Prest. Convey.* p. 266. While a fine in the Common Pleas of lands in a county palatine, is actually void; *Prest. Convey.* p. 268. Even the court of King's Bench has not any original jurisdiction over fines, but if a writ of error to reverse a fine be depending in that court, the error may be discharged by a fine acknowledged in that court, operating as a release of the error. 13 *Vin. Abr.* 217.]

[x] 50 Ass. pl. 9.

[y] Stat. 2 E. 6. chap. 28. 37 H. 8. c. 19. 5 Eliz. c. 27.

(48) In the city of *Chester*, by 43 Eliz. c. 15; in the county palatine of *Chester*, by 2d & 3d Ed. VI, c. 28; of *Lancaster*, by 37 Hen. 8, c. 19; of *Durham*, by 5th Eliz. c. 27; and in the courts of the Great Sessions in *Wales*, by 34 & 35 Hen. 8, c. 26, s. 40. As to fines in courts of antient demesne, and in courts of cities and corporate towns, see *Essay on Fines*, 63.

(49) Lord *Coke*, in his eighth reading on fines, says, a fine levied in *King's Bench* is not void, but *voidable by writ of error*.

Stat. 32 H. 8. c. 7. West. Symb. in his Tract of Fines, Sect. 25. 50. see in exposition of deeds, infra.

3. In respect of the thing whereof the fine is levied, and of what things a fine may be levied or not, and by what names.

A fine may be levied of all things whereof a *præcipe quod reddat* lieth, and of all things which are inheritable and in *esse* at the time of the fine levied, [in which there is an estate of inheritance, or, it is apprehended, any other estate,] whether the thing be ecclesiastical and made temporal [as tithes, rectory, &c.] or temporal (50). As of an honor (51), manor, island, barony, castle, messuage, cottage, mill, toft, curtilage, dove-house, garden, orchard, land, meadow, pasture, wood, underwood, chapel, river, chauntry, corrody, office, fishing, warren, fair, rectory, mines, a view of frankpledge, waif, estray, felon's goods, deodands, hospital, furzes, heath, moor, rent, common, *advowson*, hundred, way, ferry, franchise, seigniory, reversion, toll, tallage, pickage, pontage, acquittal, services, portion of tithes, oblations, or the like (52). (53) And therefore fines *De honore de S.* or *De manerio de S.* or *de castro*, or *de castello de S. cum pertinen'* are good. So fines *de uno messuagio, uno*

---

(50) Or whereof a *precipe quod faciat* doth lie, as the writ of customs and services; or a *precipe quod permittat*, as to have a common way, &c. or a *precipe quod teneat*, as the writ of covenant to levy a fine, and the like, 2 *Inst.* 513.

(51) A fine will not bar a *peer's title of honour*, or the right of any person claiming such title under him who levies the fine. *Show. Parl. Ca.* 11. *King* v. *Purbeck.*

(52) To these may be added *shares in the New River water*, whereof fines are levied by the description of so much land covered with water, and when a fine and recovery of these shares are necessary, in regard the New River runs through the several counties of *Hertford*, *Middlesex*, and *London*, there must be three several fines and recoveries, 2 *Pr. Wms.* 128. Where *money is agreed to be laid out in lands to be settled in tail*, a fine cannot be levied of the money, but a *decree of a court of equity can bind it as much as a fine alone could have bound the land if it had been bought and settled.* 1 *Pr. Wms.* 130. See accordingly *Oldham* v. *Hughes*, 2 *Atk.* 454, where Lord *Hardwick* assigns the reason for it, that at law, money articled to be laid out in land is considered barely *as money*, till an *actual investiture*, and the *equity* of this court *alone* views it in the light of *real estate*; and therefore this court *can act upon its own creature, and do what a fine at common law can upon land.* But where the estate tail is of such a nature as would *require a recovery*, and the *remainder-man has but a chance for the estate*, as the tenant in tail may happen to die before the recovery suffered, or in a vacation when a recovery cannot be suffered, a court of equity, whose business it is to aid the intent of a party, will not, in violation of such intent, decree the payment of the money to the tenant in tail, but decree it to be laid out in a purchase of land to be settled according to the direction of the party, in order that the chance of the remainder-man may be preserved, 1 *Pr. Wms.* 471, 485. But see 39 & 40 Geo. 3. c. 56. which has allowed the practice, [R. P.] This doctrine was fully discussed, and all the cases relating to it, in the case of *Pultney* and the Earl of *Darlington*, (since reported in *Brown's Chan. Rep.* 223,) heard before Lord Chancellor *Bathurst*, and reheard before Lord Chancellor *Thurlow*, in Michaelmas Term 1778. See further of what a fine may be levied, *Vin. Abr. Fine*, (B. a.) Money agreed to be laid out in land shall be considered as land. See *Guidot* v. *Guidot*, 3 *Atk.* 254.

(53) Fines may be levied of a *remainder* or *reversion*, of a *right in future*, or of a *possibility* as well as of things in possession. *Wood's Inst.* 242. A common recovery may be suffered of the same things whereof a fine may be levied. *Pig.* 96.

cotagio, uno molendino, without *aquatico* or *granatico* annexed, are good. So fines *de uno tofto, uno curtilag. uno columbario, uno gardino, uno pomario, decem acris terræ, decem acris prati, decem acris pasturæ, decem acris bosci, decem acris subbosci, de balliva sive officio baillivat' de D. de custod. sive officio custod. de B. de custod. parci & forrestæ de D. officio senescalciæ de S. cum pertinen', decem acris brueræ, decem acris moræ, decem acris juncariæ, decem acris marisci, decem acris alneti, decem acris ruscariæ,* are good. Also fines may be *de vis. fran' pleg. libertate & franchesiis, in D. wardis, maritagiis, eschaet catall. felonum, waviat extrahur. de catall. fugitivorum, utlagat. attinct. de ferreis. mercat. wrecco maris,* Or' *de rectoria ecclesiæ parochialis de M.* or, *de decimis granorum, garbarum & fœni eidem rectoriæ spectan' &c.* Or, *cum omnibus decimis granorum, garbarum & fœni eidem rectoriæ spectan'.* Or, *de decimis garbarum, ad ecclesiam de M. qualitercunque spectan',* or, *de omnibus & omnimod' oblationibus, decimis granorum, garbarum, fœni, lanæ, lini, canabis, porcellorum, aucarum, agell.* or, *&c. & aliis emolumentis quibuscunq; spectan' crescent' sive existen' cum pertinen' in D.* Also fines may be *de cilio salium plumbarum, aquæ salcæ puteo,* Or, *de theolonio, stallagio, picagio, pontagio, infra burgum de D.* Or, *de quodam corrodio unius panis, unius lagenæ cervisiæ pro omnibus hominibus in D.* Or, *de chiminio, de piscaria,* or *de libera warrenna,* or *de frankfold, de franchesia,* or *de nundinis de D. singulis annis ad*
*P. 11. *festa de M. ibidem tenend' * mercat' de D. quiet. sive libero passagio ultra aquam de D.* Or, *de communia,* or *de pastura pro omnibus animalibus,* or, *pro omnibus averiis,* or, *de pastura pro decem ovibus,* or, *pro decem bovibus, equis, vaccis, porcis, spadonibus, &c.* or *de communia pasturæ quod prædict' M. B. habet & habere solebat pro omnibus averiis suis in centum acris terræ ipsus I. A. in D.* or *de advocatione ecclesiæ de D.* or *de advocatione tertiæ partis ecclesiæ, &c.* or *de rectoria de D. advocat. præsentat. donat. libera dispositione, & jure patronatus ecclesiæ de D.* or *de patronagio cum advocatione vicaria ecclesiæ de D. & capell. eidem rectoriæ annex',* or *de tertia parte advocationis ecclesiæ, &c.* or *de medictat' advocat' ecclesiæ,* or *de advocatione medietatis ecclesiæ,* or *de medietate,* or *de tertia parte*

messuagii, decem acris terræ, or the like, and these fines are good. Also a fine may be *de homagio*, or *de feod' militis*, or *de uno feod' milit in D.* or *de servitio unius paris calcarium deauratorum*, or *de servitio inveniendi hominem equitem*, or *peditem ad eundum vel ad equitandum*, with the cognisee *in exercitu Walliæ, &c.* or *de minera plumbi & cujuscunque generis metalli*, or *de proficuis officii*, or *de proficuo molendini*, or *de gurgite*, or *cursu aquæ current. à loco vocat' H. infra & per terr' voc' K. ad molend. vocat B.* or *de wera sive veda in D.* And fines of all these and such like things are good, but a fine that is levied of a thing not certain, as *de tenemento* (54) or *de hereditamento*, or the like, is void (55).

21 E. 3. 44. 18 E. 4. 22. West. Symb. ibid.

A fine may [by way of render, or by way of grant on creation thereof,] be of a rent-charge which had no being before, (56) or of a chief rent or other rent which had a being before, but not of annuity (57). [Agreeable to an elaborate opinion of Mr. Hargrave, and on principle, a fine may be levied of a mere personal annuity on a writ of annuity. See *Roll. Abr.* 15. Mr. Hargrave observed, the balance upon authorities appears to him to be much in favour of the application of fines to annuities; and he concluded that a married woman, with her husband, might levy a fine of a mere personal annuity, which was the interest of the wife; and it is observable that mere personal annuities are not intailable. Gifts of them by way of intail create conditional fees;] and a rent will pass by the number of things to be rendered, as *de decem librat. decem. marcat. sex denar'* or *quinque solid'* or *uno obolario*. As *precipe A. quod reddat B. con. &c. de 4 librat' reddit. & red. dimid' unius libræ piperis, ac. reddit. unius paris chirothecarum, sagittæ barbatæ, unius par' calceorum, unius vomeris, 1 lib. ceræ, 1 lib. piperis, 1 lib. cumini, 1 clavi gariophylli, 1 rosæ rubræ, 1 acus & fili, quarterii frumenti, unius quarterii hordei, 2 bracei caponum,*

(54) *Dower* does not lie of a *tenement*, it being a word of uncertain signification, and therefore the sheriff cannot give seisin of it. 2 *Ld. Raym.* 1384. *Vin. Ab. Dower*, (D.) pl. 31.

(55) Or at least *voidable* by writ of error, for the uncertainty of the words; the proper word to express a *tenement* in a fine being *messuagium*, and therefore a fine levied *de uno messuagio*, will be good. *Brown*, 23.

(56) Accordingly *Wood's Inst.* 242; *sed contr. Densh. R. on Fines* 14.

(57) Though to a man and his heirs, for it is a thing personal. *Show. Parl. Cas.* 1. *King* v. *Ld. Purbeck.*

40 *gallorum*, 20 *gallinarium*, *mille ovorum et aucarum*. [And a fine of the land chargeable with a rent levied by the person entitled to the rent, may bar an intail of the rent, and it should seem the rent would exist, so that uses may be declared thereof. *Heliot* v. *Sanders*, *Cro. Jac.* 699; 1 *Prest. Convey.* 271. But a recovery suffered of the land would not bar an intail of the rent. 1 *Prest. Conv.* p. 6.] An honor may pass by the name of a manor, or by his own proper name, as *de honore de Tickhill*, or *de manerio de Tickhill*; so other things may most of them pass by their own proper names, as *de castro vicecomitatus de S. insula de D. hundred de D. burgo de D.*

A manor may pass by [its] proper name, without naming of the town or place, towns or places, wherein it doth lie, as *de manerio de D. cum pertinen'*. [And lands which are reputed to be a manor, may pass under the denomination of a manor; and lands reputed to be parcel of a manor, may pass under the name of the manor; especially if it be added, with the appurtenances.] 19 E. 4. 9.

Other things may pass in fines by the same names they are granted in deeds, as *de scit. ambit' et precinct' nuper monasterii de D. Scit. manerii de D. grangia de D. parco de D. præbend' de D.*

A castle or hundred may be parcel of a manor, and pass by the name of the manor whereof they be parcel; and one manor may be parcel [or rather held] of another manor, and [in point of seigniory] pass by the name of that manor. [In truth the seigniory of the inferior manor, and not the inferior manor itself, passes; for when the lordship and inferior manor come into the same tenure, the inferior manor is extinct, and the tenants of the inferior manor hold of the lord of the superior manor.] Or* a castle may pass by [its] own proper name, as *de castello de S. cum pertin'*; so also may a hundred pass by [its] own name, as *de hundred. de S.* 26 Ass. p. 54. 2 E. 3. 36. 1 E. 3. 4. 27 H. 6. 2. *P. 12.

A view of frank-pledge, and such like things, may also pass by their own names, as *De vis. frank' pleg' bonorum et cattallorum, waiviorum, felon' fugitivorum, utlagat. in exigend. positorum felon' de se, deodand. thesaur' invent' ac extrahur'. cum pertinen' in M.* West. ubi supra.

By the name of a messuage may pass a house, Plow. 169. 171.

a curtilage, a garden, an orchard, a dove-house, a shop, a mill, as parcel of the same; [and even land, as hams and grounds, (as paddocks) attached to the house.] The like of a cottage, a toft, a chamber, a cellar, &c. Yet these may pass by their own single names also; as *de uno messuagio, uno curtilagio, &c.*

13 Ass. pl. 2. A chapel or an hospital must be demanded in a fine, and may pass by the name of a messuage.

43 E. 3. B. 1. A reversion of land may pass by the name of a reversion, or by the name of the land itself; [but land in possession will not pass by the name of a reversion; and a rent, or an intail of a rent, may be barred by a fine levied of the land, without naming the rent, p. 26.]

West. ubi supra. A foldage may pass by the name of *De libertate unius faldagii et cursu ovium cum pertinen' in F.* or *de libero faldagio ovium cum pertinen' in F.* or *de libera falda.*

16 Ass. 9. Land, meadow or pasture, wood and the like, may pass by a certain number of acres (58), or by the certain measure [*read* denominated contents] of the superficial quantity thereof, (59) as *de hida, carucata, bovata, virgata, acra, roda, furlingo terræ*; house-boot, hay-boot and plow-boot, may pass by the name of estovers, as *de rationabili estoverio in boscis*, viz. *in decem acris bosci ipsius A. in D.* And a fishing may pass by the name of *separali piscar' in aqua de S.* [*i. e.* when there is a several fishery: It is proper to define the nature of the fishery.]

West. Symb. ubi supra.

And high-wood [*viz.* timber woods] and underwood may pass by the name of wood, as *de* 20 *acris bosci*, &c. [but they are in practice usually distinguished into acres of wood and acres of underwood.]

West. Symb. ubi supra. Parsonages, rectories, advowsons, vicarages, [the words advowsons and vicarages are inserted by mistake, and should be omitted;] or tithes impropriate [for they are now lay inheritances by the stat. 32 Hen. 8, c. 7.] pass not by the

(58) Where a fine is levied of so many acres of land, the acres are to be considered as *customary* acres, and not acres according to the statute. *Waddey* v. *Newton*, 8 *Mod.* 276.

(59) In the *Essay on Fines*, p. 91. This page of the *Touchstone* is cited to prove that land is to be demanded by the certain measure of its quantity, according to the usual mode of measuring, &c. *and by the names which are usually given to the different species of land, as arable, pasture, &c.; but there does not appear to be any thing in the text that warrants the latter.*

names *de advocatione ecclesiæ*, but *de rectoria ecclesiæ de S. cum pertinen'*. But when the fine is but of a [the right and ownership of the] presentation to a church only, it must be *de advocatione ecclesiæ de S.* and not *cum pertinen'*; and of all vicarages endowed, the writ must be *de advocatione vicariæ ecclesiæ de S.* and not *cum pertinen'*; and where no vicarage is endowed, it must pass under these words, *de advocatione ecclesiæ de S.* &c.

If part of an entire thing [be to] pass, it must pass [it ought to be named] by these words, *de medietate, tertia parte, quarta parte*, &c. as the case is, as *de duabus partibus in tres partes dividend 8. acr. terræ*, or *de medietate omnium decimarum, granorum et fœni de ter' vocat' le Blacklands cum pertinen. in H.*; [but a larger portion would include and pass a smaller portion.] But if an entire thing, as a manor or messuage, be parted; as if the manor of *S.* be divided into two parts, (if the division be so made that the manor of that part be not extinct,) and a fine be to be levied of a part of it, it must pass by the name of the whole, as *de manerio de S.* [This observation applies to those cases only in which the manor is designated with this qualification. But it does not apply when the fine is of the manor of *A.* with the appurtenances, and of 10 messuages, &c. in, &c.] So if a messuage and 23 acres be parted, the part divided shall pass by the name of one messuage and 10 acres of
*P. 13. * land, and not by the name *de medietate unius messuagii & viginti acr' ter'*; [and yet in deeds an entire farm, arising from partition, is denominated a moiety or halfendeale, and may pass by that denomination.] And if things be otherwise named than as before, sometimes the fine will thereby lose [its] force in all, and sometimes in part. [Errors of this sort are now, generally speaking, amendable on motion to the courts, provided the amendment be warranted by the deed of uses.] But if a thing be twice named in a writ of covenant, as a manor, and a hundred parcel of the same, this will not hurt the fines, [though in a real adverse action the defendant may in this case abate the writ by the plea of *bis petitum*. See *Comyn's Digest, Abatement.*]

The things that do pass by the fine must [ought to] be named to lie in the shire, town, parish or hamlet Broo. Fines 44. 91. 9 E. 4. 6.

where it doth lie, for a fine is good, albeit it name the lands to lie in a hamlet, or in a town decayed; but it is good to name the town wherein the hamlet is, and that with addition for distinction, if there be divers towns of the same name in that county. [It is also advisable to name the parish as a parish, lest the lands should extend into more townships, in the same parish, than those which are named.] And if a manor extend into divers towns, as into *A.* *B.* and *C.* it is good to express all or none, as *de manerio de S. in A.* *B.* and *C.* For if any [one] of the towns be omitted, none of the manor in that town will pass. [It is on partition only between coparceners that one manor will be converted into two manors, by the coparceners severally taking each part of the demesnes and part of the services; and in general each manor obtains a new denomination, for the sake of distinction.] But if the fine be of the manor of *S. cum pertinen'*, and say not where it lieth, this fine will carry the whole manor. [When a manor extends into several counties, there ought to be a distinct fine for the manor, as in each county. Each fine may describe the manor, as the manor of *A.* in the counties of *B.* and *C.* &c. The like observation, *mutatis mutandis*, applies to a rent out of lands situate in different counties.] And if there be divers manors of one name, as *South S.* and *North S.* or the like, it is safe to set down in the writ for the fine which manor is intended to be passed, howsoever the fine may [by averment and proof] be good of the manor intended to be passed, without the distinction (60). [For evidence is admissible to remove this latent ambiguity. Unless the averment can be maintained by proof, it must be made effectual by election; and *quære* if election may be made, or it would be void for uncertainty. If the deed of uses will show the certainty, then the deed of uses, as part of the same assurance, and indeed as a cotemporaneous act, would supply the omission. As a general proposition, any error or omission in the parcels of the fine, may be corrected or supplied by an amendment to be made from the deed.]

(60) See further by what names things will pass in fines, *Vin. Abr. Fines*, (C. a.)

The order of placing things in fines is, first, to set down the most worthy things before things less worthy (61); as a manor before a messuage, a castle before a manor; a house before land; arable land before meadow; meadow before pasture, &c. Secondly, to set down things general before things special; as land, being the *genus* of meadow, pasture, wood, &c. before them; wood, being the *genus* to wood-grounds (as *alnetum*, *salicetum*,) before them. [In fines, land is not used as a general term descriptive of all species of land, but only descriptive of arable land. Land is named first as the most worthy. The same observation applies to wood, for the word wood is used in description of woods of mixed growth; while *alnetum*, &c. applies to woods of that particular species.] Thirdly, to set down entire things before parts of things, as *de manerio de S. & medietate manerii de B.* [and larger portions before smaller portions.] Fourthly, to set down particular things after this manner:— 7 H. 6. 39. Plow. 163. Regist. 2.

suagium, tum, lendinum, umbare, dinum, ra, tum, tura, cus, ra
Mes, Toft, Mo, Col, Gar, Ter, Pra, Pas, Bos, Brue, Mora,
ria, cus, tum, caria, ditus;
Junca, Maris, Alne, Rus, Red, Sectare, priora (62).

And yet if this order be not observed; but the things be otherwise placed in the writ, if it be suffered to pass, the fine will be good enough [*fieri non debuit sed factum valet.*]

4. In respect of the estate of the parties thereunto.

If either the cognisor or cognisee, at the time of the fine levied, be seised of any estate of freehold in fee simple, fee tail, or for life, in possession, reversion, or remainder, whether the same be by right or wrong (63), the fine will be a good fine in this respect (64); [*viz.* free from the objection Stat. 27 E. 1. ch. 1. 4 E. 3. 14. 44 E. 3. 36. 39 E. 3. 16. 17 E. 3. 62. 24 E. 3. 26.

(61) The general before the special, and the entire before its parts. Therefore land upon which a house is built being for the habitation of man, is more worthy than land without building, and therefore a messuage shall be first demanded; and of messuages, a castle before other messuages, and before a manor, though it be part of a manor. *Booth on Real Actions*, 2.

(62) These two monkish rhyming verses appear to be intended to assist the memory.

(63) An estate by *wrong* cannot be gained in *trust* estates as there may in a *legal* estate; therefore on a trust in equity no estate can be gained by disseisin, abatement, or intrusion. [illegible] *Hardwick.* See 1 *Atk.* 591. *Hopkins* v. *Dare.*

[illegible]ccordingly 3 *Co.* 90. A fine by *cestui que trust*, upon a consideration, will bar a *trust estate* as effectually as it will a legal estate. 1 *Chan. Ca.* 49; and it is

that *partes finis nihil habuerunt*; an objection which, when tenable, enables even a stranger to avoid the effect of a fine pleaded as a bar by non-claim. This is a plea, however, of which heirs in tail cannot avail themselves, in answer to a fine with proclamations, by any person to whom they are privy. This plea was taken from them by the statutes of 4 Hen. 7, c. 24; 32 Hen. 8. c. 36.] And therefore if one that is seised of land in fee simple, or fee tail, general or special, [or for life,] levy a fine of this land to a stranger, this is a good fine. So if a stranger levy a fine to him of this land, this is a good fine. So also a fine, levied by, or to, a tenant for life of the land he doth so * hold, is good in this respect, [either as a conveyance, an estoppel, a release, a confirmation, &c. and may be pleaded as a bar, by non-claim, if it be duly proclaimed;] but he must take heed of a forfeiture in this case; for if tenant for life levy a fine *sur cognisance de droit come ceo, &c.* to a stranger, [without confining the grant to his own life,] or levy a fine *sur grant & release* to a stranger, to hold to the cognisee for a longer time than for the life of the tenant for life, [or accept a fine which imports to grant a greater estate than for his life, such fine from or to a tenant for life, will disaffirm the title to the inheritance, and a fine from him, when he has the immediate freehold would, pass a wrongful fee, by devesting the remainder or reversion. A fine to a tenant for life will not have this effect;] howsoever, in this case the fine be a good fine, [*viz.* cannot be avoided by a plea of *partes finis nihil habuerunt*,] yet this [fine] is a forfeiture of the estate of the tenant for life (65), whereof he in reversion or remainder may take present advantage (66). And

*P. 14.

Forfeiture.

---

said that such a fine with proclamations, and five years non-claim, will bar the *remainder of a trust estate*. 1 *Vern.* 296. A fine and nonclaim bars all *trusts* and *equities*, where the equity *charges the land*, but where it charges the *person in respect of the land*, it will not bar; also in equity a trust, created by fine, shall never be destroyed by the same fine. 3 *Salk.* 169. 1 *Ch. Rep.* 278. Lord Chancellor *Parker* was of opinion that a fine and five years non-claim should, in favour of a purchaser, bar a trust term, though the *cestui que trust* was an *infant*. See note to p. 310 of 3 *P. Wms.*

(65) Forfeiture defined and its various kinds enumerated in 2 *Bl. Comm.* 267. Forfeiture may be either by matter *in pais*, or by matter of record. See *Co. Lit.* 251, a. *Com. Dig. Forfeiture*, (A.) 1 *Wood*, 78.

(66) But he is *not bound* to do so, and therefore the law gives him *five years after the death of the tenant for life*, because he has no reason to look until the natural determination of the

yet if such a tenant for life levy a fine *sur grant & release*, to hold to the cognisee for the life of the tenant for life; [*i. e.* in effect though not in terms,] or grant his estate by such a fine to him [who has the first or immediate estate] in reversion or remainder; [or if he himself have the first estate of inheritance in reversion or *remainder*; or he joins in the fine, with the person who has the first estate, or perhaps any estate of inheritance in reversion or remainder;] or by fine grant a rent out of the land for longer time than for his own life: in these cases the fine is good, and there is no forfeiture of the estate of the tenant for life, [because no estate is devested, nor is the title to the inheritance disaffirmed.] So likewise if a fine be levied to a tenant for life by a stranger, who doth hereby acknowledge all his right [*totidem verbis*, or by equivalent expressions] to be in the tenant for life, and release and quit claim to him and his heirs, and go no further, this is a good fine, and no forfeiture of the estate of the tenant for life; for his estate is not *changed* [*viz.* the seisin is not devested] thereby, and it may enure to him in reversion; but if the stranger say further in the fine *come ceo que il ad de son done*, this is a forfeiture (67), [because he affirms a right to the fee.]

1 H. 7. 22. Co. 2. 56. 9. 106.

But if neither the cognisor nor cognisee be seised of any estate of freehold in possession or reversion, of the lands whereof the fine is levied, at the time of the levying of the same, but have only a lease for years, or not so much, [and the fine is not preceded by a feoffment, so as to gain a freehold by wrong,] the fine is void and of no force as to any stranger, howsoever it may be good between the parties by way of estoppel (68). And

Co. 5. 123. 3. 88. 90. super Lit. 251. 3 H. 7. 9. 5 H. 7. 41. 3 H. 6. 21. 27 H. 8. 4.

Estoppel.

---

estate. Per Ld. *Hardwicke*, 2 *Ves.* 482. So also *Whaley* and *Tankered*, 2 *Lev.* 52. For the reasons why a fine by tenant for life works a forfeiture of his estate, see 2 *Bl. Comm.* 274. *Bac. Abr. Estate for Life, &c.* (G.) But a distinction is taken whether the estate of the tenant for life is a TRUST or a *legal estate*; for which see the words of Lord *Hardwicke*, in *Lethieullier* v. *Tracy*, 3 *Atk.* 729; and *Fearne on Cont. Rem.* 246.

(67) This part of the doctrine on fines is inserted verbatim in 1 *Wood*, p. 545, and also in p. 562; but this instance of a fine *to* a tenant for life *by* a stranger is very erroneously printed in the latter of these places. So as to entitle a remainder-man to enter, if the tenant for life accepts the fine, and yet it does not displace or devest the remainder or reversion. See *Fearne's* learned and useful *Essay on Contingent Rem.* 3d edit. 247 and 274.

(68) Accordingly 1st *Burr.* 95, and in *Co. Lit.* 352, a. an estoppel is explained. In what fine works by way of estoppel, is explained in *Weale* v. *Lower*, *Polex.* 54; and *Fearne* v. 287.

therefore if a lessee for years, or a disseisee (69), or one that hath right only to a remainder or reversion, levy a fine to a stranger that hath nothing in the land, this fine is void, or at least voidable as to and by any stranger thereunto; and he that hath cause may show that the freehold estate and seisin of the land was in another before and at the time of the fine levied; and that *partes finis nihil habuerunt tempore levationis finis*; and by this avoid it; [and this fine, by a disseisee, may operate as an estoppel to the disscisee and his heirs, and enable the disseisor, his heirs and assigns, to defend himself from the claim of the disseisee and his general heirs; though not his issue in tail, unless the fine be with proclamations; *Buckler's case*, 2 *Co.* 55, 4 *Resol.* This point, of excluding the disseisee, is, without sufficient reason, doubted in *March*, p. 66] (70). And yet a vouchee, after he hath entered into the warranty, may levy a fine unto the demandant, [operating by way of release, or as the circumstances may require, as a conveyance;] but not to a stranger. And a disseisor may levy a fine to a stranger that hath nothing in the land, and this is a good fine; for he hath the fee simple by wrong in him (71), [also the fine would be free from the objection of *partes finis nihil habuerunt*; if either of the parties had any estate of freehold, by title derived under the disseisin.] Also the issue in tail may be barred by way of estoppel, by a fine levied [with proclamations,] by [an] ancestor being tenant in tail; [or rather by force of the stat. of 4 Hen. 7. c. 24, 32 Hen. 8. c. 36, than by reason of estoppel; for the general rule is, that heirs in tail are not barred by estoppel;] albeit neither conusor nor conusee have any estate of freehold in the land [for such fine by any person to whom they are privy under the intail; 1 *Prest. Convey.* 259, 297 (72), would bar the issue, whether such person has an estate, or right or title, or a mere possibility.] [a] A joint-tenant, tenant in common or coparcener,

[a] 26 H. 8. 9. Dyer 334. 69. Plow. 375. 238. E. 4. 13. 11 Ed. 4. 68.

(69) See the case of the Earl of *Peterborough* v. Sir *Thomas Bludworth*, 1 *Lev.* 128.

(70) But although a fine levied by lessee *for years* or *at will* be *void*, yet it is otherwise by one having a *defeasible right*. *Wils.* 520, *Carter* v. *Barnardiston*.

(71) 1 *Lev.* 128.

(72) For a fine may be levied of a *right in futuro*, or of *a possibility*, and will be sufficient to bar the issue in tail, 10 *Co.* 50, a. A contingent remainder may be barred by a fine, by estoppel. *Fearne*, 289.

may levy a fine of his part to a stranger, and this will be a good fine [and a fine of the entirety, or a larger share, will be good to the extent of the share] (73). And so also, as it seems, may one [joint-tenant] coparcener or tenant in common to another. [And as to joint-tenants, it would be safe to plead the fine as a release, since joint-tenants cannot convey to each other. The estoppel would, however, in all probability, obviate this technical objection.]

One single member of a corporation aggregate of many cannot levy a fine [with effect] of the lands of the corporation; as a mayor, or the master of a college, cannot levy a fine without the commonalty, or his fellows, &c. But such persons may levy fines of the lands they are solely seised of in their own right, as other men may do. [And one of the members of a corporation, not being the head, may, on principle, be a conusor or conusee in a fine to or from the corporation.]

*P. 15. * Such as have estates of freehold in ecclesiastical lands in the right of their churches, houses, &c. as bishops, deans and chapters, prebendaries, parsons and the like, may not levy a fine of such lands; for if they do, it will not bind the successor. Co. 11. 78.

He that hath an estate of fee simple in lands in the right of his wife ought not to levy a fine thereof without her; and if he do, she and her heirs [till barred by non-claim on the fine, if it be with proclamations,] may avoid it after his death (74). Also he that hath an estate of lands given in tail by the king, or by the provision of the king, [for services performed] ought not to levy a fine of this land, for [while the crown retains the reversion or remainder,] it is void as against the issue in tail and the king. [Such fine is void against the issue in tail, *Prest. Convey.* 1 vol. p. 18. 145, in case, and only in case the gift be from the crown or of its provision for services performed, and only while the crown retains the reversion or remainder. In no case can the seisin of the crown be devested, or as a consequence, *barred* by adverse possession under a fine.] Also, he that hath an estate of Stat. 32 H. 8. chap. 8. 12 E. 4. 12. Co. 6. 55. Broo. Fines 121. Stat. 32 H. 8. ch. 36. Co. 5. 3. 4. Stat. 1 H. 7. ch. 20.

(73) And if there be two joint-tenants in fee, and *one of them* levies a *fine of the whole*, this will *not* amount to *an ouster* of his *companion*, but it is a *severance of the jointure*, though they c in of the *old use*. *Essay on Fines*, 71, 2. 6 *Mod.* 45.

he suffers five years to pass after the death of her husband without entry or er heirs are barred. *Dyer* 72, b.

lands that are prohibited to be sold by act of parliament, ought not to levy a fine of such land. Also, she that hath an estate of lands of her husband, or of any of his ancestors, assured to her for her jointure, dower, or in tail, by the means of her husband or any of his ancestors, may not [*read* ought not, without the consent of the person next in remainder or reversion, or the next in succession under the intail to] levy a fine of this land, for if she grant a greater estate than for her own life, this worketh a present forfeiture (75), [and such fine cannot discontinue the seisin, so as to turn the estate into a right of action; but it will devest the remainders and reversion, and render non-claim on her fine a bar. A husband is prohibited from discontinuing, as at common law he might have done, the seisin of his wife; but his fine may, under an alienation by him, become a bar by non-claim on the fine. The husband's power of aliening is not abridged. The effect of the alienation, as a discontinuance, is merely taken away; and the wife and her heirs have a remedy by entry, &c. instead of remedy by action] (76).

West. Sym. ubi supra. Sect. 30. Co. 5. 38.

In the concords of fines some things are to be regarded in the manner and form; and some things in the matter and substance. First, when a fine is levied to divers cognisees, the right shall [ought to] be limited to one of them (77). As if a fine be levied by *A.* to *B.* and *C.* it shall [*read* it ought to] be, *Quod prædict' A. recognoverit tenementa prædict' esse jus ipsius B. ut ill' quæ iidem B. et C. habent, &c.* But the King's tenant [a point for which no reason occurs] may acknowledge the right to be in divers, [and so may coparceners in gavelkind]. Secondly, the estate shall be limited to his heirs only, to whom the right is limited, and not to the heirs of all the cognisees, as thus, *Quod prædict' A. cognoverit ten' præd' &c.*

5. *In respect of the concord and matters touching it; and what concord or agreement may be made by fine or not.*

(75) See further of what estate persons may levy fines, *Vin. Abr.* Fine, (D.) *Wood's Inst.* 241.

(76) *A.* seised in fee in right of his wife of a share in the *New River Water.* Husband and wife mortgage for 1000 years by deed without fine, reserving a peppercorn-rent; husband died, whereupon feme received the profits and paid the interest; the mortgagee brought his bill to foreclose the wife. The court held, there ought to have been a fine, it being the inheritance of the wife; that the lease expired by the death of the husband; and therefore dismissed the bill. *Drybutter* v. *Bartholomew*, 2 *Pr. Wms.* 127. See the edition of *P. Wms.* by Cox.

(77) For if a fine be levied to *two persons and their heirs*, the court will refuse it. 1 *Leon.* Rep. 62. See *Essay on Fines*, 311.

esse jus ipsius B. ut ill' quæ iidem, B. & C. habent de dono prædict' A. & ill' remisit & quiet' clam' de se & hered' suis præfat' B. & C. et hæred' ipsius B. &c. [And yet if the right be acknowledged to two and their heirs, there will be an informality only, and not a vitiating error. *Fieri non debuit, sed factum valet.*] The release and warranty must be from the heirs of one of the cognisors, where there be more than one; for in a fine from divers the fee is supposed to be in one only, and therefore it must be thus: *Quod prædict' A. & B. cogn' &c. & ill' remis, &c. de se & hæred' ipsius A. &c. Et iidem A. et B. concesserunt pro se et hæred' ipsius A. quod ipsi war' tenementa, &c. contra se et hæredes ipsius A. in perpetuum.* [The practice is mistated. There are frequently several and distinct warranties.] But if the fine be of lands in gavelkind, *contra* (78). [This is also form and not substance. When there are several conusors they usually warrant first jointly for themselves and their heirs, against themselves and their heirs; next, each warrants for himself and his heirs against himself and his heirs, and each husband and wife warrant for themselves and for the heirs of the husband against the husband and wife and the heirs of the husband, and afterwards for themselves and the heirs of the wife against themselves and the heirs of the wife.] Fourthly, the concord need not to rehearse all the special names of the things contained in the writ, but it is sufficient to say, *Tenementa prædicta*, [or other appropriate terms. *See* the rule in *Wood's Conveyancing*, vol. 2, p. 740] as *quod prædict' A recognoverit tenementa prædicta, &c.* Fifthly, as a concord cannot be without an original writ, so it must pursue the original writ, and cannot be of any foreign thing, *i. e.* such a thing as is not contained in the writ, except it be consequent thereunto; as when the writ is of land, there may [in a fine, *sur grant & render,*] be in the concord a rent out of this land; but there may be more things in the *precipe* than are named in the concord. [And then the fine would be good for those things only which are in the concord, being the substantial part of the fine; and] a concord may be with an ex-

---

rdingly a fine levied by three, with warranty for the heirs of them all, ad- court; because the land was gavelkind, and the conusors heirs by the custom avelkind, 132, and the authorities there.

ception of some part; but this exception must always be of such things whereof the writ will lie and are mentioned therein; [and the excepted parcels] * must be certainly named, and must succeed the things out of which they be excepted, as *præcipe A. B. quod teneat C. D. convenc' &c. de manerio de D. cum pertinen'* (79) *in C. (except' uno messuagio, duabus acris terræ, et advocatione Ecclesiæ de C, &c.) Et est concordia, &c. quod præd' A. cogn' tenementa prædict' cum pertinen' (except. præexcept.)* [The instance does not correspond with the proposition by which it is introduced; the proposition refers to a general *præcipe*, with a concord containing a particular exception; while in the instance here given there is a *præcipe* with an exception, and a concord adopting that exception.] And in all these and such like cases, as before, where the concord is not formal, the judges ought not to receive the fine nor suffer it to pass; but if they do, and the fine be finished, it cannot afterwards be avoided, by writ of error or otherwise, for these faults (80.) [except so far as the concord is not warranted by the writ.] *P. 16.

See in West. Symb. divers examples. Perk. sect. 629. Broo. Fines 108.

The concord and agreement may be made of an estate in fee simple, fee tail, for life, or for years; it may be also of divers remainders, and that to them that are no parties but strangers to the fine. It may be also single or double, with [a grant and] a render back again of some estate in the same land or some rent out of it; so as a concord may have in it a reservation of rent, a clause of distress, or *nomine pœnæ*, and a warranty. [b] And therefore if *A.* levy a fine to *B. sur cognisance de droit come ceo, &c.* And *B.* by the same concord do grant and render the land back again to *A.* for life without impeachment of waste, the remainder to *C.* the wife of *A.* for her life, the remainder to *A.* and his heirs, this is a good concord; and by this device a jointure may be, and is oftentimes made to a woman (81); [and through the medium of this render, a man may take back an

[b] Bro. Fines 106. 118. Co. 6. 33. Plow. 435. Dyer 279. Co. 1. 76.

(79) It is said, that all the services, royalties and appendixes, belonging to a manor, may pass well enough by the words *cum pertinentiis*. *Brown*, 29.

(80) For various precedents of præcipes and concords, see *Brown*, 26. *Wils.* 101 to 239. *Wils. Form of Fines, sur conusans de droit come ceo*, &c. 101. *Done grant et render* 185. *Done de droit tantum* 208. *Done concessit* 214. *Mad. Form. Angl.* 217 to 237; and for the nature and antiquity of concords, see *Mad. Form. Angl. Dissert.* p. 13.

(81) Accordingly *verbatim*. *Chct.* 8 & 9; and in *Wood*, 549.

estate to himself or to his wife, or make his heirs, or heirs of his body, purchasers by that appellation. In construction of law, the conusee in the first grant, is, in the second grant, the grantor.] And
Jointure. if a man would have a lease for life or years made of land by fine, the lessee must by the concord ac-
Lease. knowledge the lands to be the right of the lessor (who is seised of the land) as that, &c. And then the lessor must grant and render the same land back again to the lessee (the conusor) in the fine for life, or for a certain number of years, as the agreement is, reserving a rent with clause of distress; and this is a good fine, and a common device for this purpose, [and a very clumsy device it was, and is now obsolete in practice. Such demise for years may be made immediately, in the first instance, by a fine *sur concessit* from the intended lessor to the intended lessee.] But if the lessor be tenant in tail, it seems this fine will not bind the issue in tail, [unless the fine be with proclamations] (82). And yet if *A.* tenant in tail, and *N.* do by fine acknowledge the land to be the right of a stranger, *as that, &c.* and then the stranger, that is the cognisee, doth grant and render the land again to *N.* for life or years, with clause of distress, &c. and then grant and render the reversion to the tenant in tail, this is a good fine, and will bar the issue in tail also, and will likewise pass the rent, and the reversion to the tenant in tail. [In one case the original grant, and in the other case the render only, proceeds from the tenant in tail; but no reason occurs why the tenant in tail should not be bound by his grant in the render. And a fine *sur concessit* with proclamations, would, of a certainty, bind the issue in tail.] So if a stranger that hath nothing in the land levy a fine *sur cognisance de droit come ceo que il ad, &c.* to him in remainder in tail depending upon an estate for life, and the cognisee by the same fine render to the cognisor for ten years to begin at Michaelmas following, and dieth, and all the proclamations are made after his death, and the tenant for life dieth after the time the lease is to begin; this is a good fine, and so a good lease to bar the issue in tail. [This proposition, and a former proposition, being two passages

(82) Unless executed in the life of the tenant in tail. See *Chet.* 8, & 27.

of the original text, are at variance; unless reconciled by the addition to the text.]

West. Sym. ubi supra. Co. 7. 38.

If *A. B.* & *C.* levy a fine to *D.*, and *D.* render the land back again to *A.* for life, the remainder to *B.* in tail, the remainder to *C.* * in tail, and the remainder to a stranger in fee, this, or any such like record as this, is good (83.) And if *A.* and *B.* join in a fine of a messuage to *C.* and *D.* and to the heirs of *C.* who do grant and render a charge of 30*l.* out of the land to *A.* for his life, to begin after the death of *B.* to be paid at the feasts of, &c. *Proviso semper quod præd' concessio præd' annualis reddit' 30l. non aliqualit' se extendat ad onerand' personas dict'* C. & D. *sed tantummodo ad onerand' dict' messuag' tota vita ipsius A.* and then they grant and render the messuage to *A.* during the life of *H.* the remainder to *B.* in tail, the remainder to the right heirs of *B.* this is a good fine. But in such a fine *sur grant & render*, these things must be heeded:—1. None may take the first estate by the concord, but the *cognisors* [*viz.* parties to the fine] or one of them, [and yet in a conveyance or fine to uses, a stranger may take the *first* use.] And therefore if *A.* acknowledge a fine to *B.*, and *B.* render and grant the land to *A. habendum sibi & E. uxori ejus*, and the heirs of their bodies, [for the wife is a stranger;] or if the husband levy a fine of his wife's land, and the cognisee grant and render the land to the husband and wife, [for she is not a party to the fine] this is not a good concord [so far as respects the wife; and if the first estate which is rendered be to a stranger, all the remainders will be void, as in grants at the common law, for *debile fundamentum fallit opus.*] 2. The render of the rent must be to one of the parties to the fine, and not to a stranger. 3. A man cannot [by the render grant an estate to himself, or in other terms he cannot grant to himself or to his heirs, or heirs of his body *eo nomine*, or to his wife, or] reserve a less estate to himself than a fee; and therefore if *A.* acknowledge a fine to *B.* and *B.* render to *A.* in

*P. 17.

1] 24 Ed. 3. 27. Bro. Fines 108.

2] Co. 2. in the Lord Cromwel's case.

3] 24 E. 3. 26. 14 H. 4. 31. Dyer 69. 33. 34.

(83) The estate, made by the render, cannot be made to a stranger to the fine in the first instance; but if it be made to a party to the fine in the first instance, it may be afterwards limited to a stranger by way of remainder. 2 *Inst.* 514. *Wils.* 64. 2 *West. Prec.* 30. *Chet.* 7. The render may be of a thing issuing out of the same land contained in a fine, but not of a thing collateral, or of another nature, which is not issuing out of or incident to it. 2 *Inst.* 514.

tail, the remainder to himself [*B.*] for life, this remainder is void (84), [and in this instance, the fee remains in *B.*] So if *A.* by fine acknowledge lands to *B.*, and *B.* grant and render the land to the conusor in tail, the remainder to *B.* in tail, the remainder to *B.* in fee, the limitation of this estate in tail to *B.* is void, and he can never have execution of it [and he retains the reversion in fee under the original grant to him. But if the remainder in fee had been limited to a stranger, the fee would have been immediately dependant on the estate of *C.* as if the gift in tail to *B.* had been omitted: for a void remainder will not impede the effect of a more remote remainder, with the exceptions introduced by the law against perpetuities, 2 *Abstr.* 170]. So if *A.* acknowledge the lands to *B.* and *B.* doth grant and render to *A.* for life, [the remainder or reversion will be in *B.* by force of the grant of *A.*; but a man may by fine or deed raise uses in favour of himself, his wife, or heirs of his body, notwithstanding the rule of the common law, that a man cannot grant to himself, &c.] 4. The agreement must be possible and sensible, for if there be three conusors in a fine, and the conusee render to one of them for life or years [rendering] a rent, and grant the reversion to another of them for life or years, rendering a rent, and grant the reversion in fee or in tail to the third, this is not a good concord. [The objections against this concord are not obvious or easily discoverable.] 5. There can be no condition or clause of re-entry for non-payment of rent inserted into the concord. [This is a mistake, if the rendering grantor retain a reversion; the rule is proposed too generally; for if the conusor in the render has limited a particular estate only, and no remainder, and has reserved a condition, what reason could be alleged against the validity of that condition?] and yet some hold a fine levied to one in tail, upon a condition with a remainder over, is good. [On principle the limitation over of the remainder discharges the condition; and, as the case is stated, the remainder may be good, though the condition be void. The remainder will be void in those cases only in which the remainder is limited to a stranger, on an event arising

4] Co. 6. 33.

5] 44 Ed. 3. 22. 27 H. 8. 24.

(84) This fine *sur grant et render*, should be always levied upon a fine *executed*, as *sur cog. de droit come ceo*; for on a fine *executory*, the conusee hath *nothing which he can render* to the conusor till execution. *West. Symb.* 6.

*Co. 3. 5. super Lit. 363. 5. 38. out of the condition.] * And such concords as these of the last sort before, ought not to be received, and if they be received, the fine in most cases may be avoided for these faults; but if a fine be received with a condition inserted into the concord, this is a good fine and not avoidable by writ of error or otherwise. [But the condition will be void, and rejected, if the condition be against any rule of law.]

Plow. 248. No single fine can be with a remainder over to any other person contained in it, but it must be to the conusee and his heirs only (85), [or to several and the heirs of one of them, or, though irregularly, to their heirs; or it may be for a particular estate, as in

1] 50 E. 3. 9. tail, for life, or for years.] 2. No rent can be reserved upon a fine that is *sur conusance de droit come ceo, &c.* but upon a fine *sur grant & render*, or *sur concessit* only [a rent may be reserved,] for if one levy a fine *sur conusance, &c.* rendering rent, this reservation is void, [because the fine is founded on a former right in the conusee. On such fines a rent, &c. may be created by a declaration of the

3] Co. 5. 38. uses of the fine.] 3. No single or double fine shall be received with any covenants or other agreements than are before mentioned, * but in all these cases, also when the fine is received and levied, it seems *it is good* and unavoidable, and that only the remainder in the first case, the rent in the second, and the covenants in the last, are void, and the fine good for the residue. [But warranties are admitted in fines. They are covenants real. In the renders of fines there may be any variety of agreements, limitations, &c. which may be inserted in a common law grant. But all limitations contrary to the rules of law will be void, and so treated in the consideration of the legal operation of the fine. Uses may be declared of estates created by the render of a fine.]

*P. 18.

44 Ed. 3. 36. A particular tenant, as for life, &c. cannot surrender his term to him in reversion or remainder by fine, but he may grant and release it to him by fine (86), [and this grant and release will in its

(85) It is said in 1 *Wood* 534, that no single *or double fine* may be with a remainder over to any other person not contained in it, &c.; but it seems erroneous with respect to the *double fine*. See 2 *Inst.* 514.

(86) In *Com. Dig. Fine*, (E. 10.) it is said, a fine upon a surrender is where tenant for life, in tail after possibility, by the curtesy, or in dower, *by fine* surrender their estates to the reversioner.

effect or consequences, be a surrender, if the next estate in reversion or remainder be in the conusee.]

One may grant his tenements which *H.* doth hold for life, and which after the death of *H.* ought to remain to him, to *H.* for life, rendering rent with clause of distress, saving the reversion, and a fine of this form is good, [but he cannot subject *H.* to a new rent, unless *H.* agree to the estate.] 44 Ed. 3. 45.

The manors and tenements contained in the writ may be divided; as if a fine be levied between *A.* and *B.* of two manors, and *B.* doth acknowledge all his right of the said two manors to be the right of the said *A.* as that which, &c. for which *A.* doth grant and render one manor to *B.* for life, with two parts of the other manor which *N.* holdeth in dower, to have the one manor and two parts of the other manor to *B.* for life, the remainder after his death to *A.* in tail, [*read C.*, for *A.* could not grant to himself,] and that after the death of *N.* the third part shall remain to another. So if a fine be levied of the manor of *G.* with the appurtenances by *A.* unto *C.* which *A.* acknowledgeth the right in *C.* as that, &c. and *C.* granteth and rendereth the same to *A.* in tail, the remainder of the fourth part of the manor towards the west [very indefinite] to the said *A.* and her heirs, the remainder of another fourth part towards the east to *I.* in fee, and so of the other two fourth parts; or (uncertainly) [*omit* uncertainly] by 3. third parts in remainder to *A. B.* and *C.* in remainder severally, and these are good concords. 44 Ed. 3. 11. 46 Ed. 3. 19. 44 Ass. Pla. 11. Bro. Fines 111.

If *T.* and *E.* his wife levy a fine to *R. D.* and *T. C.* of divers manors and lands in *A. B.* and *C.* and in the fine there are divers grants and renders, and one grant and render is of the manors of *A.* and *B.* and the lands therein to *T.* and *E.* and the heirs of *T.* and in another render 100 acres parcel of one of the same manors is granted to *E.* in tail, the remainder to the right heirs of a stranger, notwithstanding this seeming repugnancy, the record, and consequently the whole fine, is good, [for by one of the rules of construction, the 100 acres will be treated as excepted out of or not included in the former grant.] Co. 5. 38.

6. In respect of the manner and order of levying it, and other matters.

The fine must be levied and sued forth in that manner and order as before is set forth; for if it be not so, but that there want an original writ, or See before.

if there be one, it doth bear *teste* after the *dedimus potestatem*, [or if the concord be, not as to the parcels warranted by the writ, or so far as the parcels in the concord are not warranted by the writ; or if the parties die before the return of the writ; or if the lands are not within the jurisdiction of the court; or if the writ be returnable on a *dies non juridicus*,] or the like, it will be a defective fine, and either *ipso facto* void, or at least voidable by writ of error (87).

Dyer 220. 254. Crom. Jur. 92. Dyer 246.

If any one of the conusors die before the conusance be certified after it is acknowledged and taken, [*read* before the writ of covenant be returnable,] the fine cannot now be made a good fine; and yet if the commissioners shall certify this conusance with an antedate, and so the fine be finished, this may be a good fine at the common law, but perhaps may be avoided by sentence in *the Star Chamber. But if the conusance be certified, and the king's silver paid to the king, [and the writ of covenant be returnable] before the death of the conusor or conusee, the fine may be ingrossed and finished after his death well enough, and it will be a good fine (88). If there be only one conusor or one conusee, and he die before the return of the writ, the fine will be void; but if there be several conusors, and some or one of them, or several conusees, and some or one of them die, so that there are efficient parties who survive, the fine will be good, and may pass as between these parties; or if it be passed as to all the persons included, and among them those that be dead, it is avoidable as to such as are dead, but will remain in operation as to the other parties.] And if a feme sole make a conusance of a fine, and before it be certified and ingrossed she take a husband, this will not let [vitiate the fine] but the fine may be finished, and albeit it be recorded and sued out in her name as sole, whereas in truth she is covert and of another name, yet is the fine a good fine; however, in this case it is not amiss to get a release of errors from

*P. 19.

(87) If there is no original writ sued out, the fine is not void, but voidable only by writ of error. *Vin. Abr. Fine* (F. 2.) *Plow.* 394.

(88) The conusor died died before the return of the writ of covenant, and the fine set aside after it was completed, because the post-fine or king's silver *due at the return of the writ of covenant, and not before*, became due, and was paid *after the death of the conusor*. *Watts* v. *Birkett*, 1 *Wils. Rep.* pt. 2. p. 115. See *ante*, p. 2. note 1.

her husband. [The release of the husband would bind him only for his time or interest, leaving the wife and her heirs at liberty to dispute the validity of the fine. To accomplish the object of barring the wife and her heirs, there should be another fine by the husband and wife.]

Lands that are bought of divers persons may pass by one fine, and then the writ of covenant must be brought by all the vendees [or a nominee] against all the vendors, and they must every one of them warrant for himself and his heirs (89), and such a fine is good (90), [but it is the practice of the offices to allow of such fines only when the lands so purchased are together of the value of 200 *l.*] West. Symb. ubi supra.

If land lie in divers shires, it may be contained in one concord, and good enough; but there must be several writs of covenant in every county (91), else the fine will not be good. [Now the practice is to have a distinct fine for the lands in each county; and if one manor, &c. being an entire thing, be situate in several counties, or if a rent, &c. issue out of lands in several counties, there must be several writs, and one concord.] Dyer 227. 15 Ed. 4. 33.

Covin. Recovery. If a fine be levied of covin [evidenced by the continuance of payment of rent, performance of services, &c.] by a lessee for years, or life, or a copyholder, of purpose, and with an intent to bar him in reversion or the lord of his inheritance, this is of no force, and therefore *non-claim* within [*read* for] five years will not hurt in this case; [and a fine by lessee for years, or a copyholder, without a previous feoffment, does not pass any estate of freehold, and may be avoided by the plea of *partes finis nihil habuerunt*; while the fine of a tenant for life in possession levied without fraud, in deceiving the reversioner or remainder-man by payment of rent, &c. may devest the remainder or reversion, and become a bar by non-claim for five years after the death of tenant for life;] so that it seems a fine or Co. 3. 78. 8. 9. 105.

(89) *Only*, for it is absurd that one man should warrant the sale of another without consideration. *Wils.* 47. 1 *Wood*, 552.

(90) And such *joint fines* seem reasonable, where the several purchases are of small value, though they are *ex gratia*, see *Wils.* 47. where an order of Lord Chancellor *Hatton* is inserted, authorizing the cursitor to stay the writ when there is more than one demandant and one deforciant, (except coparceners, joint tenants, and tenants in common;) but the cursitor will permit two separate purchases to be comprised in one fine, on an affidavit that the value of them together does not exceed 200 *l.*

(91) Returnable all at one day. *Dyer*, 227. pl. 24. *query?*

Co. 3. 80. 16 H. 7. 5. see infra, in Deed.

recovery may be covinous and avoidable for covin as well as a deed, and therefore that a fine or recovery levied or suffered of fraud to deceive purchasers or creditors, will be void as to them as well as any other conveyance (92). So also a fine or recovery, levied or suffered, in execution or pursuit of an usurious contract, may be void by the statutes of usury, as well as a feoffment or other conveyance by deed. But a fine or recovery shall not be said to be levied or suffered *per duress*, and avoided for that cause. [But equity may relieve against circumstances of fraud.]

Usury.

Duress.

Co. 5. 38. See in exposition of Deeds, infra.

7. *How the concord of a fine shall be expounded and taken.*

The conusance of a fine, and a grant and render therein, shall be expounded and taken as a charter or other conveyance between party and party, because it is a conveyance upon record, and not as a writ or judgment upon record (93). And therefore if *A.* and *B.* by fine acknowledge the manors of *S. T.* and *W.* to be the right of *C.* and *C.* doth render the manors of *S.* and *T.* to *A.* by one render, and after by another render limit 100 acres, parcel of the manor of *S.* to *B.* this shall be a good concord, and be expounded according to the intent of the parties, *viz.* That *B.* shall have the 100 acres, and *A.* all the residue of the manor, [for the reasons stated in a former page.]

37 H. 6. 5.

Deed.

If a fine be levied to two men *& hæredibus*, without the word [*suis*] this is void for uncertainty in a fine as it is in a deed. [A like omission would in a will be supplied by construction.]

Co. super Lit. 9. Frederick vers. Wakefield's case. Trin. 36 Eli. Co. B.

Recovery.

If a fine be levied, *come ceo que il ad de son done*, hereby a fee-simple will [unless there be words of express limitation] pass, without any word of heirs. And so also it is in case of a common recovery, [but even in this fine a particular estate may be limited by appropriate words.]

If the lands be limited in the concord of a fine to *B.* for life, and after to the children of *C.* begotten, and *C.* hath, at the time of the * fine levied, two daughters only, in this case the sons and

*P. 20.

(92) In what cases fines may be avoided for deceit or fraud. See *Chet.* 78. and the books referred to in note 2 to p. 35.

(93) The fine and render is a conveyance at common law, and the render makes the conusor a new purchaser, as much as feoffment and re-infeoffment at common law. *Price* and *Langford*, 1 *Salk.* 337. 1 *Show. Rep.* 92. So that if a person seised of an estate *ex parte materná*, levies a *fine sur done grant & render*, and takes back an estate to himself and his heirs, the nature of the descent is thereby altered, and the estate will thenceforth descend to his heirs *ex parte paternâ*. *Co. Lit.* 31. b. *Essay on Fines*, 7. 8. and 9.

daughters that are born after shall take nothing by this fine. [It may be doubted whether this point be not over-ruled. The general rule is, that all the children born before the determination of the life-estate are capable of taking. *Mogg* v. *Mogg*, 2 *Meriv. Rep.* 654; *Baldwin* v. *Karver*, *Cowp. Rep.* 369; and after-born children might beyond all doubt take under a declared intention in their favour.] And no averment of intent will help in these cases. And yet an averment lieth upon a fine of the uses thereof and of no other matters as upon a deed. [A conusee may aver an use in his favour without writing, or rather may repel the resulting use by averment. So the use may result to the conusor for want of a consideration, or intention in favour of the conusee; but no use can be declared in favour of a stranger, nor any particular estate by way of use be created without a writing, 29 Car. 2. c. 3; and the uses of fines already levied cannot be declared without deed, and *query*, if without indenture. 2 *Prest. Convey.* p. 41.]

Averment.

8. *What persons shall be barred by a fine, or a fine and non-claim. And in what time. Or not, and how.*

A fine at the common law, or a fine without proclamations, was once a perpetual bar to all persons that had right and no impediment at the time of the fine levied, and that did not claim within a year and a day after the execution of the fine by possession; but now this law is changed, and this kind of fine will bar none but such as are parties and privies thereunto (94), [as their general heirs or representatives. It would not, without proclamations, bar heirs in tail; but the *laches* of a tenant for life, having the freehold, was at common law, a bar to those in reversion and remainder. *Cruise on Fines*, 149.] But a fine by the statute, or [that is] a fine with proclamations, is now much of the same virtue and force as a fine at the common law was, [merely varying the periods for claim,] for by the statute of 4 H. 7, it is provided, that every fine, after the ingrossing thereof, shall be proclaimed in the court the same term and the three next following terms, four several days in every term (95), [now one day only in each

Stat. 18 Ed. 1. de finibus, stat. 34 Ed. 3. 16. Plow. 373. stat. 4 H. 7. ch. 24. 1 R. 3. ch. 7. 32 H. 8. c. 36.

(94) The legal signification of the word *bar* explained in *Co. Lit.* 372. *a*; and for the different methods of making *claim* at common law, and by whom such claim should be made, 2 *Inst.* 518. And how and by what statutes altered, 2 *Bl. Com.* 352. See the *Essay on Fines*, 29. 100—108.

(95) But by the statute of 31 Eliz. c. 2. a fine need only be proclaimed four times, viz. once in the term wherein it is ingrossed, and once in each of the three succeeding terms; see proclamations, *Fish* v. *Brokit*, *Plow.* 265. By the 23d Eliz. c. 3. further

of four terms, *viz.* in the term of which the fine is levied, and in the three succeeding terms. Even when a fine is levied of a preceding term, the proclamations are entered as of that term, as one of the four terms;] which proclamations so made, the fine shall conclude all parties, privies and strangers, except women covert, persons within twenty-one years of age, in prison, out of the realm, or of *non sanæ memoriæ*, (being no parties to the fine) so as they or their heirs take their action or lawful entry within five years after these imperfections removed. Saving to all persons and their heirs (other than parties) the right, claim and interest which they have at the time of the fine, so as they pursue it by action or entry within five years after the proclamations. And saving to all other persons such right, title, claim and interest, as first shall grow or come to them after the proclamations by force of any matter before the fine, so as they make their claim or entry within five years after the same grow due, or if at that time there be any impediment as aforesaid, within five years after the impediment removed (96). And by the statute of 32 H. 8, (which is an exposition of this statute) it is provided, That all fines with proclamations levied according to 4 H. 7, by any person of twenty-one years of age, of any land, &c. before the fine levied entailed to him that doth levy the fine or any of his ancestors in possession, reversion, remainder or use, immediately after proclamations had, shall be a bar against him and his heirs, claiming only by force of any such entail, and against all others claiming only to the use of him or any heir of his body (97). By which statute it doth appear that all the parties to the fine, conusors and conusees, whether they be femes covert, men *de non sanæ memoriæ* (98), or others,

Plow. 246. 3 Co. 51. 84. 7 Co. 32. 9 Co. 140. 11 Co. 75. Bro. Ass. 6. 6 Tr. of abuse, 57. Taile 2. Fines 109. 118. 121. Co. Lit. 372 a. 1 Bulst. 33. 13 Ed. 1. § 1. c. 1. 1 Leon. 244. 2 Leon. 36. 57. 62. 224. 3 Leon. 10. 1 And. 3. 39. 141. Skin. 95. 2 And. 109. 114. Cro. Car. 435. Vin. Abr. 13. 264. 1 Wood, 530.

regulations are made, to be observed by the chirographer respecting the notoriety of the fine. See further as to proclamations, *Wils.* 7.

(96) If the reader is desirous of comparing the opinions of historians and lawyers concerning the statute of fines, 4 H. 7,—he will find them in 3 *Hume's Hist.* 8vo. p. 400; 2 *Mortimer's Hist.* 188; 4 *Bl. Com.* 422; and in the 13th edit. *Co. Litt.* 121 *a.* note 1. which contains an explicit description of the nature, use, and effect of a fine, by the learned and ingenious editor of that edition.

(97) Previous to the 32d H. 8. it was doubted whether a fine, levied by *tenant in tail*, could *bar the issue* under the statute 4 H. 7. although all persons appeared to be concluded thereby under the words *privies* and *strangers* to the fine; and that, no doubt, occasioned the enacting the statute 32 H. 8. See *Bac. Abr. Fines*, (E.)

(98) Idiots, madmen, or lunatics.

(infants only excepted, who during minority may avoid it), and whether they have a natural or civil capacity; and privies, *viz.* privies in blood, as heirs [or heirs of the body,] whether they be lineal or collateral, or privies in representation, as executors and administrators; and all strangers also, *viz.* all others besides parties and privies that have or
*P. 21. pretend any present right * or title (except women covert, and the rest that have impediment that do make their entry or claim, or bring their action within five years after proclamations had, and those persons excepted also if they make not their claim, &c. within five years after the impediment removed) all these are included, *i. e.* so shut and closed up together, for their right is so extinct hereby, as they can never open their mouths or lift up a finger against it. Saving to all others, *i. e.* such as have no present right at the time of the fine levied, and were excepted before, such right, title, claim or interest as shall accrue to them after the proclamations [*viz.* last proclamation] upon any trust, gift in tail, or other cause, before the fine levied, so as they make their claim, &c. within five years after their right first accrued, if they have then no impediment, or if they have, within five years after the impediment removed (99).

Durore v. Jones, 4 T. Rep. 300.

For a more full understanding of which statutes and this matter, these things in general must first be observed:—1. That the persons to be barred by a fine are, 1st. parties; 2d. privies; 3d. estrangers. The parties, if they be of the age of twenty-one years, are bound for ever by the fine, and shall have no time to claim to preserve their right (100). The privies also, being heirs [or heirs of the body] and executors to the parties, and void of impediment at the time of the fine levied, or not, if they claim by the same title that their ancestor had that levied the fine, are barred for

(99) For the operation and construction of the 32 H. 8. c. 36. see *Vin. Abr. Fines*, (W. 5.) In two cases this statute seems to weaken the statute of 4 H. 7. in the case of tenant in tail by act of parliament, and tenant in tail with reversion in the crown, per *Hobart*, in *Mackwilliam's* case, *Hob.* 332.—The statutes relating to fines in order of time, the benefits intended by them, and the inconveniences they were made to redress, with comments, see in *Chet.* 21 to 49. A fine may be a bar in point of law, to all intents and purposes, without being a bar in equity; for it is certain doctrine in a court of equity, that a fine by mortgagor in possession cannot bar a mortgagee. Per Lord *Hardwicke*, in *Earl Pomfret* v. *Lord Windsor*, 2 *Ves.* 482.

(100) Although they are idiots or *non compos*. *Co. Lit.* 247.—Who are deemed *parties*, and how they are barred, see 2 *Bl. Com.* 355, and compare it with *Chet.* 58.

ever by the fine, and shall have no time to claim to preserve their right (1). [a] And therefore if my father disseise my grandfather of land and then levy a fine of the land, and then my grandfather die, and after my father die, by this fine I am barred of the land for ever. [But unless the father had survived the grandfather, provided the grandfather had been seised in fee, the grandson would not have been bound. But if the grandfather had been seised in tail, the grandson and all the heirs in tail would have been barred; *Grant's case*, 10 *Rep.* 50 a.; *Mackwilliam's case*, *Hob.* 333; for the law is more unfavorable to heirs in tail, as will appear in the sequel; and if there be grandfather, donee or tenant in tail, and in his lifetime his son levy a fine with proclamations, and die leaving issue, and then the grandfather die, leaving the grandson his heir in tail, the grandson and all the heirs in tail will be barred. So, if there be three sons, *A. B.* and *C.*, and in the lifetime of the father, tenant in tail, a fine be levied by *A.* the eldest son, with proclamations, this fine will bar all the issue, provided *A.* or any his issue, inheritable to the estate tail, should survive the father. But if *A.* and his issue die in the lifetime of the grandfather, *B.* and *C.* and their issue will not be barred. So, if the second son levy a fine, his issue would in all events be barred; but *C.* and his issue would be barred by this fine only in case *B.* or his issue should eventually become the heir under the intail; 1 *Prest. Abstr.* 404.] And here note, [b] that he that is a privy within the intent of 4 Hen. 7, is an heir within the statute of 32 Hen. 8, *et sic e converso*, [and a customary heir is a privy in blood *pro hac vice.*] And that privies or heirs in estate and blood, as he that is heir to whom the land doth or should descend, are within these statutes, and shall be barred by the fine of their ancestor of that land. And so also shall privies in estate that are not privies in blood, as where one hath land in Burrough-English, and levy a fine of it, hereby the youngest son is barred. So if one be tenant in tail to him and the heirs female of his body, and he levy a fine, having a son and daughter, hereby the issue female is barred, and yet she is not the heir of his blood, [*viz.* general

[a] Dyer 3. Pasch. 7. Jac. B. R.

[Helps v. Hereford, 2 Barn. & Ald. 242. Sir W. Jones, 456.]

[b] Trin. 21. Jac. Com. B. Curia in Will. Godfrey's case.

(1) Who are deemed parties and privies, and how they shall be barred, see 2 *Inst.* 516. *Vin. Abr. Fines*, (A. 3. § 8.) *Bac. Abr. Fines*, (E.) *post*, 28.

heir; but she and also the heir in Borough-English is as much heir as is a heir *ex parte materná*]. But he that is privy in blood only, and not in estate also, is not within these statutes, neither shall he be barred by the fine, and therefore if lands be given to a man, and the heirs females of his body, and he hath a son and a daughter, and the son levy a fine and die without issue, this is no bar to the daughter, for howsoever she be heir of his blood, yet she is not the heir to the estate, nor shall need to make her conveyance to it by him. [The reader is to keep in mind the distinction between fines,—1st. as Conveyances; 2d. as Bars to Intails; 3d. as Bars by Non-claim: To fines as conveyances the proclamations are immaterial; while proclamations are essential to the operation of fines as bars to issue in tail and by non-claim.] The strangers that are to be concluded by the fine, are either, 1st. such as have present right and no impediment, and these are barred* if they
*P. 22. make not their claim within five years after the proclamations (2); [*viz.* five years, computed from the last proclamation.] 2. Such as have present right, but have impediment of infancy, &c. and these are barred if they do not make their claim within five years after the impediment removed; [or if there be several co-existing impediments in the same person, one arising before the other is determined, as infancy and marriage during infancy, then after the several impediments are removed.] 3. Such as have no present, but future right upon cause precedent (3), and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrue; or they have impediments, and then they are barred if they claim not within five years after the impediment removed (4). 4. Such as have neither present nor future right at the time of the levying of the fine, by reason of any matter

(2) Though the statutes of 4 H. 7, and 32 H. 8, have made the operation of fines stronger against *parties and privies* than they *were at common law*, yet they have enlarged the privilege of *strangers* to avoid them; for, by those statutes, strangers have *five years* from the fine to make their claim where they have a *present right* at the time of the fine levied; and where it accrues *after the fine*, they have five years from the time of such *accruer*; whereas by the common law, in both these cases, they had only a *year and a day from* the entry of the silver at which time the land passed. *Bac. Abr. Fine*, (F.)

-ons in reversion or remainder. *Co. Lit.* 372.

he 4 Ann, c. 16, § 16, no claim or entry to avoid a fine with proclamations , unless within one year after such claim an action is commenced and pro- ct. See 2 *Bl. Com.* 356. *Williams' Fraud*, 1 vol. p. 319, n. 1.

before the fine, but whose right groweth either entirely after, or partly before and partly after the fine, and these are not barred at all by the fine, but they may make their claim, &c. when they will. [As in the instance of an estate to *A.* on condition; and he levy a fine before the condition broken, this fine never could bar the right of entry by reason of the condition; but in the same circumstance, by a singular anomaly and departure from principle, the fine of *A.* might become a bar to his wife's right to demand dower by her non-claim. *Menville's case*, 13 *Rep.* 19; 1 *Prest. Abstr.* 419; 3 *Prest. Abstr.* 374.] And parties, privies and strangers to fines that are barred thereby, are such as have natural capacities or civil, for both these are barred. And therefore [at the common law] it is held, if such a corporation as hath an absolute estate and authority of his possessions, so as he may maintain a writ of right thereof, as mayor and commonalty, dean and chapter, &c. levy a fine of their lands, they and their successors are barred presently, [by five years non-claim;] but if a bishop, dean or prebend, without assent of the dean and chapter, or a parson and vicar, without assent of the patron and ordinary, had levied a fine, this would not [by its own operation] have barred the successor; neither will it bar now with their assent, for they are restrained by divers statutes; [but each successor, being the head of the corporation, and the corporation, may be barred for his time, by five years non-claim running, during the time of such successor] (5). So also such persons are barred by the fines that are levied by others, if they make not their claim in time; as if one disseise a corporation aggregate of land belonging to their corporation, [and which they could alien in fee,] and after levy a fine of it with proclamations, and they do not make their claim, &c. within five years, hereby they are barred (6). [But if they are restrained from alienation, then the corporation will

Plow. 538. 337. 375. 378.

(5) 1 Eliz. c. 19. 13 Eliz. c. 10. *Ante*, p. 7.

(6) But *not their successors* after their decease, for it would have been of none effect to have prohibited corporations from barring the right of their *successors by conveyances* made by themselves, and to have left them power by their permission or *sufferance and non-claim* to bar it. 11 *Co.* 78, b. And accordingly fine levied by copyholder of a dean and chapter, and five years passed without claim by him who was *dean at the time*, yet the fine did not bar the *succeeding dean*. *Ventr.* 311. See further as to the operation of fines and non-claim, with respect to *corporations aggregate or sole*, *Wils.* 13. 1 *Cruise, Essay*, p. 178.

be barred by the non-claim only during the time of each successive *head* of the corporation, allowing five years from the succession of each head of the corporation.] 2. Where the ancestor is barred by the fine, there for the most part the heir [including the heir in tail] is barred also. And therefore, if tenant in tail be disseised, and the disseisor levy a fine with proclamations, and the tenant in tail suffer five years to pass without claim, &c. hereby he and his issues are barred for ever; so that the heir [and even an heir in tail] doth suffer for the laches of his ancestor; [and a bar by the heir for the time being, under the intail, will be a bar to all successive heirs in tail, for each successive heir will not, as has sometimes been supposed, have a new and successive period of five years. *Plowd.* 357.] 3. The estates that shall be barred by the fine are estates by the common law, or by copyhold, in fee-simple, fee-tail, or for life, or for years; the estates also of tenant by statute [merchant or staple, and] *elegit* (7), and of guardians in chivalry, and of executors that have land until debts and legacies be paid (8). [But an authority to executors to sell, will not be barred while it remains an authority; but an estate limited under such authority, and prior to the fine, may be barred. In short, no estate or interest is barred by non-claim on a fine, unless it be before the fine, or by the operation of the fine (as in the instance of a fine by tenant for life devesting the remainder, &c. or of a fine by tenant in tail creating a discontinuance,) converted into a right of entry or of action; or be in a state of adverse claim. The case of dower in the wife of the conusor of the fine, is an excepted and anomalous case. If a man has a fee subject to an executory devise, or springing or shifting use, or a base or determinable fee, his fine with proclamations never could become a bar to the title afterwards arising under this executory devise, &c. A fine by a person who has a fee subject to a condition, is subject to the like observa-

Co. 9. 105.

Co. 9. 104. 5. 124.

(7) Also a title of entry for a condition broken, a power appendant or in gross, a power of revocation, and a writ of error, may be respectively barred by a fine. See the *Essay on Fines*, 147 to 151, and the cases there cited.

(8) Provided the lands are extended. 2 *Inst.* 517. *Essay on Fines*, (ed. 1783,) p. 145. But the interests of tenants by statute merchant, statute staple, or *elegit*, cannot be barred il they have *extended* the lands, or pursued their rights in some other manner, ave no right to enter on the lands, and therefore cannot be put out of pos- *on Fines*, 186.

tion.] And therefore, if one enter upon and put out a copyholder of land, and levy a fine thereof, and the copyholder suffer five years to pass, and make no claim, &c. the copyholder and his lord both are hereby barred for ever (9). [The alleged reason is, that the lord and tenant have severally present interests. If the copyholder held for life, a new right of entry would (it should seem, *sed qu.*) arise on his death.] And if a lease be made for years, and the lessor or another, before entry of the lessee [and while he has a present existing right of entry,] levy a fine with proclamations, and the lessee doth not make his claim, &c. within five* years, hereby the lessee is barred of his interest for ever. [But if the fine be levied by a stranger, the lessor may bring his assise, &c. within five years, or may enter at any time within five years after the expiration of the term. And if the lessor levy a fine, and the lessee has merely an *interesse termini*, the fine would not disturb the interest of the lessee, or ever become a bar.] 4. The things whereunto these statutes do extend, are lands and tenements, and not a rent or other profit apprender out of the land; and therefore, if I have a rent, common, or estovers out of land, or a way over land, or power to sell the land, and a fine is levied of the land itself, and I do not make my claim of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. And for this cause it is, that if a tenant in ancient demesne levy a fine of his land [with proclamations, in the court of Common Pleas,] and five years pass, the lord is not hereby barred to avoid it [by a writ of disceit,] for herein [by this writ] he claimeth not the land, but his ancient seigniory (10). [Or rather, his suit is to avoid the fine, as suspending his seigniory, and then the maxim *non potest adduci exceptio ejusdem rei cujus petitur dissolutio*, protects him from the operation of the fine; *Bac. Maxim.* 1. But if a second fine with proclamations be levied, the second fine and the non-claim of the lord may be

*P. 23.

Plow. 378. Bro. Fines, 123. Co. 5. 124.

(9) And the lord shall not have five years after the death of the copyholder, even if he was a copyholder for life. See 9 *Co.* 105, b. That *copyholds* are within the statute of 4 Hen. 7, see *Co. Comp. Cop.* 126. *Chet.* 69. As to *copyholds* being within the Statute of Fines, the affirmative is said in *Bac. Ab. Copyhold*, (C.) But note the manner of putting the authorities in the margin of the books were contradictory.

(10) See accordingly 1 *Salk.* 210; and further, as to the force and effect of fines in ancient demesne, *Vin. Abr. Fine*, (N. b. 4.) 4 *Inst.* 270. What things are barred by fine, see *Vin. Abr. Fine*, (Z.)

pleaded in bar to the right of the lord to maintain his writ of disceit; *Bac. Elem. Maxim.* 1.] 5. The time in which they must make their claim or bring their action, that have present right and no impediment, is within five years after [the last] proclamation had, and the time for them which have impediments is within five years after the impediment removed (11). 6. The time within which they must make their claim or bring their action whose right [to enter, &c.] doth happen afterwards, if they have no impediment, is within five years after the time that their right doth [first] accrue; and if there be any impediment, within five years after the impediment removed. 7. The persons whose right is saved and preserved are mentioned in the first and second saving of the statute of 4 H. 7, and they are strangers, and not parties nor privies. 8. They that have benefit by the first saving of the statute shall have none by the second saving; for he that will be within the second saving, to have benefit by it, must be, 1. Another person; 2. The right must come and accrue to him first; 3. His right must be upon some cause or matter before the fine; 4. It must come to him after the fine and proclamations. 9. No fine shall bar any estate in possession, reversion or remainder, which is not devested and put to a right at the time of the fine levied (12); [or by the operation of the fine, as in the instance of a fine by a tenant in tail, operating as a discontinuance, or a fine by tenant for life, operating to devest the remainders, &c.] And therefore, if one levy a fine of my land while I am [by myself or my tenant, or by any person connected with me, in privity of estate as a prior tenant for life, &c. *Carhampton* v. *Carhampton*, 1 *Irish Cases*, p. 567.] in possession of it, this fine will not hurt me (13). So if the tenant of the land, out of which I have a rent or common, &c. levy

Plow. Lord Zouche's case, 370.

Dyer, 3. Co. 3. 86, 91. Plow. 373.

Co. 5. 124. 9. 106.

(11) If a person has several impediments, he shall have five years after the last impediment is removed. 1 *Leo.* 215. *Plow.* 375, a.

(12) And he that at the time of the fine levied had not any title to enter shall not be barred, for the fine does not bar the estate but binds the right; and when the fine does not turn the estate to a right, there needs no claim. Sir *T. Raym.* 149. 3 *Mod.* 196. But this must be understood in the case of a future interest, and not of a tenant in tail barring his issue, by stat. 32 H. 8.

(13) For I may show that I was seised before and at the time of the fine levied, and that *partes finis nihil habuerunt tempore levationis finis*, and by this avoid it. 2 *Inst.* 517. *Cro. Jac.* 60. 1 *Vent.* 81. Or, if one gets possession under a forged deed, and levies a fine and [illegible] thereon, a court of equity would decree against the fine. *Per* Lord *Hardwicke*, *Cartwright* v. *Pultney*, *post*, 35.

a fine of the land, this shall not bar me of my rent or common, for I am still in possession of this in the judgment of the law (14). [The like law obtains if I have an authority to sell.] So if there be tenant for life the remainder for life, or tenant in tail the remainder in tail, and the first tenant in tail or for life do bargain and sell the land by deed indented and inrolled, and after [as a distinct assurance, *Seymour's case*, 10 *Rep.* 95.] levy a fine to the bargainee, in this case the remainders *are not barred*, albeit five years pass without claim, for the law in these cases *doth adjudge them always in possession* (15); [*viz.* in the seisin. But if the fine be part of the original assurance, then if it proceeded from tenant in tail in possession, it would discontinue, and if from tenant for life in possession, it would devest the seisin and might operate by non-claim.] So if I make a lease for years of land, rendering a rent, and a stranger levy a fine of the land, and the lessee for years payeth his rent to me duly, in this case I am said to be always in possession [in the seisin,] and therefore am not barred by this fine of my reversion. So if there be a tenant by copy, or lease for life, the remainder for life, and the first tenant for life accept of a fine of the * land with proclamations, and five years pass without claim, &c. hereby he that is in remainder is not barred, [for no estate can be devested by the acceptance of a fine.] So if one have a lease for years of land to begin in *futuro*, and a fine is levied of the land [before the commencement of the lease in interest, *Saffyn's case*, 5 *Co.* 123, is not to the contrary of this doctrine. In that case, the fine was levied after the right to enter commenced, and before the entry of the lessee; *query* the difference between a fine by a lessor, and a person who disseises the lessor;] and five years pass (after the term begins) [to be omitted as immaterial to the proposition;]

*P. 24.

(14) See accordingly *Saffin* v. *Adams*, *Cro. Jac.* 60. This principle hath also been confirmed in the case of *Goodright*, on the demise of *Hare* v. *Board & Jones*, determined (since the last edition of this book) in R. R. Mich. 23 Geo. 3, and is stated fully in the *Essay on Fines*, 187.

(15) The remainder not being displaced, for the bargainee had a fee determinable upon the entry of the issue, and he in remainder has his remainder open upon default of issue of the tenant in tail. 10 *Co.* 96. *Jenk. Cent. Ca.* 97, p. 51. But if in that bargain and sale, or in a lease and release, the tenant in tail covenants to levy a fine, and levies it accordingly, the deed and fine are held to be all one conveyance or assurance (which Lord *M.* in 2 *Burr.* 711, says are nearly the same, except in name) by the tenant in tail in possession, and operate so as to work a discontinuance, and devest the remainder. See *Doe*, on dem. *Osborne*, v. *Whitehead*, 2 *Burr.* 704.

it seems this fine is no bar, because this estate is not put to a right [by the fine, or before it is levied; as the term is not commenced in interest when the fine is levied, the term cannot be barred by any non-claim, at whatever time its commencement may take effect, either during or after the five years.] And for the further illustration of all these things [respecting the operation of fines with proclamations, as against heirs in tail,] see the examples following. [c] If tenant in tail [*viz.* the donee of a vested or contingent interest in tail, be it in possession, reversion or remainder,] levy a fine of the land intailed, with proclamations according to the statutes, this is a bar to the estate tail, wherein these things are to be known. 1. That wheresoever the issue doth claim by the same title and [as heir in tail,] and must make his conveyance to the lands by him that levied the fine, there the fine will bar him; and therefore, if lands be given to the husband and wife in special tail, *viz.* to them and to the heirs of their two bodies issuing, or the like, or the gift be to them and the heirs males or females of their two bodies, or to them and the heirs of their bodies, with [or without] the remainder to the right heirs of the husband in fee, and the husband alone levieth a fine with proclamations, by this the issue in tail is barred(16); [this doctrine is so clear that no doubt ought to be expressed on the point.] And yet the right of the wife is saved, so as she makes her claim, &c. within five years after her husband's death (17), [and on her entry, or before entry if no entry be necessary, the wife will have a base fee, an estate to her and her heirs, while the issue inheritable under the intail shall continue. But though the heirs cannot in-

[c] Stat. 4 H. 7. 32 H. 8. Co. super Lit. 372.

1. *Issue in tail barred by the fine of his ancestor, or some other.*

1] Co. 9. 138. 140, Dyer, 3. [Hob. 157.]

(16) For the stat. 32 H. 8, c. 36, makes it a bar to the issue expressly. *Raym.* 359. Even though the fine was levied of an estate tail in reversion or remainder, and not in possession, nor by him who hath the right of the intail in him at the time of the fine levied. *Cro. Eliz.* 610. 3 *Co.* 84. But such fine by tenant in tail will not bar him in reversion or remainder, if he makes claim, *or* pursues his action within five years after the estate tail is spent. *Co. Lit.* 372, a. But if tenant in tail by bargain and sale, or by lease and release, conveys to *B.* who levies a fine, or if tenant in tail discontinues, and the discontinuee levies a fine, though five years pass in the life of the tenant in tail, yet his issue shall have five years to claim from his death. *Cro. Eliz.* 896. *Noy*, 46. *Plow.* 374, a. 3 *Co.* 87, b. *Dyer*, 3. *Bac. Ab.* 2, 532.

(17) Though the wife may enter within five years from her husband's death, and avoid the fine, and thereby become seised of an estate tail, and the remainders revested, yet the issue [illegible]d; for although the whole estate tail be in the mother, yet it cannot descend [illegible]e issue, because they were barred by the father's fine before. *Hob.* 257.

herit by force of the intail, they may inherit as her general heirs; and although she be not tenant in tail, the privilege of suffering a common recovery and barring the remainders, remains as an incident to her estate. *Beaumont's case*, 9 *Rep.* 138; *Baker* v. *Willis*, *Cro. Char.* 476.] [d] So if husband and wife, tenants in special tail, have issue and the wife die, and the husband marry another wife and have issue, and levy a fine *sur cognisance de droit come ceo*, *&c.* [with proclamations,] and take back by the same fine an estate in special tail the remainder over, [those circumstances do not affect the conclusion, but merely the title,] &c. and die, the issue by the first wife is barred. [e] So if tenant in tail be disseised, or make a feoffment in fee, and after levy a fine with proclamations to the disseisor or to a stranger, the issues in tail are hereby barred for ever, (the continuance of the possession [*viz.* seisin] in another notwithstanding,) [*viz.* affords no objection against the operation of the fine to bar the issue, even though, as in the case of a fine to a stranger, the fine be as against persons not parties or privies, avoidable by the plea of *partes finis nihil habuerunt*, for the plea of *partes finis nihil habuerunt tempore finis levati* is a plea at common law. The effect of a fine, with proclamations by tenant in tail to bar his issue, is by force of the express provisions of the statute law.] [f] So if a gift be made to the eldest son and the heirs of his body, the remainder to the father and the heirs of his body, and the father dieth and the eldest son levy a fine with proclamations, and dieth without issue, this shall bar the second son for ever (for the remainder descended to the eldest), [*read* for the estate tail to the father descended on the eldest son, and the younger brothers become privy to their elder brother, as heirs of the same in-tail.] [g] So if lands be given to an eldest son and the heirs of the body of his father (the father being then dead) [may be omitted,] and he levy a fine of this land, [and he is or becomes the heir of the body, so that the intail is an interest in him,] this fine will bar the younger brother. [But if the son die in the lifetime of the father, then the intail as an intail will not be barred by the operation of the fine, though it may be barred as a contingent remainder. The gift to the heirs of the body will vest an estate tail in the person who first

[d] Dyer, 364.

[e] Co. 3. 90.

[f] Co. super Lit. 373.

[g] Curia Trin. 21 Jac. C. B.

answers the description, and the eldest son will immediately, if the father be dead, or if the father be living, will on his death become the donee in tail. *Mandeville's case, Co. Litt.* p. 26, b.; *Southcot* v. *Stowell*, 2 *Mod.* 47.] [h] But if the issue in tail do not make his title by him that did levy the fine, there the fine will not bar, and therefore if my father be tenant in tail, and his brother [my uncle] disseise him [thus gaining the freehold] and levy a fine, and he and my father die, this fine shall not bar me as issue in tail, [though I am the general heir of my uncle,] because I do not make my title to the land by him [my uncle. *Palmer's case*, cited 2 *Brownl.* 155:] but if I suffer five years to pass and do not make my claim, &c. by this non-claim I may be barred by the fine [under the statute law.] [i] And if the fine be levied of another thing than the thing itself intailed, as if the tenant in tail grant by fine a rent, common, or the like out of the land intailed, this fine will not bar the issue, [but when the rent is already intailed, a fine of the land will bar the rent.] So if a rent be intailed, and the tenant * in tail of the rent disseise the terre-tenant of the land out of which the rent doth issue, and then levy a fine of the land, this is no bar to the issue, of the rent. [This point is overruled, and the contrary is decided, but a recovery suffered of the land would not bar an intail of the rent. 1 *Ves.* s. 391.]

[h] Dyer, 3.

[i] Plow. 435.

*P. 25.

2. Albeit the fine be a double fine with a grant and render, yet it is within these statutes, and will bar the issue in tail as well as a single fine, so as the grant and render be of the land itself, and not of any profit apprender out of it. [When a rent is the subject of the intail, the fine, as has already been observed, ought to be of the rent, not of the land. The distinction to be collected from the books is, a fine levied of the land will bar an intail of rent issuing out of the land. But a fine levied of the rent will not bar an intail of the land, and the render of a rent in a fine *sur grant et render* is considered as against the issue in tail, merely as a fine of the rent, when the donee in tail is the rendering party.] And therefore if husband and wife be tenants in special tail, and they levy a fine with proclamations, and the conusee grant and render the land to them and their heirs, this fine will bar the issue in tail. And if tenant in tail join with *I. S.* and

[a] Co. 3. 76. 85. super Lit. 353. Bro. Fines. 118. Dyer, 279.

levy a fine with proclamations to a stranger, and the stranger doth grant and render the land again to *I. S.* for years, and to the tenant in tail in fee afterwards, the issue in tail is barred by this fine. So if there be tenant for life, the remainder in tail, and he in remainder in tail accept of a fine from a stranger, and grant and render to the stranger again for years with a remainder over, hereby the issue in tail is bound. [But when the bar of the issue depends on the render, it is necessary that the render should be of the land, provided the land is the subject of the intail.

[k] Plow. 435. And] [k] if tenant in tail accept of a fine of the land intailed from a stranger, and then grant and render a rent [or other profit] out of the land to the stranger by the same fine, this [fine] will not bind the issue in tail to pay the same rent; [but if he had granted the rent, and limited away the inheritance, then on principle the persons who obtained a title by means of the render would be bound to pay the rent.]

[l] Dyer, 117. If tenant in tail make a feoffment on condition, and die having two sisters inheritable to the tail, and one of them levy a fine with proclamations *sur release* to the feoffee of the whole, in this case it is doubted whether the other sister be barred of her half or not, [perhaps the condition, as a condition, is entirely released, but the coheir in tail may recover a moiety of the land in right of the intail. For no heir under an intail can by fine, or even non-claim on a fine, or under the Statutes of Limitation, bar the intail for more than his or her

3] Co. 3. 86. 87. in Shelley's case. own share or aliquot part.] 3. Albeit the tenant in tail die before all the proclamations be finished, yet when they be finished, as they may be after his death, the issues in tail are bound by the fine, for howsoever by the death of the tenant in tail the right of the estate tail doth descend to the issue, yet when the proclamations are passed, this right that doth descend is bound by the statutes, and the issue cannot by any claim, &c. save the right of the estate tail that doth descend unto him (18), [and even though the issue entered, &c. before any proclamation was made, the proclamations might proceed, and the fine eventually become a bar to the issue. And if a fine be levied to bar by non-claim, an entry to avoid the fine, and which avoids it, would render the fine of no avail, though procla-

(18) But if a fine be determined or avoided before proclamations passed, it shall have no other force than as a fine without proclamations. *Plow.* 437. 2 *Mod.* 109.

mations were afterwards made; and an ejectment may be maintained notwithstanding a fine, if the ejectment be brought before all the proclamations are made. But a fine with proclamations in a state of operation by non-claim, cannot be avoided without a real action, *viz.* a suit, or an entry for the express and declared purpose of avoiding the fine. See *William*'s note to *Saund.* p. 319, n. 1; 4 and 5 Ann, *c.* 16; *Watkin's Princ.* by *Prest.* p. 230. If the title be equitable the claim must be by bill in equity.]

4. Albeit the issue in tail be within age, out of the realm, under coverture, *non compos mentis*, or in prison, at the time of the fine levied and the proclamations passed, yet the estate tail is barred by the fine. And therefore if *A.* be tenant for life of land, the remainder to *B.* in tail, the reversion to *B.* and his heirs expectant (on the intail,) and *B.* levy a fine to *C.* and his heirs, and hath issue and die before all (or any of) the proclamations are passed, (the issue in tail being then out of the realm,) the proclamations are made, and after (the issue in tail cometh into the realm, and) claimeth the remainder in tail upon the land, in this case the estate tail is barred for ever. [Sheppard in this as in many other instances, is stating particular cases which have been decided, and introduces all the circumstances, while some of them are immaterial to the general conclusion. The passages within parentheses are immaterial to the general conclusion.] 4] Co. 3. 84. 91.

5. These statutes do extend to fines levied by tenant in tail, [donee in tail, or any person in the line of intail] by conclusion, and the issue shall be bound by the fine of their ancestor unto whom they are [or become] privy in estate and blood, albeit *partes finis nihil habuerunt tempore finis.* And therefore if the issue in tail [may be barred by a fine] * in the life of his ancestor when he hath only a possibility, [or rather hope or chance of succession,] as if there be grandfather, father and son, and the grandfather be tenant in tail, [or donee in tail under a vested or contingent interest,] and the father levy a fine of the land before the grandfather's death, and then the grandfather die before the father, and after the father die, in this case the issue is barred by this fine: * so also if the grandfather survive the father [and the father leave issue] (19). But in case of 5] Co. 3. 90. Dyer, 279. Plow. 435.

*P. 26.

* Curia. Trin. 21 Jac. Com. B. Godfry and Wade's case. Dyer, 48.

(19) The issue shall be barred by his father's fine, for though he claims from the grandfather, yet he derives his title from the blood of his father. 3 *Co.* 90, b. *Hob.* 333.

a collateral descent [to the issue,] if the collateral ancestor die in the lifetime of his father and without issue, [or before the estate devolves to him or his issue,] this fine is no bar, but if he [or any of his issue] survive his father, *contra*. [So if a gift be made to a man and the heirs of his body, and he die leaving two sons, and the second son enter and levy a fine with proclamations in the lifetime or during the continuance of issue of his elder brother, this fine will not affect the elder brother or his issue in respect of the intail merely as a fine, though the elder brother and his issue may be barred by non-claim. This fine would, however, bar the issue of the second brother. So if a gift be to a man and the heirs of his body, and he die leaving three sons, and the second son levy a fine with proclamations in the life of the elder son, and while he is in possession, this fine, 1st, will bar the intail as to the second son and his issue; 2d, it never can bar the intail as to the first son or his issue; 3d, it may bar the third son and his issue, in case and only in case, they should become privy to the second son, by reason that the second son or his issue may survive the first son and his issue. *Mackwilliam's case, Hob.* 333; and *Grant's case*, 10 *Rep.* 50 *a.*] So if lands be given to the grandfather and his wife in special tail, and the grandfather dieth, and the father doth disseise the grandmother, and doth levy a fine with proclamations, the grandmother dieth, and then the father dieth, in this case the son is barred, [and so are all the issue under the intail. The like point is law if the father had died in the lifetime of the grandmother, and had left issue inheritable under the intail. But if the father had died without issue in the lifetime of the grandmother, the heirs under the intail would not have been barred by force of the fine and proclamations as such; because, in the event, there was not any privity to the son, since neither he nor any of his issue ever became heirs under the intail.] [m] So if lands be conveyed in tail to a woman for her jointure within the stat. of 11 Hen. 7, c. 20, and while she liveth the issue in tail doth levy a fine [with proclamations] of the land, by this [fine, provided the person who levies the fine or any of his heirs, become heirs under the intail,] the issues inheritable to the estate tail are barred for ever. [It follows that lineal issue are barred in

[m] Co. 3. 50, 51. 9 140.

all cases; the collateral issue only in particular cases; *viz.* when the intail devolves in point of accession to the person who levies the fine, or some of his issue; and though the inheritance should descend to the person who is heir under this intail, he would be seised in fee and not in tail; see *Beaumont's case*, 9 *Rep.* 138; *Baker* v. *Willis*, *Cro. Car.* 476. But he would still have the capacity of suffering a common recovery, so as to bar the remainders, reversion, &c.] [n] So if tenant in tail make a feoffment or be disseised, and after levy a fine with proclamations to a stranger, hereby his issue are barred for ever. [o] So if tenant in tail die, and his issue before his entry (having a freehold in law only) doth levy a fine with proclamations, this [fine] shall be a bar to his issues and to his collateral heirs and brothers of the half blood [because he was tenant in tail *de jure*.] [p] So if a tenant in tail have four daughters and one of them levy a fine in the life of the father, [and she or any of her descendants survive the father,] this will be a bar to her issue for the fourth part of the land; [*read* to the extent of the share of herself or her issue, whatever it eventually may be. But if she die without issue, in the lifetime of the father, the fine would be a nullity as against her sisters and their issue.] [q] But in these cases before, and such like, where the issue in tail doth levy a fine in the lifetime of the tenant in tail, the tenant in tail himself may after levy a fine of the land, and thereby bar his issue, and the conusee also to whom his issue hath levied a fine, and therefore, in all these cases, it is supposed that the tenant in tail doth die and suffer the right to descend to his issue. [r] If lands be given by will to one when he shall come to his age of twenty-four years, to hold to him and the heirs of his body, [so that he has an interest in tail, by way of executory devise, or contingent remainder, and not a vested estate,] and he after his age of 21 years, [and before 24,] levy a fine of this land with proclamations, this is a bar to the issue in tail (20). If a disseisor [or rightful owner] make a gift in tail, and the donee make a feoffment to *A.* and after levy a fine with proclamations to *B.* that hath nothing in the land, this fine will bar the

[n] Plow. 434, 435.

[o] Curia. 21 Jac. Co. B.

[p] Idem.

[q] Co. 3. 50, 51. 9. 140.

[r] Co. 10. 50. 9. 141. 3. 50, 61.

(20) See accordingly the case of *Johnson* v. *Gabriel*, in *Cro. Eliz.* 122, and cited afterwards in the same book, p. 610, in *Hunt* v. *King*.—Note the difference between the state of the case of *Johnson* v. *Gabriel*, in these two places.

issues in tail, and they shall not avoid it by pleading that *partes finis nihil habuerunt, &c.* [and the title of the feoffee would become absolute by force of the statute of proclamations. It is also a rule of the common law, that a person in the seisin may avail himself of an estoppel, *Buckler's case*, 2 *Co.* 55, arising from a fine to a stranger; but as the issue in tail are not bound by estoppels at the common law, the aid of the fine with proclamations was necessary to bar the issue;] but it [*viz.* in case of a disseisin and a gift in tail by the disseisor, the fine] is no bar to the disseisee, for he may avoid it [the fine] by this plea [of *partes nihil, &c.*] when he will. [b] And *à fortiori* therefore, if a fine be levied by the tenant in tail that hath only an estate of freehold in remainder or reversion, it is good; as if *A.* be tenant for life, the remainder to *B.* in tail, and *B.* levy a fine [with proclamations,] abeit this [fine] be no discontinuance, yet it is a bar to the estate tail. [c] [And may operate in confirmation of the title, for the benefit of those connected in privity, as the tenant for life, &c. *Carhampton* v. *Carhampton*, 1 *Irish cases*, p. 567.] [d] But if tenant in tail have issue a son and a daughter, and the son, living the tenant in tail, levy a fine and die *without* * *issue*, and then the tenant in tail dieth, by this the daughter and the estate tail is not barred; [because by the event, there is not any privity in estate, between the daughter and the son.] So if the younger son levy a fine in the life of the father, and then the tenant in tail die, this is no bar to the elder son; [and if there be a tenant in tail, and three sons, and the middle son levy a fine with proclamations, this fine never can bar the elder son or his issue, and it will bar the third son and his issue, in case and only in case the second son or his issue should become *de facto* the heir in tail.] So if lands be given to a man and the heirs females of his body, [or to him and the heirs males of his body, with remainder to him and the heirs females of his body,] and he hath a son and a daughter, and the son doth levy a fine of the land, this is no bar to the daughter. So if tenant in tail have a daughter, his wife being with child of a son, and the daughter levy a fine, and after the son is born, this fine shall not bar the son, for these howbeit they be privies and heirs to the blood, yet are not privies and heirs to the estate; [for when the

[b] Co. 3. 84.

Discontinuance.

[d] Trin. 25 Jac. Co. B. Will. Godfrey v. Wade's. Dyer, 48.

*P. 27.

son is born his title has relation for this purpose to the death of his ancestor, 3 *Co.* 61, 2 *Cruise*, 160.]

6. Albeit the estate, passed by the fine, be afterwards, before all the proclamations had, avoided, yet [if the proclamations be afterwards perfected] the issue in tail is barred by it. And therefore if tenant in tail discontinue in fee, and after disseise the discontinuee and levy a fine with proclamations to a stranger, and take an estate back by render in the same fine, and the discontinuee, before all the proclamations pass, enter and claim, and so avoid the fine, yet hereby the estate tail is barred; [But if a fine with proclamations be avoided for error in the fine, then, as the fine is void, the proclamations also will be void, for *debile fundamentum fallit opus*; and the discontinuee, though the fine be avoided as to its common-law operation, may avail himself of the fine as a bar to the heirs in tail, under the statutes of 4 Hen. 7. c. 24, and 32 Hen. 8. c. 36.] [a] And if tenant in tail infeoff the issue in tail, and after disseise him and levy a fine, [with proclamations,] the issue enter, [and consequently avoid the fine,] and after the proclamations pass, and after the issue in tail doth infeoff the tenant in tail which levied the fine, [and thus restore the seisin to the donee of the estate tail] and dieth, it seems, this fine shall bar the issues in tail; [there appears indeed no doubt of the issue in tail, *quasi* issue in tail being barred.] 7. This [*viz.* a fine with proclamations, so far as it operates by way of conveyance, release, &c.] is a bar to the estate tail and to the issues only, and is no bar to him in remainder or reversion; and therefore when the estate tail is spent, this bar is at an end, [and the remainder or reversion in fee, unless there be a discontinuance, will become an estate in possession without entry, &c.; ruled by *Leach*, Vice-Chancellor, July 1820; *Berney* v. ——.] And therefore if an estate be limited to *A.* and *B.*, his wife and the heirs male of the body of *A.*, the remainder to *C.* and *A.*, and *B.* have issue, and *A.* die, and *B.* and her issue, or her issue alone levy a fine, this [fine] will bar the issues of the issues [all the issue in tail] whilst there be any, but if they fail it will not bar *C.* in remainder, except he suffer five years to pass (21), and so be barred by his *non-claim*; [and

6] Co. 3. 91.

[a] Per Popham et Fenner, Just. M. 39. 40. Eliz. B. R.

7] Co. 1. 76. super Lit. 372.

(21) After his remainder comes into possession. *Ante*, 23; *post*, 32.

non-claim on this fine would not have ran if there had not been a discontinuance.] So if tenant for life and he that is next in the remainder in tail, join in a fine, this is a good bar to the issues in tail for ever as long as that estate tail shall continue, but not [*proprio vigore*] to him that is next in remainder, nor to any other that shall come in of any remainder in tail or in fee, nor to him in rever sion; [and as the remainders, &c. are not devested, the remainders can never be barred by non-claim on this fine. On the contrary, the persons in remainder, &c. may take advantage of the fine, as affirming and strengthening their title, under the statutes of non-claim.] [x] If lands be given to *A.*, and the heirs males of his body, the remainder to *B.*, and the heirs males of his body, the remainder to the right heirs of *A.*, and *A.* doth bargain and sell this land by deed indented and inrolled to *I. S.* and his heirs, and after levy a fine of it *sur conusance de droit come ceo, &c.* [as a distinct assurance] to him and his heirs, by this the remainder to *B.* is not discontinued, but it [the fine] is a bar to the estate tail by the statutes, and causeth the estate of the bargainee to last so long as the tenant in tail hath issues of his body, [giving him a base or determinable fee, which *ipso facto*, without entry, &c. determines on the death of tenant in tail and failure of his issue inheritable under the intail; it also passeth the remote fee: *Essay on Estates, chap. on Estates Tail*;] but if the fine had been before the bargain and sale, [or as part of that assurance, *Doe* v. *Whitehead*, 2 *Burr.* 704] it had been a discontinuance of the remainder; but in neither case a bar [*proprio vigore*] to him in remainder, unless * he suffer himself to be barred by his non-claim within five years after his remainder happen to come in possession (22). [This fine could never, unless it operated by discontinuance, bar the remainders by non-claim.] 8. If there be tenant in tail, the remainder to him in tail, and the tenant in tail levy a fine of this land [with proclamations,] hereby both his estates are

x Co. 10. 96. & 9 Jac. B. R.

Discontinuance.

*P. 28.

8] Co. super Lit. 372.

(22) And therefore if tenant in tail makes a lease pursuant to the stat. 32 H. 8, and then levies a fine, and dies without issue, and afterwards the lease expires, the reversioner ought to enter within five years after the death without issue, (the time when his right accrued,) and shall not have five years after the term expired, for he had not then a new right. *Cro. Car.* 156. 3 *Bl. Com.* 363.

barred (23). [So if several persons be tenants in tail with cross remainders in tail, and one of them levy a fine with proclamations, this fine extends to his estate in the several aliquot parts.] *Et sic de similibus.* But (all this notwithstanding) if lands be conveyed to a woman in tail (24) for her jointure within the statute of 11 Hen. 7. c. 20; [see 1 *Prest. Convey.* 19, 146; 1 *Cruise*, 119; 2 *Cruise*, 152,] and she levy a fine [with proclamations] of this land (25), this [fine *proprio vigore*] will not bar the issues in tail; [but as it may devest the seisin, it may operate by non-claim,] (26). Or if lands be given in tail to any subject, by the king's own gift or provision, [for services performed; *Earl Derby's case*, *Pig. Rec.* 201,] and the tenant in tail levy a fine [with proclamations,] this fine [though operating as a conveyance of a base and voidable fee] shall not bind the issues in tail nor the king (27), but others it will bar; for these fines are not intended within, but excepted out of the statute of 32 Hen. 8; but the king himself, being tenant in tail of the gift of some of his ancestors being subjects, may levy a fine of it to bar his issues in tail. And in all cases where a recovery will not bar the issues in tail, there a fine

y Bro. Fines, 121. Co. 6. 55. Dyer, 4. Co. super Lit. 372. Co. 8. 17. 78.

(23) See further as to the operation of a fine in barring the issue in tail, *Bac. Abr. Fines*, (E.) *Com. Dig. Estate*, (B. 22.) (B. 25.)

(24) As in the case of *Horner* v. *Horner*, 1 *P. Wms.* 123, which Lord Chancellor *Cowper* declared she could not bar, being restrained by 11 H. 7.

(25) Or suffer a recovery, she being disabled from doing either by the stat. 11 H. 7, c. 20, confirmed by § 2 of 32 H. 8, c. 36; for an explanation of which statute, and the reason of its being made, see *Pig.* 76. To bring the fine within the compass of this act, the provision must come purely from the baron, or some of his ancestors. *Pig.* 79. *Eyton* v. *Studd*, *Plow.* 463. *Warder* v. *Walthew*, *Cro. Jac.* 173. But then there must be a limitation to the issue or heirs of the husband. See *Essay*, 84.

(26) *A.* seised in fee, levied a fine to himself for life, remainder to his wife in tail male for her jointure, and had issue male; husband and wife levied a fine and suffered a recovery. After the death of the husband and wife, issue male entered by force of the statute of 11 H. 7, and held lawful, this case is *out of the letter*, though *within the remedy* of the statute, for she neither levied the fine, *&c. being sole*, or *with any after taken husband*, but by herself with her husband who made the jointure. *Co. Lit.* 365, b. [The contrary was decided in *Kirkman* v. *Thompson*, *Cro. Jam.* 474. *Pig. Rec.* 81. 2 *Cruise*, 160. See 3 *Bl. Com.* 431.] But *Pigot* says (in p. 81) he cannot see how this case be law, for the husband and wife joining may bar their issue by a recovery; and cites *Cro. Jac.* 475, *Kirkman* v. *Thomson*. See also 1 *Eq. Ca. Abr.* 220, *Symson* v. *Turner*. See *Essay on Fines*, 82. See further *Vin. Abr. Jointress*, (I.) (K.) as to what shall be deemed a forfeiture within the 11th H. 7, c. 20, and who shall take advantage of it. *Bac. Abr. Discontinuance*, (D.)

(27) It is said, there are not more than five or six of these intails in the kingdom, whereof the Dukes of *Bolton*, *Montagu*, *Norfolk* and *Marlborough*, and Lord *Arundel*, have four. If such tenant in tail of the gift of the crown makes a feoffment in fee, and is afterwards attainted of high treason, the right of the intail is forfeited, for it could not be discontinued, because the reversion continues in the crown. *Cro. Car.* 427.

will not bar them. [This proposition is too general and founded in mistake; for a valid recovery cannot be suffered by the expectant heir under the intail, even so as to bar the issue; and yet the issue may be barred by a fine with proclamations. The proposition, that others it will bar, is also questionable as to fines by tenant in tail of the gift of the crown; for as the estate tail cannot be discontinued, or the remainder devested, how can the rightful owners be barred? That there may be a bar by non-claim, there must be another fine with proclamations after the possession has become adverse; for *quod ab initio non valet tractu temporis non convalebit.*]

Dyer, 72. Plow. 373.

2. *Wife barred by the fine of her husband, or some other.*

Albeit the fine of the husband and wife together of the wife's land, or of the land of the husband and wife together, be a perpetual bar to her and her heirs for ever, yet if the husband (28) alone levy a fine with proclamations of such land, and then he die, in this case she is not [by the mere operation of the fine] barred of her right; but if she [or, if dead, her heirs] do not make her [Hob. 265.] [or their] claim, &c. within five years after her husband's death she is [*read*, she and her heirs are] barred of her right for ever, notwithstanding the statute of 32 Hen. 8. (29), [for this statute does not prevent the discontinuance or devesting. It merely gives the remedy by entry, in the place of the remedy by action.] [a] And if one seised of land in fee marry a wife, and after make a lease of this land to *A.* for life, the remainder to *B.* in fee, and *B.* [though he be the remainder-man, 1 *Prest. Convey.* 226.] levy a fine with proclamations, and the husband die, and the wife do not make her claim, &c. within five years after the death of her husband, hereby she is barred of her dower for ever, notwithstanding the estate for life in *A.* [for this fine enures to confirm the title to both estates, *Carhampton* v. *Carhampton*, 1 *Irish Cases*, 367;] but if the remainder of *B.* had been put

[a] M. 18. Jac. Co. B. in Anne Twist's case.

(28) See *Essay*, 86, as to fines by husbands seised *jure uxoris*.

(29) Where baron and feme levy a fine, and are afterwards divorced for any cause arising antecedent to the marriage, yet the fine shall remain good. 2 *Roll. Ab.* 20. In a fine of the wife's land by husband and wife, the whole estate passeth from the wife, and the conusee is in by her only; and if the husband and wife reverse the fine by writ of error for the nonage of the wife, the whole estate which passed by the fine shall be restored to the wife. 2 *Co.* 57, b. For the reason why a feme covert may bar herself, and those claiming under her by her fine, see Mr. *Hargrave's* note 1, to *Co. Lit.* 121, a.

to a right at the time of the fine levied [so that neither of the parties to the fine had any estate of freehold] she might have avoided the fine by plea, *quod partes finis nihil habuerunt, &c.* [b] And if the husband levy a fine of his own land and die, and his widow having no impediment, doth not make her claim within five years after his death, hereby she is barred of her dower for ever [although the fine did not devest any estate; and although it was not originally adverse to her title. This case is an anomaly. A wife's title to dower is merely a right or title, not an estate. It is assumed that no necessity exists for devesting that which is not vested. The cognisee, it is taken for granted, obtains an adverse title as against the wife: she must sue him for dower. The cases prove that she cannot contend that the estate of the cognisee is charged with her dower; *Menvill's case*, 13 *Rep.* p. 19.] [c] If a jointure be made to a woman after the coverture, and her husband and she levy a fine of it; hereby without question she is barred of her jointure in this land, [by means of the fine as a conveyance, or if there be a rent, then by way of release;] but it is thought that this is no bar of her dower in the residue of the land of the husband, [and especially then when the fine is *sur conusance de droit come ceo, &c.* (30) may be omitted, for any other fine would have the like effect. If the jointure were made before marriage, and was so made as to be a legal and effectual bar of dower, the levying a fine would not restore her to her dower; *Prest. on Estates, ch. Dower.* Nor is the case to the contrary, which is cited from *Dyer*; for it was held in that case, that the wife was not barred for the residue of the lands of the husband (the jointure being made after marriage,) because her time for election was not arrived. In the cited case the husband, after levying the fine, devised to his wife for life with remainder over, and the

[b] Dyer, 224. Co. 2. 93.

[c] Dyer, 358.

(30) For she has not her election of jointure or dower till her husband's death; but if the jointure be made *before the coverture*, and after the husband and wife alien those jointure lands by fine, she shall not be endowed of any other of her husband's lands. *Co. Lit.* 36, b. 1 *Wood*, 560. Though the law does not relieve feme coverts who thus voluntarily alien their jointure lands, yet if the title to any jointure made before marriage proves to be bad either by fraud or accident, and the jointress is evicted, she shall then (by the provisions of the statute of 27 H. 8, c. 10,) have her dower *pro tanto*, at the common law. 2 *Bl. Com.* 138. See further *Bac. Abr. Jointure*, (C.) and fully as to fines by baron and feme in *Vin. Abr. Fine*, (T.) (B. b.) (C. b.) Mr. *Hargrave*, in note 1 to p. 121, of his edition of *Co. Lit.* dis-

wife entered, claiming under the devise to her.]

[d] Dyer, 35. [d] If lands be given to a man and his wife in tail, the remainder to the right heirs of the husband, and the husband alone levy a fine of this, [land with proclamations] this [fine] will not bar the wife, except she suffer five years to pass after his death without making claim, &c. and therefore if the fine be to the use of the husband and his heirs in fee, he [as against all persons, except the wife and her heirs,] may dispose it as a fee simple, and his issue [as issue, either of himself or his wife,] hath no remedy [to avoid this fine; or escape from its operation as a bar to the intail. But if the wife should survive the husband, then the title will be governed by her interest, to the extent of that interest; *Baker* v. *Willis, Cro. Car.* 476. 1 *Prest. Abst.* 371, 449. 2 *Ibid.* 44. 1 *Cruise*, 226.]

Co. 9. 105. 3. 87. super Lit. 298.

* If a man disseise me of the land I have in fee simple, or fee tail, and after levy a fine of this land with proclamations, and I do not make my claim, &c. within five years after the [last of the] proclamations had, hereby I and my heirs [and heirs in tail] are barred for ever of this land (31). And if I, being such a tenant in fee, make a lease for years, or be the lord of any copyhold estate, and my lessee for years, or copyholder in fee or for life, be ousted, and I thereby disseised, and the disseisor levy a fine, and neither I nor my lessee for years, or copyholder, do make any claim, &c. within the five years after the fine levied, hereby we are all barred for ever [of our present rights and interests; but the reversioner or my heirs may enter within five years after the term shall be expired by effluxion of time.] And if one disseise me of land, and

*P. 29. 3. *Disseise and the like, barred by the fine of the disseisor, &c.*

---

cases at length the reason why a feme covert is bound by a fine; and concludes, "that the common notion of a fine's binding a feme covert merely by reason of the *secret examination* of them by the judges, is incorrect;" and that the *secret examination* should be only deemed the secondary cause of this operation, the primary one being the *pendency of a real action* for the *freehold* of the land.

(31) The issue in tail shall not have five years, after the death of the tenant in tail the disseisee, for the father had a present right to the intail. *Plow.* 374, a. But if tenant in tail bargains and sells in fee, and the bargainee levies a fine, though five years pass in the life of the bargainor, the issue in tail shall not be bound, but shall have five years from the death of his father. *Peniston* v. *Lister, Cro. Eliz.* 896. If a jointure be made to a wife during coverture, and after the husband and wife levy a fine thereof, yet this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before, and then the fine levied of the jointure before her time for election of dower was come, can be no bar for electing of dower when it is come. *Bulst.* 173. *Leon.* 285. *Dyer*, 358. *Bac. Abr. Dower*, (F.) p. 140.

after make a lease for life of it, and then levy a fine with proclamations, and I suffer five years to pass, hereby I am barred both of the reversion and of the estate for life also; [for there is an estate of freehold, though in reversion, in one of the parties to the fine; and non-claim on this fine will benefit the reversioner, and the tenant for life for the sake of the reversioner; for if the estate for life could be avoided, the reversion might be defeated; *Carhampton* v. *Carhamton*, 1 *Irish Cases*, 367; *Goodright* v. *Jones*, 1 *Cruise*, 249. For it is a general rule, that all acts by the owner of a particular estate, or of a remainder or reversion, operate to the benefit of each other, if made on the foundation of their common seisin or privity, and not adversely.]

If tenant for life [having the immediate freehold] make a feoffment in fee, and the feoffee [or he himself duly (*viz.* with an estate of freehold in one of the parties)] levy a fine with proclamations, and he in reversion or remainder do not make his claim, &c. within five years (32), hereby he is barred for ever [in respect of the forfeiture; but in respect of his reversion, &c. he may avoid the fine within five years after the death of the tenant for life.] Plow. in Stowel's case.

If I pretend right or title to land, and enter upon it, and put him out that is in possession, [thus, committing a disseisin,] and then I levy a fine with proclamations, with [or without] an intent to bar him, and he doth not make his claim, &c. [or in case of his death his heirs do not make their claim] within five years, hereby he [and his heirs] is [and are] barred for ever, albeit he had the true right and I no right at all. Co. 3. 79.

If I purchase land of *H.*, and after perceiving my title defeasible, and that a stranger hath the right of the land, I [*cæteris paribus*; *viz.* having an estate of freehold and adverse possession, against the rightful owner] do levy a fine to, or take a fine from another, with proclamations, with intent and of purpose to bar him that hath right, and he suffer five years to pass, and doth not make his claim, &c. hereby he is barred of his Co. 3. 79. Doct. & St. 83. 155.

(32) Not from the time of the fine levied, but from the death of the tenant for life. See *post*, 30, 31. He has two periods of five years, one after the fine, and another after the determination of the estate for life. See *ante*, 13. And *Laund* v. *Tucker*, Cro. *Eliz.* 220, 254. *Essay*, 159.

right for ever, [and so are his heirs. So, if a man be in possession, claiming the fee under a defective conveyance, will, or other title, and he levy a fine with proclamations, and five years pass, the legal owner will be barred, provided one of the parties have the freehold by right or by wrong.] And in these and such like cases, there is no relief to be had in equity (33). [For instances in which equity may relieve,] see more in Numb. 11, *infra*. Equity.

Co 10. 95. 9. 106.

If there be tenant in tail, the remainder in tail, and the tenant in tail bargain and sell the land by deed indented and inrolled, and after [as a distinct act] levy a fine with proclamations to the bargainee *sur conusance de droit come ceo, &c.*; in this case, as to the tenant in tail and his issue, this is [a conveyance of a base fee, and] a bar; but as to all others, it is no bar, albeit they never make any claim, [since the remainders, &c. are not discontinued or devested. Had the fine been part of the same assurance, and created a discontinuance, then the remainders, &c. might eventually have been barred by non-claim; *Doe* v. *Whitehead*, 2 *Burr.* 704] &c. So, if tenant in tail [having an estate in remainder or reversion, expectant on a prior estate of freehold; or jointly with the tenant, having the freehold for his life] levy a fine of his intailed land, this is a bar as to him and his issues, but as to all others, it is no bar at all, and therefore he [they] in remainder or reversion in their times may enter notwithstanding, [and their estates continue, so that no entry is necessary to the existence of a seisin in law, as distinguished from a seisin in fact; because there is not any discontinuance or devesting of the seisin.] [c] So if lands be intailed to the husband and wife, and the heirs of their two bodies, and the husband alone levy a fine of this land, this [fine] as to the husband, tenant in tail, and the issues, is [under the construction and effect of the statutes of Hen. 7. and Hen. 8.] a bar, but not as to the wife, for she shall be tenant in tail still, [*i. e.* she shall have the ownership conferred by the estate tail, *Com. Rep.* 217. This estate will in her, if she survive, be a determinable fee, descendible to her heirs generally, and not to her heirs in tail as such: and the issue may take by

9. Where a fine shall be a bar as to one person, and not to another, or as to one part of the land, and not to another.

[c] Co. 9. 140. 142.

Recovery.

(33) See further who shall be bound by a fine. 2 *Atk.* 631. 1 *Wood*, 573. *Vin. Abr.* Fine, (S.)

descent from her, as being her general heirs, though they are excluded as heirs in tail.] And yet it seems she may not suffer a recovery of this land afterwards; [*read*, and after the death of her husband she may restore herself to her seisin; and a recovery duly suffered by her, before or after the seisin shall be restored, would, *cæteris paribus*; *viz.* the concurrence of the freeholder, bar the reversion or remainder expectant on the estate tail. Her entry, though it does not revive the estate tail, defeats the alienation by her husband, so far as it depended on the estate tail.] So, if a man attainted of felony or treason levy a fine of his land, this, as to the king, and lord of whom the land is held [*query* as to the king or lord claiming by escheat] is void, and [Perk. § 26.]
*P. 30. is no bar to their advantage * and title of forfeiture, but as to all others [and the issue in tail, if the fine be with proclamations,] it is a good bar. [f] So, if one [f] 7 H. 4. 44. F. N. B. 98.
levy a fine of lands in ancient demesne and of other lands together, this as to the lands in ancient demesne is not good, nor any bar at all [as against the lord entitled to bring his writ of *disceit*,] but as to the other lands it is a good bar (34). [The fine may be reversed by writ of *disceit* as to the lands in ancient demesne. Till reversed, the fine will operate effectually, and the lands will in the mean time be frank-fee. A second fine with proclamations might, as already noticed, even bar the lord's right to maintain a writ of *disceit*.

10. *The time of claim, and within what time he that hath right to land must make his claim, &c. to prevent the bar of the fine.*

By the ancient common law, he that had right, was bound to make claim, &c. within a year and a day after the fine levied and execution thereupon, or else he was barred for ever, but this bar by *non-claim* is now gone, and if such a fine without proclamations be levied at this day, [or, if the proclamations be not pursuant to the statutes,] he that hath right may make his claim at any time [unless barred by the Statutes of Limitations] to prevent the bar and avoid the force of the fine (35). Co. super Lit. 254. 262.

Parties.

Parties to fines, void of impediment at the time of the fine levied, are barred of the land presently, Stat. 1 R. 3. ch. 7. 4 H. 7. ch. 24.

(34) But may be avoided, as to the land in ancient demesne, by a writ of *disceit*. *Fitz. Nat. Br.* 98, P. See *ante* 22, note 2. But a fine may be levied of lands in *ancient demesne* alone, in the court of the manor whereof the lands are held. *Hunt* v. *Browne*, 1 *Brown's Parl. Ca.* 48. And *Essay on Fines*, 64.

(35) Who shall be said to have such a right as to entitle him to claim, and as to the methods of making claim, see 2 *Inst.* 517. *Com. Dig. Claim*, (B. i. &c.) *Vin. Abr. Fine*, (G. a.)

and shall have no time to avoid the same fine by entry, claim, &c. And privies in blood, and privies in representation, claiming by the same title, [and the identical estate and identical right,] which their ancestor that levied the same fine had, shall be barred by the same fine presently, and that whether they have any impediment or not; [provided as to and against the heirs in tail, the fine be duly proclaimed. As against other heirs than heirs in tail, the fine may be effectual, as a conveyance, independently of the proclamations.]

Privies.

See the Stat. Plow. 374. Co. 9. 105.

Estrangers to fines, (being all such as are neither parties nor privies) who have present right to the land whereof the fine is levied, and have no impediment natural or legal, shall have time to make their claim, &c. within five years after the fine levied and [last of the] proclamations had, and no longer. And therefore if lessee for years, tenant by *elegit*, or by statute, or a copyholder in fee, or for life, be ousted, and he in reversion disseised, they shall have but one five years between them to make their claim, &c. and if they claim not within that time they are all barred for ever; for they have all present right and may bring their action presently: but otherwise it is where the tenant for life, and he in reversion [or remainder] be disseised; for in this case he in reversion [or remainder] is not barred by the first five years after the fine levied, for in that time he can have no action, therefore he shall have time to make his claim five years after the death of the tenant for life. [And if there be a copyholder for life, with remainder over, it should seem the copyholder in remainder will not be barred, though the fine may be a bar to the copyholder for life; and even as to a copyholder for life, is it clear that the lord might not enter within five years after the death of the copyhold tenant? and on the determination of a particular estate for years, the reversioner shall, according to the more recent decisions, have a further period for five years; and if tenant for life levy the fine, the reversioner or remainder-man may enter within five years for the forfeiture; or waive the forfeiture and enter, in right and by reason of his remainder or reversion, within five years after the determination of the estate of tenant for life.] [g] If a disseisor levy a fine with proclamations of the land whereof the disseisin was, the disseisee must make

Estrangers. 1. *That have present right, and no impediment.*

[g] Plow. 356. 375.

his claim within the first five years after the [last of the] proclamations had, and if he happen to die within the five years, his heir shall not have five years more, but so much time more as to make up the time incurred in his father or other ancestor's time, five years; and albeit he be an infant at the time of his ancestor's death, yet he shall have no longer time.

[h] If a tenant in tail be disseised, and the disseisor levy a fine, the tenant in tail or his issues must make their claim within the next five years after the last of the proclamations passed, otherwise they shall be barred for ever, [and successive issue will not, as sometimes supposed, be allowed successive periods for the assertion of their title. But in case of a bargain and sale, or other conveyance by tenant in tail, and a fine by the alienee, the period of non-claim will not begin to run until the death of the tenant in tail; for in this instance the issue are the persons to whom the right *first* devolves after the fine. The conveyance of the tenant in tail is a title as against himself.] The like it is in the *laches* of him in remainder or reversion, [*viz.* each in his turn, or his heir or issue (see the next section) must claim within five years after the right of possession under the reversion or remainder shall happen.] [i] And if in these and such like cases, he that hath present right and is without impediment bring upon himself any impediment, as if being within the realm at the time when the fine is levied, he do * afterwards go beyond the sea, [or being a feme do marry,] or the like, [or become disabled by imprisonment, or the act of God, as lunacy, &c.] in these cases he [or his heirs or issue] shall have no longer time than the first five years after the last of the proclamations had, [because the five years began to run before the disability existed.]

[h] 19 H. 8. 7. Plow. 374. Dyer, 3.

[i] 1 Co. 100.

*P. 31.

2. *That have present right and impediment.*

Infant.

Estrangers to fines pestered with [*viz.* subject to] impediments of infancy, coverture, madness, idiocy, lunacy, imprisonment, or absence out of the realm, at the time of the levying of the fine, [to be consistent it should at the time of the last proclamation made,] and having then any present interest or right shall have five years time after the infirmity removed to make their claim, &c. And therefore an infant regularly [*i. e.* by the rule of law and in ordinary cases] shall have time for five years after he come to his full age to make his claim, &c. although he be in his mother's womb at the

See the statutes. Plow. 339. Dyer, 3. Plow. 367. 377.

time of the fine levied, [provided he be the person, who if born would have the present immediate right, and though the heir *pro tempore* has the first or present title of entry.] And yet if my father's brother disseise him [my father,] and levy a fine with proclamations, and a year [or at any other time] after the proclamations my father dieth, and after and within five years my uncle dieth, in this case I by reason of my infancy shall have only so much time to avoid the same fine as at the death of my father remained to come of the five years next after the [last of the] proclamations, and not a new five years, because I claim by the same title that my father had, [and the period of five years for claim *commenced* in his lifetime.] So if my father or other ancestor be disseised, and the disseisor levy a fine with proclamations, and my father or ancestor die within five years after the [last of the] proclamations, in this case I shall not have a new five years, but only so much as remaineth of the old five years to make my claim, &c. [and it is a general rule, that if nonclaim on a fine once begin to run, it shall continue to run notwithstanding any subsequent disability in the party or his heirs. *Durore* v. *Jones*, 4 *Term Rep.* 300; 1 *Prest. Convey.* 242.] Madmen and lunatics (being strangers to the fine) shall have the like time to make their claim, &c. as infants have; and yet if this infirmity happen after the fine levied, and before the last proclamation be made, these persons are not bound to the first [five] years, [because non-claim on a fine does not begin to run till the last proclamation is made,] but shall have five years time after they be cured of their maladies. [But if they are in their senses, &c. at the time when or after the last proclamation is made, and afterwards become of unsound mind, the fine will continue to run against them and their representatives. *Doe d. Griggs and another* v. *Shane*, 4 *Term Rep.* 306, in a note.] Women covert (estrangers to the fine) [being of full age] shall have five years time after they be discovert to pursue their right, [or if they die under coverture their heirs or other representatives shall be allowed five years; but no disability in them, or in their heirs, issue, &c. will protract the bar beyond five years from the death of the ancestor dying under a disability.] But if a *feme*

Plow. 366. 375. *Non sane memoria.*

Plow. 375. 379. Women covert.

sole (estranger to a fine) [being of full age] have present right, and after the fine levied she take a husband, and so five years pass after the proclamations had, in this case she is barred and shall have no further time to claim. Estrangers to fines, imprisoned at the time of the fine levied, shall have the same time and liberty [which] infants have, but if such imprisonment happen after the time of the fine levied, and before the last proclamation made, it seemeth they shall have five years after the inlargement. [In *Durore* v. *Jones*, 4 *Term Rep.* 300, it was decided that the period of non-claim runs against the party while in prison, so as he was imprisoned at any time after the commencement of the period of five years. The text is right in the first branch of the proposition, distinguishing the imprisonment to be before the last proclamation. In the second proposition the text is erroneous and over-ruled.] And estrangers to fines being out of the realm at the time of the levying thereof [*read* the last proclamation made,] shall have five years time after their return to enter or claim, &c. But if they be in *England* at the time of levying of the fine [*read* the last proclamation made,] and after go beyond the seas, and suffer the five years after the proclamations to pass, in this case they shall have no longer time, except they be sent in the king's service and by his commandment; [it does not appear that such command and absence would suspend the bar, since the statute has not introduced any saving for persons thus circumstanced.] [k] And if the party be beyond the sea at the time of the fine levied [the last proclamation made,] and never return but die there, it seems in this case the fine will not bar his heir at all (36). [It is now decided that the fine will begin to run against the heir from the time at which his title as heir commences. *Dillon* v. *Leman*, 2 *H. Blackst.* 584, and will begin and continue to run notwithstanding the heir be within age, or under any other disability

Imprisonment. Plow. 360. 366. 375.

Out of England. Plow. 366.

[k] Sir Tho. Cotton's case, 27 Eliz.

(36) And his heirs may enter or bring their action at any time. 2 *Inst.* 519. 4 *Co.* 125, b. See also *Chet.* 65 to 68, where the different opinions of Lord *Coke* in his 2 *Inst.* and of Ch. J. *Anderson* in 1 *Leon*, 211, on *Cotton's case*, are stated and left to the reader's judgment. From an opinion given by a late sound lawyer and able conveyancer, on this point, it seems he thought that the case in *Leonard*, though it might relate to the same family of as the case in 2 *Inst.* 519, arose probably under some other settlement or limi- that mentioned in 2 *Inst.* and that Lord *Coke*'s opinion was good law.

at the death of the ancestor, since he was not the person to whom the right first accrued, &c.]

Plow. 375. Dyer, 133.

* Estrangers to fines that have divers defects and infirmities, as infancy, coverture, non-sanity of mind, imprisonment, absence out of the realm, [existing at the same time, or in continued succession, without any interval,] to avoid fines, shall have time for five years after the last of the infirmities removed. But if they have divers impediments, and they be all once, after the [last of the] proclamations made, wholly removed, and after they fall into the like again and die, in this case [they and] their heirs shall not have a new five years, but the first five years, begun in their ancestors time, immediately after the first impediments so removed, shall proceed, and *non-claim* of their heirs during all the residue of the said five years [and notwithstanding any infirmities in the heirs, as infancy, or any other disability specified in the statute] bindeth them, as their said ancestors should have been bound thereby, if they had remained void of such impediments during all the said five years (37). *P. 32.

3. *That have divers defects.*

Plow. 373. Dyer, 224.

Estrangers to fines that have no present, but a future right, and that such as groweth wholly before the [last of the] proclamations, if they be void of impediment shall have five years time after their right, title, claim or interest first groweth, remaineth, descendeth or cometh to them after the [last of the] proclamations. And therefore if a mortgagee be disseised, and the disseisor doth levy a fine with proclamations, and the five years pass, and after the mortgagor [by virtue of a condition operative on the legal estate] payeth or tendereth the money, [so as to give him a right of entry by force of the condition,] in this case he shall have time for five years after the tender or payment of the money to make his claim, &c. (38), [this is at

4. *That are without impediment, having future right upon cause precedent.*

(37) And so it seems in all cases both of present and future rights, where the five years commences in the life of the ancestor, and he dies before they are expired, the heir shall be barred unless he makes his claim, &c. during the residue of those five years, even though he is under impediments at the death of his ancestor. *Chet.* 65. If a person be under any of the legal disabilities, and die before such disability is removed, his heir is not bound to claim within five years, nor is he bound to any time. See Mr. *Booth's* opinion at the end of this book, [over-ruled].

(38) For his title first accrued to him after the proclamations by the payment or tender, upon cause or matter before the proclamations, *viz.* by the condition made before the fine. *Plow.* 373. If a fine is levied by a *mortgagee in possession*, and five years nonclaim pass thereon, the *mortgagor* is not barred of his equity of redemption. 1 *Vern.* 132.

the common law; but in equity, a fine by a mortgagor or mortgagee will not have any effect against the other of them; and even at law a mortgagor, being in possession and paying interest, &c. could not bar the mortgagee by levying a fine.] So if a man levy a fine of his land whereof his wife is dowable, she shall have five years after her husband's death [or other event, as the reversal of an attainder, in which she can assert her title of dower, *Menville's case*, 13 *Rep.* 19,] to make her claim, &c. and not be bound by the five years after [the last proclamation of] the fine, [and this is an instance of a fine operating as a *bar* by non-claim, though it did not devest the interest of the wife, but passed the seisin *cum onere*.] So if tenant in tail [in possession] levy a fine with proclamations, [operating as a discontinuance, (for without discontinuance the fine would not confer an adverse title),] and after the five years dieth without issue, [inheritable to the estate tail,] the donor shall have five years after his death without issue to bring his *formedon* (39). [m] So if lessee for life levy a fine [with proclamations, and which devested the remainders. *Goodright* v. *Forrester*, 1 *Taunt.* 578,] or make a feoffment in fee, and the feoffee doth levy a fine [with proclamations;] in this case he in reversion or remainder shall not be bound by the next five years after the fine levied, [but he may enter within the five years, and avoid the fine as a forfeiture of the life estate; or claim, in right of his reversion, within five years after the particular estate is determined;] but [*read* (*i. e.*)] he shall have five years next after the death of the tenant for life, and if he die [after the commencement of the period of non-claim, and] within the five years, his heirs shall have only so much time as to make up the time before his death five years. [n] So also is the law if lessee for life be disseised, and the disseisor or a stranger levy a fine [to the disseisor or other person in whom the freehold resides (since otherwise the fine may be avoided by the plea of *partes*

[l] Plow. 374.

[m] Co. 78. Plow. 373. 374.

[n] Plow. 374. Co. 9. 305.

(39) In the reverter, which action lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns. *Fitz. Nat. Br.* 219, (E.) In what form the reversioner must bring this writ, see *Bl. Com.* 192. The time of limitation in a *formedon* by stat. 21 Jac. 1, c. 16, is twenty years; within which space of time, after his title accrues, the demandant must bring his action, or else is for ever barred, [with an exception for disabilities.]

finis nihil habuerunt, &c.;)] in this case he in reversion, or his heirs, shall have five years after the death of the tenant for life, and shall not be bound to the next five years after the time of the fine levied. [And yet in this instance he has an option of entering or claiming in the lifetime of the tenant for life.] °So if tenant in tail in possession levy a fine [with proclamations, and creating a discontinuance; *Seymour's case*, 10 *Rep.* 95; *Doe* v. *Whitehead*, 2 *Burr.* 704;] and die without issue, [being the event on which the proper and regular determination of his estate takes place,] in this case he in the remainder [in tail or for life, or in fee,] shall have time for five years after the death of the tenant in tail without issue; and if he make not his claim, &c. in that time, he and his issues [and heirs] are barred for ever (40). [In all these and the like cases it must be understood that the issue are the issue inheritable under the estate tail.] The same law is for him in reversion, or the donor, if there be no remainder. [And it must also be remembered that the owner of each successive remainder, &c. will be allowed to claim within five years from the determination of all the particular estates anterior to his remainder, &c.] ᵖ And if tenant in tail discontinue in fee, and the discontinuee levieth a fine with proclamations, and five years do pass, and the tenant in tail dieth, in * this case his issue shall have five years after the descender to bring his *formedon* (41.) [So if tenant in tail bargain and sell in fee, thus passing a base fee, without creating any discontinuance, and the bargainee levy a fine with proclamations, the heirs in tail will have five years after the death of the tenant in tail to make their claim, for the fine is never adverse to their title till the death of the tenant in tail. But non-claim

[9 Rep. 106. a.]

° Plow. 374. 19 H. 8. 7. Co. 3. 87. 84. Dyer, 3.

ᵖ Co. 3. 87.

*P. 33.

(40) If tenant in tail makes a lease pursuant to the statute 32 H. 8, and then levies a fine, and dies without issue, and afterwards the lease expires, the reversioner ought to enter within five years after the death without issue, (the time when his right accrued,) and shall not have five years after the term expired, for he had not then a new right. *Cro. Car.* 156.

(41) But if tenant in tail discontinue in fee and dies, and the discontinuee makes a lease for life, and grants the reversion to the issue, the issue in tail shall not have a formedon against the tenant for life, because by his formedon he must recover the estate of inheritance, and that is in himself, by acceptance and estoppel. *Co. Lit.* 297, b. See further what shall be deemed a *discontinuance*, and the remedies thereon by formedon in descender, reverter and remainder, in *Finch's law*, 190, 267. *Co. Lit.* 326, b. 3 *Bl. Com.* 171, 191. And fully in *Fitz. Nat. Brev.* tit. *Formedon.*

on this fine never could bar the owners of the remainder or reversion in fee; for they claim in privity of that base fee, and may take advantage of the fine as a confirmation of their title. Had the estate tail been discontinued, or a fine been levied after the base fee was determined and a new seisin acquired by adverse title, then only would the fine have run against the owners of the reversion or remainder.]

[q] But if tenant in tail discontinue, rendering rent, and die, and the issue accept the rent (which doth bar him for his time, [*viz.* after acceptance of the rent, to avoid the alienation, and thus gives a title against him for his time,)] and then the discontinuee levieth a fine and dieth, in this case the issue of the issue [who thus accepts rent] shall not be barred by the five years after the fine, but shall have five years after the death of the issue [who accepted the rent, since the right of avoiding the fine first accrued to the issue in the second degree.] [r] And if one *de non sanæ memoriæ* make a feoffment, [being, according to the old authorities, a good alienation as against himself, on the ground that he cannot stultify himself,] and the feoffee levy a fine [with proclamations,] and then the feoffor die, in this case the heir, [as the first person to whom the right of avoiding the fine accrues,] shall have five years after the death of his ancestor, and not be bound by the five years next after the fine levied; [*read* the last proclamation had; because the feoffee has the right of holding under the feoffment, so that the right of entering or making claim to avoid the fine, first accrues to the issue.]

[q] 30 El.

[r] Plow. 374.

5. *That have future right and impediment.*

Estrangers to fines, that have future right upon any cause precedent, being affected with such impediments when the right first accrueth, shall have five years after the impediment removed to make their claim, &c. And therefore infants that are born or in their mother's womb when such right doth happen to them, women covert, madmen, lunatics, prisoners, [persons] beyond the seas, shall have this time. As if a man have issue a son and a daughter, and the son doth purchase lands and die, and the daughter entereth as his heir, and is disseised by *A.* who levieth a fine, and five years pass without claim, and ten years after the father hath another son who is heir to his [the father's] brother; he shall have in this case a new full five

See the Statutes Plow. 366. 367. Dyer, 3. Plow. 368.

years after he come to his full age, for he is the first unto whom the right descended after the proclamations; [since by his birth the event has proved that the daughter was not the heir. The like conclusion is law if an uncle to the infant son had been the mesne heir; and thus a sister or an uncle, barred as the mesne heir, may, as it is apprehended, have a new title through the nearer heir, if born, and he should die within five years. The maxim is, *Cum duo jura in unam personam concurrunt æquum est ac si essent in diversis.*] But if a stranger to a fine, to whom a remainder or other title first accrueth after the fine, do not pursue his right within five years [after the right to the possession arises,] hereby he and his issue are barred for ever. And in like manner if the first issue in tail, to whom the title of the tail first accrueth, neglect to make his claim, &c. within the first five years after his title accrued, hereby he is bound for ever, and the whole estate tail also; [*viz.* all the heirs under the intail, and those claiming in succession from them; and there shall not, as has sometimes been supposed, be a distinct title in each successive heir in tail, as if he had a distinct estate.] And if one abate after the death of a tenant in fee-simple, [thus gaining a fee-simple by this species of disseisin,] and make a feoffment upon condition, and the feoffee levy a fine [with proclamations,] and five years pass without any claim made by his heir, [*viz.* the heir of the ancestor who died seised,] hereby the heir is barred for the present; but if afterwards the condition be broken, and the abator enter, [thus defeating the estate of the feoffee,] then the heir may have an assise of mordancester against the abator, or enter when he will; [for as the seisin on which the fine operated, and to which the fine was a protection, is defeated, the effect of the fine is gone. Had the estate of the feoffee been affirmed by release, confirmation, &c. then the fine and non-claim would have continued in operation.]

Plow. in Stowell's case. [373] (e)

Estrangers to fines that have neither present nor future right at the time of the levying of the same fines, by reason of any matter before the fines levied, whose right groweth entirely before

6. That have no right for any cause before the fine.

(e) Plowden has the point, but not the conclusion; on the contrary, Plowden says, the heir shall be aided by the second saving; and of course he has only five years. And see the case put by him of a mortgagor.

the proclamations, or partly before and partly after, may make their claim, &c. when they please. As if a father die seised of land, his elder son being professed, and the younger son entereth and is disseised, and a fine with proclamations is levied by the disseisor, and then the elder son is de-arraigned, in this case it seems he is bound to no time (42). [As the case cannot now happen, it is of little importance, except for its principle; but on principle it would seem to be clear that the heir would be barred, unless the fine were avoided by entry, &c. within five years after the de-arraignment.] So if a tenant cease one year, and then a fine with proclamations is levied, and after the tenant ceaseth another year, the lord may * have his *cessavit* twenty years [being the limitation to rights of entry, by the 21 Jas. 1, c. 16.] after the proclamations. [In this instance the right to enter did not arise till the end of the two years; and the fine, when levied, was not adverse to the title of the lord. The lord claimeth under the seigniory, and not under the tenancy, and his title is complete by the *cessavit* for the second year, for till the *cessavit* for the second year; there is not any right of entry. This is an instance of a bar to a person who has a seigniory and not any estate, and consequently there is not any devesting. Thus the right of entry is barred by force of adverse possession, although the rent, services, &c. remain. This case approximates to that under which a title of dower is barred. In the case of a fine by the disseisor while the daughter is heir, and her title is defeated by the birth of a nearer heir, the title was adverse to the heir, whoever might be heir.]

*P. 34.

7. That have future rights by divers titles.

And estrangers to fines, that have several future rights by divers titles growing [*viz.* commencing] at several times, it seemeth shall have several five years to make their claims, &c. commencing from the several times that their titles [of entry, &c.] do first accrue unto them. As if tenant for life, the remainder in fee, make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in the remainder suffer the five years to pass, in this case he is barred of his entry upon the alienation

Plow. 537. 367. 372.

(42) As to the doctrine of profession, see *Vin. Abr. Profession*, and the several titles there referred to.

for the forfeiture; but it hath been held that if the tenant for life die, that he, [the owner of the remainder,] shall have another five years time to bring his *formedon* in the remainder, [for a *formedon* lies, F. N. B. 542.] So if the husband make a feoffment of his wife's land to another upon condition, which is broken, and he [the feoffee] levieth a fine [with proclamations] of this land, and the husband hath issue by his wife and dieth, and the first five years pass, and then his wife dieth, hereby he [the heir] is barred of the title by the condition, [for in respect of the condition he must claim in right of his father;] but he shall have five years more [from the death of the father] to make his claim as heir to his mother [under her title; and these five years may, provided the mother survive the father, begin to run in the time of the mother. If the father had survived the mother, then the right of avoiding the alienation by feoffment, would have first accrued to the heir.] But if lands be given to *H.* for the life of *A.*, the remainder to *B.* for life, the remainder to *H.* in fee, and *H.* is disseised, and after the disseisor levy a fine [with proclamations,] and five years pass, in this case [1 *Prest. Conv.* 240,] some say *H.* is barred both of his present and future estate, and shall have no further time to make his claim, &c.; and yet [some say] if *cestuy que vie* and he in the mesne remainder die, *H.* shall have another five years to make his claim to preserve his remainder. In like manner it is if land be given to *H.* for the life of *A.* the remainder to him for the life of *B.* the remainder to him for the life of *C.* and he is disseised, and the disseisor levieth a fine with proclamations, in this case some say *H.* for his present right shall have five years by the first saving of the statute, and five years after the death of *A.* by the second saving of the statute, [because the party had a present right, and the savings are to other persons. This doctrine was admitted by some, though denied by other Judges, in *Zouch* v. *Bampfield*, *Plow. Com.* 357.] But the example is not correctly put for the purpose of the illustration, since one of these estates for life would, it is apprehended, merge in the other, on its creation.] If one disseise a feme sole, and after marry her and have issue by her, and the husband is disseised before marriage or after, and then a fine is levied with proclamations, and

Plow. 357. 367. 368. 372.

the husband dieth first, and afterwards the wife dieth within the five years, the issue being of full age, the five years pass, hereby he is bound as heir to his father, but he shall have five years more after the death of his mother to make his claim, &c. [as her heir, on the ground of her title as disseisee. Had the mother died in the life of the father, the son might have claimed even in his father's lifetime; and must, if free from disabilities, have prosecuted his title as heir to his mother, by claiming the estate within five years from her death.] *Quando duo jura in una persona concurrunt, æquum est ac si essent in diversis* (43).

11. *How a fine shall enure and work.*

Where there is a precedent agreement amongst the parties, as a feoffment or the like, there the fine shall not pass any thing, nor work by way of estoppel, but only by way of corroboration, and shall be guided by the precedent agreement. [The proposition seems too general and unqualified.] And therefore if a feoffment be made to two and their heirs, and after a fine is levied to them two and the heirs of one of them, this [fine] shall enure as a release, and shall not alter the estate; [this seems to be principally on account of the practice of requiring that a fine shall not be levied to two and their heirs, but to them and the heirs of one of them,] but if there be no precedent agreement it shall work as it may, [*viz.* to give the parties an estate for life with the inheritance to one of them, according to the form of the limitation.]

Co. 10. 96. 2. in Cromwell's case.

If *A.* enfeoff *B.* of certain land in fee, rendering rent, with condition of re-entry for not payment of rent, and by indenture at the * same time [or at a subsequent time] covenant to levy a fine of the same land to the feoffee to the uses and conditions in the deed of feoffment, and after a fine is levied *sur conusance de droit come ceo, &c.* accordingly, in this case this fine shall enure as a fine *sur release*, [*viz.* as part of the same assurance, or by way of further assurance, because it is part of the same transaction or title; and] because the conusee hath the fee before, and it shall not enure by way of estoppel, albeit it be a fine *sur conusance de droit come ceo, &c.* And therefore the rent and condition shall remain in this case, and not be extinct.

*P. 35.

Dyer, 157. Fitz. Estoppel, 211. Co. 2. in Cromwel's case.

Estoppel.

Extinguishment.

[And a fine and deed of uses may operate as an

or how the five years non-claim shall be accounted. *Vin. Abr. Fine*, (H. a.)

[Brown v. Herring, 1 Ventr. 368.]

execution instead of being an extinguishment of a power; and a lease, release and fine, being parts of the same assurance, and proceeding from tenant in tail in possession, may operate as a discontinuance. *Doe* v. *Whitehead*, 2 *Burr.* 704, while no discontinuance would be effected, if the fine were a distinct transaction confirmatory of a title to a base fee. *Seymour's case*, 10 *Rep.* 95.]

See before, at Numb. 6. part 2. F. N. B. 20. f. Stat. 23. El. chap. 3.

A fine may be avoided for many causes, as by the death of the parties after the conusance before the recording of it (44), [*read* before the return of the writ of covenant,] or by covin in the procuring of it; also it may be avoided for other causes, as for some error in the proceeding in the suing out of the fine, and this is done by writ of error, [to be prosecuted within twenty years, 10 & 11 Wm. 3, c. 14;] but this error then, that shall make a fine voidable must be notorious, because the thing is done by consent, and it is a rule in law *consensus tollit errorem* (45), [the reason assigned is a misapplication of the rule. The consent is to the fine not to the error.] And by this means if the husband and wife levy a fine, and (46) both of them be within age, while either of them be within age they may avoid the fine as against them both. [This seems to be true as to both, only when the husband and wife are both inspected and both found to be under age, for then the fine is void against both.] But if there be tenant for life, and he in remainder in tail being an infant, and they two levy a fine, and he in remainder reverse it for in-

1. *Where a fine may be avoided, or not. And how.*
1. *By a writ of error.*

Co. 2. 77. 1. 76.

(44) As where a writ of error was brought by the heir of the wife of the cognisor to reverse a fine levied in *Wales* by husband and wife, the land being the estate of the wife, and the error assigned was, that the wife died before the return of the writ of covenant. The fine was reversed without any difficulty. See *Essay on Fines*, 32, which cites *Clements* v. *Langhorne*. 2 Lord *Raym.* 872. *Cockman* v. *Fanor*, Sir *T. Raym.* 461. 3 *P.* & *Comb*, 57, 71, S. P. See also *Salk.* 168.

(45) Note a distinction between the reversal of a fine by writ of error and by act of parliament, for it seems the reversal of a fine by act of parliament will restore a *contingent remainder* destroyed by that fine, though a reversal for error will not. *Fearne*, 240. 1 Lord *Raym.* 314, which cites *Cole* v. *Levingston*, 3 *Keb.* 87, where it appears the act of reversal was in 13 Car. 2. The act was 13 and 14 Car. c. 27, intituled an act for making void certain fines unduly procured to be levied by Sir *E. Powel*, Bart. and dame *Mary* his wife. Any person who brings a writ of error to reverse a fine, must show upon such reversal that he is entitled to the land. See 2 *Bac. Abr.* 537. *Essay on Fines*, 215.

(46) All writs of error for reversing of fines, must be brought and prosecuted with effect within twenty years after the time of levying them, according to statute 10 & 11 W. 3, c. 14, with a proviso as to persons under impediments, who are allowed five years after the impediments are removed. In the case of *Lloyd* v. *Vaughan*, 2 *Str.* 1257, it was resolved the twenty years were to be computed from the time of the fine levied, and not from the time the title accrued.

fancy, this shall not avoid the fine as to the tenant for life also (47), [and the reversal of a fine for error will not restore a contingent remainder destroyed by the operation of the fine. But on a reversal by act of parliament the contingent remainder would revive. *Fearne on Remainders, &c.* 240, 3 edit. So a recovery may remain operative and effectual, although the tenant to the writ of entry was made by fine, and the fine be reversed for error after the recovery is suffered. Sometimes a fine may operate merely by conclusion and estoppel, so as to bind a future right, as in *Helps* v. *Hereford*, 2 *Barn. & Ald.* 242; or to protect the title of the terre-tenant, although he be not a party to the fine. Thus if a person who has only a right as a disseisee, discontinuee, &c. 2 *Rep.* 55, *Pollexf.* 57, (*March*, 66, is *contra*), levy a fine to a stranger, the terre-tenant may take advantage of this fine by way of conclusion or estoppel, for the conusor cannot claim in opposition to his fine, and the conusee cannot make title, inasmuch as the conusor had merely a right of entry or of action, and such right cannot be transferred.] A fine also is and may be sometimes avoided, or at least lose much of [its] force by the claim, entry, or action of him that hath right to the land (48), [the only case in which an actual entry is now necessary is, to avoid a fine with proclamations. And the entry must be made for the declared purpose of avoiding the fine, or all fines, &c.] for if the estate, contained in a fine, be once within five years after proclamations lawfully defeated, the party hath thereby left [*read* lost] his whole estate both against him which did reverse the same, and against all others which had right or title paramount and made no claim within the five years, albeit he, which doth bring the action, have no judgment and execution within seven years after

2. *By a claim, entry, &c. And by whom a claim, &c. may be made.*

Plow. 358, 359. Co. 9. 106.

(47) But in *Zouch* v. *Thompson*, 1 Lord *Raym.* 179, it was adjudged that though a fine may be reversed as to part of the land, and remain good as to the residue, yet it cannot be reversed *in toto*, as to one man, and remain good *in toto*, as to another. [*Qu.* if not too general.]

(48) To avoid a fine there must be an *actual entry*. 3 *Burr.* 1897. *Doug. Rep.* 466. ...y, *Dormer* v. *Fortescue, Dom. Proc.* 1740. And by the statute 4 Anne, c. 16, § 16, ...ntry to avoid a fine with proclamations shall be sufficient, unless an action be ...ithin one year next after such entry or claim, and prosecuted with effect. ... to *Saund.* p. 319, *Doug. Rep.* 468. *Berrington* v. *Parkhurst, Stra.* 1086.] And ... is not brought, the entry is of no avail to hinder the bar of non-claim.

the proclamations, [for if a fine be avoided by the owner of a particular estate, it is avoided, as a bar by non-claim, as to all persons in remainder; and yet it may remain in operation as far as it conferred a title by conveyance, estoppel, &c.] In like manner if there be tenant for life, the remainder for life, the remainder in fee, and the first tenant for life alien [in fee, *viz.* devesting the remainders, &c.] and the alienee levy a fine with proclamations, and the second tenant for life claim, or enter, &c. [and avoid the fine,] this doth make void the fine both against him and against him in remainder also: for it is a rule, that any one that hath any estate in possession, [remainder] or reversion, which will be barred by the fine when it is levied, [and by non-claim on that fine,] may make a claim or entry to prevent the bar of the fine. As tenant for his own, or for another's life, tenant for years, he in reversion or remainder after an estate for life or years, a copyholder, or the lord, a guardian in nature, or nurture, may avoid the fine. And this they may do for themselves and others; and for others without authority, precedent or assent subsequent; and the claim of one of them in this case shall avail the other. [See *Lutterel's case*, *Moor* 450; but if the inheritance be discontinued, then an entry by the lessee for years, or other person having a chattel interest, will be good only *pro interesse suo*. There must be an action to restore the seisin.] And by authority also any other man may make a claim, entry, &c. in this case, for him that hath right; and so he may do also without any authority precedent, if the party for whom he doth it do afterwards agree and assent unto it (49). But a * stranger of his own head (unless perhaps it be for an infant) cannot make such a claim or entry to prevent the bar of a fine, except he that hath the right do give him authority before it be done, so to do, or do agree to it after it is done. [The maxim, is *qui vis potest renunciare juri pro se introducto.*] And therefore if a stranger of his own head will make an entry or claim into land whereof a fine is levied, whereunto I have right, and he do it to my use, and I do not agree to it within the five years, this entry or claim will not avoid the

*P. 36.

(49) Within the five years, or otherwise it will not preserve the right, or avoid the fine. Co. Lit. 245.

fine (50). And yet it was held by Just. *Dodridge*, [a native of Devonshire, and the recognized author of this work,] *M.* 2 *Car. B. R.* that if a stranger enter in my name and to my use that have the right, this doth vest the estate in me before agreement, and I shall be said to agree until I do disagree; [and no entry by a stranger in my name will avail, unless I do afterwards, and before I am barred by non-claim, agree to such entry.]

3. *By a plea.* A fine also is, and sometimes may be avoided by plea, as by averment of the continuance of seisin of the land in another, at and before the time of the fine levied, and that *partes finis nihil habuerunt tempore levationis finis*, and then he must show in whom the tesate was. As if lessee for years, [without making a feoffment,] or a disseisee, levy a fine to a stranger that hath nothing in the land; or *A.* be disseised by *B.* and *B.* be disseised by *C.* and *B.* [while a disseisee] levy a fine to *D.* or one that hath a right of a remainder only, [as distinguished from an estate in remainder;] or a disseisor make a gift in tail, and the donee make a feoffment to *A.* and after levy a fine to a stranger that hath nothing in the land. But this plea, it seems, neither parties nor privies, albeit they be issues in tail, [and provided, as to the issue, the fine be with proclamations,] may have at this day (51), but strangers only; and therefore, in the last case, the disseisor, and not the issue in tail, may avoid this fine by this plea, [for the issue were barred by reason of the proclamations.] But if a collateral ancestor, of whom [*viz.* through whom] the issue in tail doth not claim the land, levy such a fine, the issue may by this plea avoid it, [though the fine be with proclamations.] It seems also the issue in tail may have this plea to a fine *sur release* only; [since if there be no previous seisin, there cannot be any release; *sed query.*]

Stat. 4 H. 7. c. 24. Co. 3. 141. 88. Dyer, 334.

Also there is a plea by which (as it seems) a fine hath been avoidable, which in effect is nothing else

Co. 3. 84. Dyer, 334. 290. Stat. 27 E. 1. c. 1.

(50) An entry on the land by a *cestuique trust* is not a sufficient claim to avoid a fine, but it must be by *subpœna*. 1 *Cha. Ca.* 268, 278. But it is said, claim to avoid a fine by *bill in Chancery* is not sufficient, and *that it ought to be by action. Per Catlin, Dal.* 116, pl. 9, 16 *Eliz. Anon.* See further *Vin. Abr. Fine*, (G. a.) *Com. Dig. Claim*, (B.) As to a plea in equity of fine and non-claim, see *Hinde*, 185.

hey are debarred the plea *quod partes finis*, &c. by the statute 27 Ed. 1, *de* 2 *Inst.* 522. *Hob.* 333. [Or rather as to the issue by the Statutes of Pro- ines.] 1 *Leo.* 83. 1 *And.* 170. *Sav.* 88.

but an averment of seisin still in the demandant or plaintiff, or his heirs, before, at, and after the time of the fine levied. And this plea (as it seems) no man may have at this day, but [*viz.* except] the issue in tail only, to avoid a fine levied *sur grant & render*, by the ancestor in tail, and not to avoid a fine levied *sur conusance de droit come ceo que il ad de son done*, &c. and a feme covert, to avoid a fine levied by her husband alone.

[When a stranger grants to the tenant in tail, and he renders back the land, even in that case, provided there are proclamations, the issue will be barred. But the render of a rent would not bar the issue, unless the issue were also deprived of the land, by a render of the land.]

34 H. 6. 19. 19 H. 6. 44. If there be two of one name, and one of them levy a fine of the land of the other; or [if] a stranger levy a fine in the name of him that is owner of the land; in both these cases the fine may be avoided by pleading the special matter. [See the writ of *Idempnitate nominis*, *F. N. B.*] And yet some hold that in this [the latter] case the party hath no remedy but by action of disceit (52), [or motion to the court to vacate the fine.] 4. By a vacat.

A fine also is, and sometimes may be, avoided by the sentence of a court, when it appeareth to be gotten and obtained by some notorious fraud or practice (52). [Filing a bill for equitable *relief* is

(52) See further in what cases a fine may be avoided by a plea. *Vin. Abr. Fine*, (G. b. 3.) and 22 *Co. Read.* 2 *Inst.* 523. *Com. Dig. Fine*, (H.)

(53) In *Hubert's case*, *Cro. Eliz.* 531, where one levied a fine in the name of another not privy nor consenting, the fine was declared void by *vacat* upon the roll; and Lord Keeper said, when the fraud appeared to the court, as in that case it did, the court may well enter a *vacat* on the roll, and so make it no fine, although the party cannot avoid it by averment during the time it remains as a record. This offence is now death by 21 Jac. 1, c. 26. In some cases the court will vacate a fine upon motion, to prevent the parties the trouble and expense of a writ of error. 3 *Lev.* 36. 2 *Wils. Rep.* 115. In *Hubert's case*, the Lord Keeper said he always made this difference: "If one of my name levy a fine of my land, I may well confess and avoid this fine by showing the especial matter, for that stands well with the fine; but if a stranger, who is not of my name, levies a fine of my land in my name, I shall not be received to aver that I did not levy the fine, but another in my name, for that is made contrary to the record, and so it is of all recognizances, and other matters of record; but I conceive when the fraud appears to the court as here, they may well enter a *vacat* upon the roll, and so make it no fine, although the party cannot avoid it by averment during the time that it remains as a record. The offence of levying a fine in the name of a person not privy or consenting thereto, is death by 21 Jac. 1, c. 26. When fines may be set aside in equity, 1 *Eq. Ca. Abr.* 258, 2, 474. If a fine is levied by a person who got possession under a forged deed, equity will decree against the fine. Per Lord *Hardwicke*, in *Cartwright* v. *Pultney*, 2 *Atk.* 380. Avoided for fraud, and aided when defective, *Com. Dig. Chancery*, (3 N.) and 1 *Ves.* 289. See further how fines may be avoided, or reversed, and by whom. *Com. Dig. Fine*, (H.) *Pleader*, (3 B. 9.) *Vin. Abr. Fine*, (D. 11.) And *Bac. Abr. Fines*, (H.) [*Cruise on Fines*, 311.] 1 *Ves.* 289.

equivalent to bringing an action, in its effect of preventing a fine from being set up as a bar. Filing a bill, merely for discovery, was held by the Lords Commissioners in 1783, not to be sufficient, *Pinke* v. *Thornycroft*, *Bro. Ch. Cas.* 289, but the decree was reversed in *Dom. Proc.* in 1785, *Cruise on Fines*, 329; *Cas. tempore Redesdale*; *Bond* v. *Hopkins*, 1 *Sch. & Lef.* 413.]

*P. 37. * And now it is high time we come to the second kind of common assurances made by matter of record, *viz.* a common recovery (54).

CHAP. III.

Of a Common Recovery.

1. *Common recovery. Quid.* A RECOVERY, in general, is the obtaining of any thing unjustly taken or detained, by judgment or trial of law, [or rather by semblance of law, *fieri non debuit sed factum valet.*] And it is either a common recovery, which is such a recovery as is used for a common assurance of land, or other recovery, [*viz.* a recovery in truth and in fact, under an adverse title] which is not used as an assurance of land. And the common recovery that is used for the assurance of land is nothing else but *fictio juris*, or a certain form or course set down by law to be observed, for the better assuring of lands and tenements to men. [This is not quite accurate. The law never prescribed the recovery as a common assurance; but the ingenuity of men versed in the laws applied the form of a real adverse action to a mere amicable proceeding. In short, common recoveries were a fraud on the statute *de donis*, to escape from the effect of the enactments of that statute] (55). And this is somewhat after the example [and in the form] of the recovery

Co. super Lit. 154. See the preamble of the stat. of 23 H. 8. cap. 10. 23 Eliz. cap. 3. Doct. & Stud. 41. West. Symb. tit. Recovery.

Wood, 394.

(54) For a description of the nature and operation of *deeds to lead or declare the uses of a fine*, and some general rules and observations concerning them, see *Chet.* 84, stat. 4 & 5 Ann, c. 16, § 15. 2 *Bl. Com.* 363. *Bac. Abr. Uses and Trusts*, (E.) *post* in the chapter on Uses; and *Com. Dig. Uses*, (B.) [2 *Prest. Convey.* 2–60.]

(55) Common recoveries were first invented by ecclesiastics to elude the Statutes of Mortmain by fictitious adjudications of right. 2 *Bl. Com.* 117, 271, 357; but were first introduced in the time of King Edward the 4th for the purpose of unfettering estates, and making them more liable to forfeiture. 4 *Bl. Com.* 422. 1 *Burr.* 115. *Pig.* 8. As to the similitude between a fine and recovery, and feoffment, see 1 *Burr.* 92. The difference between a fine and recovery, *Pig.* 18.

upon title, which is without consent and contrary to the will of him against whom the same is had: for there is in this [assurance] a colourable suit, wherein there is a demandant which is called the recoveror (56), and a tenant which is called the recoveree, and one that is called to warrant upon a supposed warranty which is called the vouchee.

Recoveror. Recoveree. Vouchee.

Wood, 595.

2. *Quotuplex.*

The common recovery is sometimes with a single voucher; which is, when the writ is brought against him that is to pass the land, immediately, and he doth vouch over the common vouchee; [but the practice of suffering recoveries with single voucher is obsolete.] And sometimes it is with a double voucher; which is when the writ is brought against another, to whom he that is to pass the land [or rather to bar the intail] hath [but this is not a necessary circumstance] aliened it, and he doth vouch him that is to make the assurance, and he doth vouch over the common vouchee: and this is the surest way, and the safest kind of recovery (57), [and in all cases of bars to intails, as will afterwards be noticed, this voucher over is essential to bar the estate tail; and sometimes a recovery is with treble voucher, and then the tenant vouches one person, who vouches, another who vouches the common vouchee. This mode of voucher is used, when an estate tail is derived out of an estate tail, and both estates tail are to be barred; and it is questionable, whether the treble voucher be, even in this case absolutely necessary; 1 *Prest. Convey.* p. 127.]

See the places before. Co. 1. 94. 10. 43. 45.

3. *The manner and order of suffering a common recovery.*

In this formality of a common recovery, the course is, that by agreement of the parties, a real action [or rather, an action in the realty] is begun by a writ of entry brought by him that is to have the land assured, [or as is the usual practice, by a mere nominee or stranger,] against him that is to make the same assurance, [*viz.* whose intail existing in him as an estate is to be barred;] if it be with a single voucher; or if it be with a double voucher, against him to whom he that is to make the assur-

(56) Who is a mere *instrument* and *creature* of the tenant in tail. 2 *Co.* 77. *Poph.* 23.

(57) And it is now usual always to have a recovery with double voucher, for if the recovery be had immediately against a tenant in tail, it bars only such estate in the premises of which he is then *actually seised*; but if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest he may have in the lands recovered. *Bro. Abr. Taile*, 32. 2 *Bl. Com.* 359. For a further explanation of single, double, or treble voucher, see *Pig. Recov.* 151, 152. *Bac. Abr. Fines and Recoveries*, (C.) *Wils. on Fines*, 245; and *post*, 44.

ance, [or his ancestor] hath aliened the land [*read* freehold, &c.] And in this suit, the recoveror that doth bring the action doth surmise that the tenant against whom the writ is brought hath no right to the land, but that the recoveror hath right thereunto, and that the tenant came to it from such a stranger whom the demandant doth name [2 *Black. Comm. Appx.* No. 5] And to this [writ] the tenant doth appear in person or by attorney, and then doth enter into defence of the [title to the] land, but in pleading doth vouch to warrant; *i. e.* doth allege that he bought the land of *I. S.* a stranger, who in the conveyance thereof bound himself and his heirs, to warrant and make good the title to him or them to whom it is conveyed; and thereupon he prayeth that *I. S.* may be called in to defend the title, and
*P. 38. then he * is allowed by the court to call in *I. S.* to say what he can for the justifying of his right to the land before he so conveyed it: And hereupon *I. S.* doth appear and make show [*viz.* appearance] as if he would defend the title, but doth pray a further day may be assigned him [denominated an imparlance,] to make his defence, which, being granted him by the court, at the day appointed, he, by agreement, covin, and assent of the parties, doth not come in, but [doth] make default: And thereupon the land is to be recovered by him that brought the writ against the tenant, and he [the tenant] is left for his remedy to *I. S.* upon his warranty, and accordingly judgment is given by the court that the demandant or recoveror shall recover the land demanded against the tenant, and that the tenant shall recover so much land of *I. S.* (of his own land) in recompence for the land recovered from him which he ought to have warranted and defended, but suffered to be lost (58). And this recovery over is called a recovery in value, or *pro rata*. But if the recovery be with a double voucher, or a treble voucher (59), *I. S.* is upon his appearance to call or vouch to warrant *I. D.* and to allege in the same manner as the tenant doth, and so pray that *I. D.* may come in, and thereupon *I. D.* doth appear and make default; [and the form is given by *Blackstone*, in 2 *Comm.*

Recovery in value, or *pro rata, quid.*

F. N. B. 134. Co. 9. 6.

(58) And this agreeably to the doctrine of warranty. 2 *Bl. Com.* 358. 3 vol. 193.

(59) Treble voucher, not mentioned before, where single and double voucher is explained.

App. No. 5]: And so if there be more vouchers; and then there must be several recoveries over in value against every one of them; but he that is the last vouchee is always the common voucher, [*read* vouchee, for he does not vouch over,] who is one of the criers of the court of Common Pleas; a man not worth any thing, and one that hath no land to render in value upon the supposed warranty, [indeed, against no vouchee would any recovery over be allowed by the courts. They would take notice that this was a mere form of proceeding.] And by this device, grounded upon [the form of] the strict principles of law, the first tenant doth willingly let go the land for the assurance of the purchasor, and yet in truth hath no recompence over; because the vouchee hath no land to render in value; [or, if he has, yet at this day the value could not be recovered from him. The court would stay any adverse proceedings instituted for obtaining a recompence in value.] And by this means if one have an estate tail in lands which he is desirous to sell, or to convert into an estate in fee simple, the same [sale or conversion,] is commonly done; for the tenant in tail doth cause the purchasor or some friend of his to bring a writ of entry against him for this land, and he appeareth to the writ, and in pleading saith that the land came to him or his ancestors from such a man or his ancestors, who in the conveyance bound themselves to warrant it. And thereupon that man is called in, who doth appear and make default, and thereupon judgment is had against him in manner as aforesaid; [but if the person who created an estate tail had only a limited or determinable interest, the recoveror will have such estate only as was in the donor; so that if the donor's estate were determinable or conditional, the estate of the recoveror will be of the same description, and not an estate in fee simple.] Or, if he would have the recovery with a double voucher, then he, [or some other person having the freehold,] by fine, feoffment, or deed of bargain and sale inrolled, [or other assurance, competent to pass the immediate freehold,] discontinue [or convey] the land, and then cause the recoveror that is to have the land to bring this writ of entry against the discontinuee, [or alienee, or other person

having the immediate freehold,] and he doth vouch the tenant in tail, who doth vouch over the common vouchee, and so it is done. [It is not necessary that there should be a discontinuance: it is sufficient that there be a change of tenancy of the freehold. Besides, there cannot be any discontinuance of the land, though there may be a discontinuance of the estate tail in the land.] And by this form the estate tail, that the tenant in tail hath or [ever] had, is barred and bound, for that it appeareth now [by these proceedings] he [the donor] had no power to intail the land whereunto he had no just title; * and besides he [the donee, or heir in tail] shall [in form, though not in reality] recover a recompence over in value, and this is adjudged in law to go in succession of estate, as the land should have done, which is the reason why [by fiction of law] the recovery is a bar to all that are in remainder and reversion, as well as to the issues in tail (60). [The material difference between a recovery with single, and a recovery with double voucher is, the former recovery bars that estate only of which the tenant in tail is actually seised, while the recovery in which the donee or heir of intail is vouched bars all estates which he had or has in possession or remainder, or of which he or his ancestor was ever seised (61).]

*P. 89.

Accordingly, Com. 360.

And in the suffering of these recoveries the tenants and vouchees do appear most commonly in person in court, and so the recovery is finished in the court presently without more doing; but sometimes they will not or cannot appear in person, and then they do use to appear and suffer the recovery by attorney. And in that case there must be [*omit* a comusance for] a warrant of attorney taken to authorize the attorney or attornies in this manner if it be for a treble voucher (62).

Experientia.

Warrant of Attorney.

(60) Though in reality it is true that the issue on a common recovery has no recompence, and that it is all a fiction of law, yet *in fictione juris subsistit æquitas*, and all laws have their fictions, and are all grounded on reason. *Pig.* 12.

(61) The recompence in value is the true reason for barring the issue in tail, but no reason for barring the reversion or remainder. The true reason why remainders and reversions are barred, is said to be, that the recoveror is, by supposition of law, in of the estate tail, and that the estate tail, by the like supposition of law, continues for ever. Per *Hale*, C. J. in the case of *Hudson* v. *Benson and Baron*, 2 *Lev.* 28. *Pig.* 14. See further *Vin. Abr. Recovery Common*, (A.) In *Vin.* it is said, the *true* reason of common recoveries being bars, is not the recompence, but that they are common conveyances. Per *Wylde* J. 2 *Lev.* 29. *Plowd.* 514. *Bac. Law Tracts*, 149. *Com. Dig. Estates*, (B. 27.) [2 *Cruise Essay*, 189.]

(62) In *Winne* v. *Lloyd*, 1 *Lev.* 130, where the warrant of attorney was tested be-

West. Symb. ubi supra.

Glouc'ss. *Prec'* A. S. & B. *uxori ejus quod juste &c. redd'* C. D. *Manerium de* N. *cum pertinen, &c. quæ clam' esse jus & hered' suam & in quæ iidem* A. *et* B. *non habent ingress. nisi post disseisinam quam* H. H. *injuste & sine judicio fecit prefat'* C. *infra* 30. *Annos jam ultim' elapsos &c. ut dic' &c.*

Glouc'ss. A. S. *&* B. *po. lo. suo* W. W. *&* R. R. *attornat. suos conjunctim & divisim versus* C. D. *de placito terræ.*

Glouc'ss. M. M. *gen. quem* A. S. *&* B. *vocant ad warrant', po. lo. suo* I. I. *&* L. L. *attornat' suos conjunctim & divisim versus* C. D. *de placito terræ.*

Glouc'ss. G. W. *gen. quem* M. M. *voc. inde ad warrant', po. lo. suo* R. G. *&* R. S. *attornat' suos conjunctim & divisim versus* C. D. *de placito terræ.*

Ca. 10. 43. Ca. 1. 94.

And in these cases [it is convenient] to make two attornies at the least, and to give them an authority jointly and severally, that if one of them die before the recovery be suffered, the other may have power to do and dispatch it. [And recoveries may now be suffered by attorney in copyhold courts, 47 Geo. 3. c. 8. s. 2; and courts of ancient demesne, 59 Geo. 3. c. 80.] And these warrants of attorney for the suffering of recoveries are to be acknowledged and certified in the same manner as the conusances of fines acknowledged in the country are (63), save only that recognizances for [*read* the acknowledgment of,] warrants of attorney for recoveries may be taken by any judge of the court of Common Pleas or any serjeant-at-law without a *dedimus potestatum* (64). But if any others take it, they use to do it by a special *dedimus potestatum*, which is to command the commissioners therein named

Dedimus potestatem.

---

fore the summons *ad warrantizandum*, yet the recovery was held good on a writ of error.

(63) By rule of the court of C. B. Hil. 14 G. 3, an affidavit of the acknowledgment of every warrant of attorney for suffering a recovery is necessary, wherein the deposing party must swear that he knows the parties, that they duly signed the warrants on the day and year mentioned in the caption: that all the parties were, at the time of acknowledging, of full age and competent understanding; and if a feme covert is a party, that she was solely and separately examined apart from her husband, and freely and voluntarily consented to, and acknowledged her warrant of attorney; and that the parties respectively knew that the said warrants of attorney were intended for the suffering of a common recovery to pass his, her, or their estate.

(64) At common law a recovery could not be suffered by *de. po.* For the statute of *Carlisle*, 15 Ed. 2, first gave the *dedimus*. *T. Raym.* 71. *Sed. qu.* this, as the statute of *Carlisle* only extends to fines. *Cruise*, 79.

to come to such persons, and to take the names of their attorney or attornies in the suit, and to certify the same into the chancery under their seals such a day. And if there be any woman covert that is to make the conusance, it seems she is to be examined, as in the case of the conusance of a fine [separately and apart from her husband, so that her free assent may appear] (65). And when this is done, the recoveries may be suffered by the [parties by means of their] attornies without the personal appearance of the parties. And this is as good a recovery as the other which is suffered by the persons themselves appearing in court, but that it will require longer time for the perfection of it; for in this * case there must go forth a *summoneas ad warran'* which must have nine [now, by the 24 Geo. 2. c. 48. § 8. four] returns ere the recovery can be perfected, and by that time one of the parties may be dead, [and by his death the warrant of attorney would as to him be revoked, and the recovery be without authority, and voidable by writ of error] (66). And when the recovery is thus suffered by the parties in person or by their attornies, the same is to be entered by some one of the clerks of the court of Common Pleas upon the rolls of the same court, there to remain upon record. And herein there must go forth a writ of execution called an *habere facias seisinam*, which is sent to the sheriff of the county where the land doth lie, to put the recoveror in possession [*read* in the seisin] of the land; (except the recovery be of a reversion of land after a lease for years of it; in which case the reversion shall be in the recoverors by a claim without any writ, [and

Examination.

*P. 40.

Habere facias seisinam.

(65) The examination is now totally disused, according to *Pig.* 66; but it is otherwise according to the editor of the second edition of that book, feme coverts being examined by the serjeants at the bar when they come to suffer recoveries. See the case of *Stokes* v. *Oliver*, 5 *Mod.* 209, where feme covert vouchee was under age, and *appeared by attorney*, and the recovery reversed after she came of age; if she had vouched in person or by guardian, the recovery should not have been reversed (*for error*) after full age.

(66) Abridged to five returns by stat. 16 Car. 1, c. 6, § 10. And by the stat. 24 G. 2, c. 48, for the abbreviation of Mich. Term, § 8. Reciting, that before that act *all writs of summons* to warrant against the vouchers upon common recoveries had in writs of entry and writs of right of advowson, were made *for five* returns inclusive, for the more speedy perfecting recoveries, it is thereby enacted, that after Michaelmas 1752, all writs of summons to warrant upon the appearance of the tenant to every writ of entry and writ of right of advowson, shall and may be made and abridged *to four* returns inclusive. See 1 *Lev.* 130, *Winne* v. *Lloyd*, where the warrant of attorney was tested before the summons *ad warrandum*, and on a writ of error, the recovery held good.

till the recoveror has seisin no uses can arise from his estate. And he has not any estate till seisin is delivered; 1 *Co.* 94 b. 106 b.; *Str.* 1185; *Sir W. Jones*, 10; or till entry or claim is duly made.] And this writ the sheriff doth return [in matter of form] as executed according to the contents thereof, albeit in truth he never do any thing upon it. And after this all the same proceeding is to be exemplified by the clerk of the same court (67); [but the exemplification is merely for the purpose of facility in giving evidence of the recovery. It is not essential to the title or to the operation of the recovery.]

Co. 5. 41. 10. 37. 39. 3. 5. 6. 41. 42. Doct. & Stud. 41. 49. 50. stat. 13. Eliz. cap. 5. 23. ca. 3. 7 H. 8. cap. 4.

4. *The use, nature and operation of it.*

A recovery being matter of record, is much [*i. e.* so far] of the nature of a fine, and such a thing as whereof the law taketh notice; for it is now become a formal and orderly manner of assurance of lands, and one of the common assurances of the kingdom; or a common way and means to pass land from one to another (68); [or to bar dower, to operate by estoppel, and to bar intails, especially when there are ulterior interests beyond the estate tail.] And therefore if a tenant for life suffer such a recovery of his land, it is a forfeiture of his estate (69); [unless he has a remote remainder in tail; *Smith* v. *Clifford*, 1 *Term Rep. infra*; or he obtains the concurrence of the owner of a remote estate of inheritance. In *Pelham's case*, 1 *Co.* 14 b. the recovery was adjudged

Forfeiture.

(67) The learned author of the *Commentaries*, in 2 vol. p. 361, proposes several methods for shortening the process of a recovery, the most desirable of which seems to be: "to empower the tenant in tail to bar the estate tail by a *solemn deed*, "to be made in term time, and inrolled in some court of record." A deed so made with solemnity would obviate the doubt of the Ld. Keeper in 1 *Pr. Wms.* 91, whether a deed alone executed by *cestui que trust* in tail should bar the remainder-man, or even the issue in tail, in regard a deed might be made at a tavern, &c. but a recovery was a solemn act.

(68) With the consent of the parties, and is not to be compared to a judgment or proceeding in any other real action. "*Pigot*, who was as able a conveyancer as any man of the profession, has confounded himself and every body else that reads his book, by endeavouring to give reasons for and explain common recoveries." Per Ld. C. J. *Willes*, in *Martin on dem. Tregonwell* v. *Strahan and Harrison*, 1 *Wils.* pt. 1, p. 73; who adds, "He only said this to show, that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense." In *Portington's case*, 10 *Co.* 43, a. it is said, "In these days a common recovery appears to us to be a common conveyance and assurance of lands;" and supported by the judges; and the court of C. B. will amend mistakes in entering up recoveries. 5 *Co.* 45. *Pig.* 170. See fully as to the origin, nature, and use of a common recovery, *Pig.* 8. 2 *Bl. Com.* 117, 357. 1 *Burr.* 115. 1 *Wils. Rep.* pt. 1, p. 73.

(69) If alone; but where he suffers a recovery with voucher of the tenant in tail, the recovery will be good to bind the remainder-man. *Wiseman Gunning's Cro. Eliz.* 570. See 10 *Co.* 44.

a forfeiture, though the tenant for life had a remote remainder in tail. See 1 *Prest. Convey.* p. 111; *Com. Dig. Forfeiture*;] an use may be averred upon it [a recovery, when it operates by way of conveyance,] as well as upon a fine; and it may be avoided for covin as well as any other kind of conveyance [may be.] But it is of special use, and hath a special virtue to bar and bind estates in tail, and all the remainders and reversions thereupon (70), [and all conditional limitations, and conditions annexed, or collateral or subsequent to the estate tail, so far as they are derived out of the estate of the donor who created the intail; but it will not bar any estate, as a remainder or reversion, or charge or collateral interest, as a condition, &c. to which the estate of the donor of the intail was subject, nor a reversion or remainder in the crown, except the remainder be conveyed to the crown by fraud.] And because many of the inheritances of the kingdom do depend upon this assurance, and it is oft-times the greatest security purchasers have for their money; therefore it hath much favour from the law at this day. And therefore the law will not endure it shall be disputed against, for *communis error facit jus.* And hence it is that it shall not be avoided for small errors; for it is another rule of law, *consensus tollit errorem.* And if a recovery be suffered by a

Averment.

Covin.

(70) And the power of *suffering a common recovery* is a privilege *inseparably incident to an estate tail*, and cannot be restrained by *condition, limitation, custom, recognizance, statute or covenant.* The opinion, that a tenant in tail cannot be restrained from suffering a recovery, is not of late invention, but is well proved by ancient books. See 10 *Co.* 42, a. *Portington's case.* 1 *Burr.* 84. But the tenant in tail, in order to be entitled to such privilege, must be tenant in tail in *possession;* or he must have the concurrence of the prior freeholder, who claims under the same settlement; [too general] for although it is now fully settled and established that a tenant in tail may, if he pleases, either turn his estate into a *fee*, or *alienate* it for his own benefit, by duly suffering a common recovery; yet he must have a sufficient *estate* and *power* to qualify him to suffer such recovery. Per Lord *Mansfield*, 2 *Burr.* 1072, in *Goodtitle* v. *Duke of Chandos.* See fully in *Fearne's Essay*, 3d ed. 182, &c. But where a father settled lands upon his son in tail, and took a *bond* from him that he *should not dock the intail*, and the son brought a bill to be relieved against the bond, the bond was held good, and the bill dismissed with costs; for, *per curiam*, if the son had not agreed to give the bond, the father might have made the son only tenant for life, and though the alienation was not made by the son, but by his issue. *Freeman and Freeman*, 2 *Vern.* 233. 2 *Black. Rep.* 1230. In the arguments in *Sonday's case*, 9 *Rep.* 128, it is laid down, that the levying a fine within the stat. 4 H. 7, c. 24, and 32 H. 8, c. 36, to bar the issue, was of the number of those incidents to an estate in tail, which could not be restrained by condition. See *Fearne's Essay*, 3d ed. 184; but tenant in tail may be restrained from aliening by feoffment, or other act, which was tortious, and which would make a discontinuance, though he could not be restrained from aliening by fine and recovery. *Co. Lit.* 224, b. *Fearne*, 186.

tenant in tail, [under an estate tail in possession, reversion or remainder,] hereby he hath not only discontinued, [*omit* discontinued,] barred and destroyed the estate tail, and so defeated himself and his issues, the former owner of the land, and all the remainders (71) and reversions thereupon that should take place after the estate tail; whether they be in *esse* or contingent only, but also all former estates, leases and charges made by him in remainder or reversion (72); for as when the estate tail in possession is not barred by a recovery, the estates in reversion or remainder are not barred, for *quod non in magis propinquo non in magis remoto valebit*; [but a recovery may bar a more remote estate tail, and all remainders expectant thereupon, without affecting prior remainders. As where *A.* is tenant for life, remainder to *B.* for life or in tail, remainder to *A.* in tail, remainder over, and *A.* suffers a recovery, this recovery will bar the estate tail of *A.* and all remainders and reversions expectant thereon, but it will not bar the estate for life or intail in *B.*; and the owner of a contingent interest in tail cannot, by a common recovery, accomplish these objects;] so it is *e converso*, where the estate tail in possession is barred by the recovery, all the remainders and the reversions, conditions (73), charges, incumbrances and estates dependent upon it, are barred also (74), except it be * in some *P. 41.

Co. 1. 62. 25. Dect.&Stud. 49. 44 Ed. 3. 22.

(71) *A contingent remainder* may, possibly, be passed or transferred before the contingency happens, by a *common recovery*, wherein the person entitled to the contingent estate comes in as vouchee, agreeably to the opinion in *Pell's and Brown's case*, 2 *Cro.* 592, though Mr. *Pigot* makes a query upon it. *Fearne*, 289; who cites *Pig.* 132, but refers to *Wright* v. *Wright*, 1 *Ves.* 409. A recovery will bar a contingent remainder. Per *Ryder*, C. J. in *Barnard and Fenton* v. *Reason*, cited in 3 *Wils.* 245.

(72) See accordingly, and the reason, *Pig.* 118; but though a common recovery bars a contingent remainder, by destroying the particular precedent estate which supported it, yet it bars not an executory devise, and therefore an executory devise is said to be a perpetuity as far as it goes; that is to say, an estate unalienable, though all mankind join in the conveyance. *Per cur.* in *Scatterwood* v. *Edge*, 1 *Salk.* 229. It is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate, *out* of which, or *after* which it is limited. *Fearne*, 306, 3d ed. Nor a springing use. *Pig.* 127. If the remainder be in abeyance, a common recovery will bar it. 6 *Co.* 42, a. A term limited to commence on failure of issue, may be barred by a recovery. 1 *Lev.* 35. A power appendant and gross, is also barrable by a recovery; [and so is an executory devise after an estate tail, though not after an estate in fee.]

(73) It bars all *collateral conditions subsequent*, and limitations. For instances of which see *Fearne*, 3d ed. p. 314.

(74) Because the law considers the conveyance by common recovery in the nature of a *real action*, and the recoveror is in by *right*; but it *will not bar a mortgage*, because that is to be considered as a charge upon the estate, and cannot be defeated. Per Ld. *Hardwicke*, 1 *Atk.* 591. See further what interest shall be barred by a recovery or not, and how, in *Com. Dig. Estates*, (B. 27.) Tenant in tail mortgaged for years, and died without suf-

See post, 42. stat. 34 & 35. H. 8. c. 20. Com. Dig. Estate (B. 31.)

special cases where the remainder or reversion is in the king, [or expectant on the estate of the donor of the estate tail. But a more remote estate tail may be barred, although more immediate estates tail be left in full force; and a recovery afterwards duly suffered by the owner of such prior estate tail may bar his estate tail, and the subsequent remainders, including the fee acquired by the recovery.] And therefore if *A.* be tenant in tail, the remainder to *B.* in tail, the remainder to *C.* in fee, and *B.* or *C.* doth make a lease for years of the land, or grant a rent charge out of the land, or enter into a statute or the like, or grant the remainder or reversion upon condition; and after *A.* doth suffer a common recovery of the land, and after dieth without issue, in this case the recoveror shall hold the land discharged of all these estates and charges in remainder. But otherwise it is if *A.* himself make a lease, or enter into a statute, and then suffer a common recovery of the land, in this case this recovery doth not avoid but affirm the lease or charge; for whereas it was before avoidable by the issue in tail, or [*read* and void as against] him in remainder or reversion, now it is good against them all, and the recoveror also shall hold it charged and subject to the lease and charge of the tenant in tail; [for the estate derived from an estate tail shall be subject to all the estates, charges and interests, except conditions subsequent and collateral limitations, springing uses, &c. to which the estate tail was subject. As if tenant in tail make a settlement, and take back an estate for life, and afterwards suffer a recovery to these uses, this recovery will confirm the first settlement as far as other persons than the tenant for life are interested. So if he concur in a recovery with the tenant of the immediate freehold. The grounds are, the settlement operates as an effectual conveyance, and is good against all persons except the issue in tail and those in remainder and reversion, and they are barred by the recovery, when suffered.] This kind of assurance therefore is in some respects better than a fine, for a fine will bar the heir in tail, but not [by its own operation, or otherwise than by

fering a recovery, the mortgage not good. If he had suffered a recovery afterwards, it would have let in the mortgage. See *Bock* v. *Welsh*, 1st part, *Wils. Rep.* 276.

non-claim,] him that is in the remainder or reversion; but a recovery will bar them all (75).

West. Symb. ubi supra. Co. super Lit. 372.

5. *What shall be said a good common recovery. And who shall be barred and bound thereby, or not.*

In every good and binding common recovery, these things are requisite. 1. That there be a demandant, a tenant, and a vouchee, [generally, *i. e.* in most cases, a common vouchee or voucher over,] as the efficient causes thereof; for if either of these be wanting it is not a complete recovery. And therefore if a common recovery be had against the tenant in tail without a voucher, this [though good as a conveyance] is void [voidable as an assurance to bar the intail, and the reversions and remainders expectant on the estate tail. The recovery would for this purpose have been equally voidable, though the donee in tail had been a vouchee, instead of being tenant to the recovery; unless there was a voucher over, because without a voucher over, there cannot be any recompence in value for the issue, &c.] And for this it is to be known that such persons, and by such names, may be demandants, tenants and vouchees in recoveries, as may be cognisors and cognisees in fines. [Recoveries by Idiots, in Pig. 73.]

Infant.

[a] Benet's case. Hobart's Rep. 275. Pasc. 9. Jac. Earl of Newport's case adjudged.

[a] And therefore a recovery suffered by an infant [in person, or] appearing by his guardian, is good (76), and will bind him and all others (77). [But such recovery ought not to be suffered without a privy seal, except in pursuance of the provisions of the stat. of 7 Ann, c. 19, *viz.* when the infant is a trustee or mortgagee within that act. A recovery suffered by an infant by attorney, may be avoided by writ of error, since the error may be alleged without impeaching the record.]

Woman covert.

[b] Co. 10. 43. Plow. 515.

[b] So also a recovery had against a woman that hath a husband, being joined with her husband, will bind her and

(75) And in some respects worse, for it will let in prior incumbrances made by tenant in tail. 1 *Wils.* 276, which a fine would not. *Qu.*?

(76) By virtue of the king's special directions, signified to the justices by privy seal which being produced to the court of C. B. they direct a person of known abilities and integrity to be guardian, and on showing the reasons for suffering the recovery, and proving that it is for the infant's advantage, it is done in open court. *Pig.* 64. In p. 66, he says, this method of infants suffering recoveries by privy seal is seldom practised. See 3 *Atk.* 559, where the Chancellor at first thought there must be an application for a privy seal to enable an infant trustee to convey by recovery, but after directed without. *Ex parte Johnson.*

(77) As to recoveries suffered by *infants*, see *Pig.* 64. And further in *Vin. Abr. Recovery common*, (D.) *Com. Dig. Enfant*, (B. 2.) In what cases equity will decree *infant trustees* to join in a recovery, 1 *Pr. Wms.* 536. 3 *Atk.* 559. When the court will direct *trustees to preserve contingent remainders*, to join to suffer a recovery. See *Barnard and Large*, 1781. *Brown's Appendix*, 534.

As to the operation of a recovery, by letting in all the preceding incumbrances, and rendering valid all the preceding acts of the tenant in tail, see *Pig.* 120. *Cruise on Recoveries*, 159.

be had of a reversion, and that there is an estate for life in being of the land whereof the recovery is to be had (for an estate for years or any such like estate will not hinder the suffering of a recovery,) there the course is to get a conditional surrender from the tenant for life of his estate to him in reversion or remainder, to the end that he may be perfect tenant of the inheritance, [*read* freehold,] and then the writ of entry may be brought and the recovery had against him (82), [or this estate of freehold may be, and most commonly is, conveyed to some third person that he may be tenant of the freehold, and the tenant in tail generally, and most properly, joins in the conveyance; and this recovery will be good, though the freehold is defeated by the condition: hence the 100,000*l.* clause.

veries suffered, where the tenant to the *præcipe* is made by fine, see fully in *Lord Anglesey* v. *Lord Altham*, 1 *Salk.* 676, and the cases there in margin. S. C. more extensively reported in 11 *Mod.* 210. [This doctrine seems to argue strongly, that a recovery suffered on a tenancy to the writ of entry on a title depending on estoppel, will be binding, as if tenant in tail in remainder, after an estate for life suffer a recovery to the use of himself for life, in tail or in fee, and after the determination of the prior life estate, suffer another recovery on a tenancy of the freehold made by himself, without the concurrence of the tenant to the former writ of entry: in this case, however, it is the general practice, and certainly advisable to call for the concurrence of the tenant to the first writ of entry, or his heirs. See *Appendix*, for an examination of this point. If the conveyance, which makes a tenant to the writ of entry, be good to the whole extent, and the recovery is defective, from the circumstance of not comprising sufficient parcels, then unquestionably the tenant to the writ of entry, or his heirs, is a necessary party.]

(82) And though the tenant for life keeps the possession, yet the recovery will be good. *Pig.* 41. And such *surrender* by tenant for life shall be *presumed* on a recovery of forty years standing. 2 *Str.* 1129, 1267. See further 2 *Burr.* 1069, [except there are circumstances to rebut the presumption.] By the statute of 14 Geo. 2, c. 20, for amending the law of recoveries, it is enacted, that common recoveries suffered *without any surrender of leases for lives*, or without the concurrence, or any conveyance or assurance from any such lessees, or other persons claiming under them, in order to make good tenants to the writs of entry, or other writ whereupon such recoveries shall be suffered, shall be as effectual in law as if such lessees, or other persons claiming under them, had conveyed or joined in conveying a good estate of freehold to the tenants in such writs. [On this account it is advisable to name the tenant for life, as tenant or vouchee.] *Provided* the person or persons entitled to the first estate for life, or other greater estate (in case there be no such estate for life in being) in reversion or remainder, *next after the expiration of such leases*, shall convey or assure, or join in conveying or assuring an estate for life at the least, to the tenants in those writs. The act of 14th G. 2, c. 20, means to preserve the same negative to persons claiming under the family settlement, as they had before. Ld. *M.* 2 *Burr.* 1074. *By this act also* purchasers for a valuable consideration may, after twenty years from the time of their purchase, produce the deeds making tenants, &c. and declaring the uses of recoveries, as sufficient evidence of the recoveries, *in case no record of the recoveries can be found: provided* the persons making the deeds had sufficient estate and power. And by this act also common recoveries shall, after the expiration of twenty years from the time of suffering them, be deemed valid, if it appears upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had sufficient estate and power to do the same, *notwithstanding the deed or deeds for making the tenant to such writ should not appear.* For the operation of this statute, see 1 *Burr.* 115; [1 *Prest. Convey.* 1 *Prest. Abstr.* 80, 3 *ib.* 141.]

1 *Prest. Convey.* p. 480. Frequently it is advisable (as in case of powers annexed to estates for life, &c. and in questions arising on the existence of contingent remainders) to pass the freehold for a particular estate, only so as to keep a reversion, &c. continuing, to support the powers, and also the remainders if contingent. For instance, tenant for life, with power of leasing, jointuring, &c. should convey to the tenant to the *præcipe* for the joint lives of himself and the tenant, he will then have a reversion, and his powers will continue, and the condition usually added will restore him to the possession after the recovery is suffered. 1 *Prest. Convey.* p. 104. Again, where there is a tenant for life, and it is doubtful whether he is tenant in tail, or whether the limitations over give contingent interests to his children, he should convey the land to *A. B.* for the life of the grantor, to the use of himself, for the joint lives of himself and the grantor, remainder to *A. B.* and his assigns, in trust for the grantor and his assigns for life, and afterwards make a conveyance to the intended tenant. In this mode the freehold taken back by the grantor will enable him to make a tenant to the writ of entry, and the estate remaining in *A.* will support the contingent remainders, if any, and the doubt on the title will not be disclosed by the recovery deed. When there is a question whether a person is tenant for life only, or in tail, and there are not any contingent remainders to be preserved, then a demise should be made for years, to be a protection against forfeiture:] for if a writ of entry be brought against a stranger, [so that there is not a good tenant to the writ of entry,] and he vouch the tenant in tail in possession of the land, and so a recovery is had; or if there be tenant for life of land, the remainder or reversion to another in tail, or in fee, and a stranger doth bring a writ of entry against him in the remainder or reversion, or against a stranger who doth vouch him, and so a recovery is had; these recoveries are not good, [because the freehold was not in the person named as tenant in the writ of entry.] And yet if the writ be brought against the tenant of the land and a stranger that had nothing in the land together, and so a recovery be had, this recovery is good enough, [since the freehold is in one of them. *Et utile per*

inutile non vitiatur.] And if a disseisor make a gift in tail of the land to another, and the writ is brought against him [the donee in tail,] and he vouch the disseisee, [this however is not an essential circumstance, except to release his title,] and he vouch the common vouchee, this is a good recovery, [because he, donee in tail, had the freehold, and because he had the estate tail in possession, since tenant in tail in possession may bar the intail as tenant, without being vouched.] 5. That it be in such a case as is not prohibited by some statute law (83), for if the king [while king] give any of his own land whereof he is seised, or cause or procure another, in consideration of money or other land, to give the lands whereof he is seised, in tail to any of his subjects or servants in recompence of their service, or the like, [or the like, to be omitted] the remainder to the king in fee simple, or fee tail; such estates in tail [or the remainders expectant thereon] cannot [while the reversion or remainder is in the crown] be barred by a common recovery; [nor will a fine bar the intail:] And therefore, if such a tenant in tail [of the gift of the crown for services performed, and while the reversion shall remain in the crown] shall suffer a recovery of such land it is [although a good conveyance by the donee in tail as against himself] void; and it will neither bar the issues in tail, nor any of them in remainder, nor the king (84). But if the king make such a gift in tail keeping the reversion to himself, and after doth grant the reversion to another, in this case the tenant in tail may [after the alienation by the crown, and now the alienation must be by act of parliament,] suffer a recovery and bar the

Prerogative.

Stat. 34 H. 8. c. 20. Co. super Lit. 371. 251. 6. Co. 8. 77. 78.

(83) Or by some legal disability, as attainder. [An attainted person or alien may suffer a recovery. See 1 *Inst.* 2 *Wils.* 220. Even *Pigot* admits this in his *Treatise on Recoveries*, p. 73, 74. The case in *Wilson* is, that an attainted person may, after the crime committed, and before conviction, levy a fine, so as to bar an estate tail. 2 *Wils.* 220.] Or being an alien, &c. see *Pig.* 73. The disabling statute 11 H. 7, c. 20, as to recoveries by feme coverts of lands *ex provisione viri*: 33 H. 8, c. 31, as to recoveries by tenant for life without the consent of him in remainder or reversion: repealed by stat. 14 Eliz. c. 8, which makes further provision for avoiding recoveries suffered by tenant for life, without consent of remainder or reversioner and such others, *Pig.* 84. 34 & 35 H. 8, c. 20, as to recoveries of lands of the gift of the crown: and 14 Eliz. c. 8, as to recoveries by covin; are explained in order, and illustrated by cases and determinations under them respectively, in *Pig.* 75 to 96.

(84) See the cases of *Murray* v. *Eyton & Price*, *T. Raym.* 338, and *Neal* v. *Wilding*, 1 *Wils. Rep.* 275, and further *Com. Dig. Estates*, (B. 31.) *Vin. Abr. Recovery*, (A.) as to recovery before stat. 34 & 35 H. 8.

estate tail and the reversion also, [for the alienation by the crown is a dispensation, with the right of protecting the issue, and those in reversion or remainder.] And where a subject by the king's provision doth make such a gift in tail [for services performed,] and then doth grant the remainder to the king for life or years only, in this case the estate tail, remainders, * and reversion also may be barred by a common recovery, [saving the right of the king, unless the grant to him be by fraud.] So in other cases where a subject doth make a gift in tail, the remainder to the king in fee, this estate tail may be barred by a common recovery, [but by the common law, independently of the statute of 32 Hen. 8, c. 36, s. 4, no estate in the crown can be barred. These differences occur: 1st, The tenant in tail may bar his own issue: 2d, He may bar all remainders prior to the estate of the crown: 3d, He may bar the remainders, &c. after the estate of the crown, when the crown has an intermediate estate: 4th, And the crown may be barred, when the gift to the crown is by fraud on the power of alienation by the tenant in tail.] And therefore if there be tenant in tail, the remainder or reversion in fee to another, and he in remainder or reversion by deed indented and inrolled, doth [fraudulently] bargain and sell his remainder or reversion in fee to the king; or if one covenant to stand seised to divers uses in tail, the remainder to the king in fee, in these cases [and in the latter case, because the king cannot take this remainder, for want of blood, &c.] the estates and the reversion, and remainders depending thereupon, may be barred by a recovery. So if a man make a gift in tail, the remainder in fee, and he in the remainder doth grant his remainder to another for life, the remainder to the king in fee, on condition the estate shall be void upon the tender of 20*l.* in this case the estate tail, and the reversion also and condition thereupon, may be barred (85), [the ground of these cases is, either fraud, or that the intail was originally independent of and unconnected with the gift of the crown, and as the tenant in tail might have enlarged his estate tail into a fee simple prior to the gift to the crown, he cannot be deprived of his right by any subsequent alienation to the crown by the person who had the reversion or remainder

*P. 43.

(85) See accordingly, 2 *Co.* 52, a.

expectant on the estate tail.] So if the Duke of *Lancaster* had made a gift in tail, and the reversion had descended to the king, this estate tail [though not the reversion] might have been barred by a recovery. So if prince *H.* son of *H.* 7, had made a gift in tail, the remainder to *H.* 7, in fee, which remainder by the death of *H.* 7. had descended to *H.* 8, in this case the tenant in tail might have barred the estate tail [but not the reversion] by a recovery (86). And yet if the king [by gift for services performed, and while king,] make a gift in tail, the remainder in tail, or grant the reversion in tail, in these cases a common recovery may not be suffered to bar the intail, remainder or reversion; [but if the grant had been on any ordinary sale or gift, and not for services performed, then all the estates, except the reversion or remainder of the crown, might be barred by the recovery of the tenant in tail; a subject fully examined in 2 *Prest. Convey.* p. 144.] And if the husband for the advancement of his wife in jointure, and the preferment of the heirs of their two bodies, make an estate in tail to him and his wife and the heirs of their two bodies, [or make the wife tenant in tail in any other form, in favour of his issue,] and the wife after her husband's death alone by herself, or with any other husband [without the concurrence of the heir in tail] suffer a common recovery of the land whereof this estate is made, this recovery will not bar the estate tail. But if in this case the recovery be suffered by the heir in tail, [after the death of the father and mother, or after forfeiture, so that the intail is in the son and not in the mother,] or by the heir (87) and his mother together, [or by the husband and wife together; or if the heir in tail do in the lifetime of the mother express his consent to the recovery by deed inrolled, &c. or record, and this assent of the son must appear by the same record, as by *voucher aid. Prayer, Co. Litt.* 362,] it is a good recovery (88). And therefore if *A.* be seised of land in fee and he make a feoffment in fee, to the intent that the feoffee shall reconvey it to him and his wife and the

Stat. 11 H. 7. cap. 20. Co. 3. 58. 61. 59.

(86) See accordingly, *Co. Lit.* 372, b.

(87) But the heir must be a male; for if a daughter join, and after a son is born, he may enter. 3 *Co.* 61, b.

(88) By the exception or proviso in the statute 11 H. 7, c. 20. See fully on this subject in *Bac. Abr.* tit. *Discontinuance*, (D.)

heirs males of his body, and this is done accordingly, and they have issue a son, and she surrender, [a surrender would not qualify the heir in tail to suffer a recovery,] or make a forfeiture, and he enter [for the forfeiture] and suffer a recovery, this is a good recovery and bar to the estate tail: or if the writ be brought against the mother [being tenant in tail in possession,] and she vouch the heir in tail, [who thus testifies his assent,] and so a recovery is had, this recovery will bar the estate tail, [by virtue of the mother's recovery and the heir's assent.] And howsoever at the common law a recovery against a tenant for life with a voucher upon a lawful warranty and a recovery in value was a bar to him in remainder or reversion, [by virtue of the warranty,] and there was no remedy in this case, yet at this day it is otherwise (89), [by the statute law, unless the wife have the estate tail of the gift of her husband by his provision.] And therefore if tenant in tail after possibility of issue extinct, tenant by the curtesy, or any other tenant for life, do suffer their lands to be recovered from them by * covin and agreement, either as immediate tenants, or as vouchees upon feigned titles, without the assent, and to the prejudice of him in remainder or reversion; such recoveries are void, and will not bar the remainders or reversions, but are [by the same statute] forfeitures of the estates of such tenants for life (90). Insomuch that if tenant for life be made tenant in *fait* to the writ, or tenant in law upon the voucher, and so a recovery be had, as if tenant for life make a lease for years, and the lessee for years doth make a feoffment in fee, and the feoffee doth suffer a common recovery in which the tenant for life is vouched, and he vouched the common vouchee; these recoveries will not bind the reversions or remainders, [and if two tenants for life, having successive estates, &c. join in suffering a recovery, each will forfeit his life estate. In short, no one, except the owner, in estate or in title, of a *vested* estate tail, can bar reversions or remainders

Stat. 14 Eliz. c. 8. Co. 1. 15. 6. 10. 43. 45. 3 d.

*P. 44.

Forfeiture.

(89) See distinction between recovery suffered against tenant for life, upon the ground of its being suffered with his consent, or without; and its different operation in those cases as to remainder-men and reversioners. *Co. Lit.* 362, a. Further as to recovery against tenant for life. *Wils.* 274. *Pig.* 84.

(90) Tenant for life suffers a recovery, and afterwards reverses it by a writ of error, but the forfeiture still remains, *Skinn.* 74.

by a common recovery.] But there is no provision made at this day to preserve the reversion or remainder expectant upon an estate tail, nor to avoid a recovery of the tenant for life, where he in the next remainder [or reversion, in tail] is agreeing and assenting to it; [so if the owner of a remote estate in tail suffers a common recovery, with the concurrence of the freeholder, this recovery will bar the estate of tenant in tail and all the reversions, and remainders expectant thereon.] And therefore if there be tenant for life, the remainder to *A.* in tail, the remainder to *B.* in tail, &c. with divers remainders over, and the tenant for life doth suffer a common recovery, in which he doth vouch *A.* who doth vouch the common vouchee; in this case this is a good recovery and doth bar the estate tail, the remainders and reversion also (91), [and if the voucher had been of *B.* and not of *A.*, then the recovery would have left the estate tail of *A.* in operation, and would have enlarged the estate tail of *B.* into a fee simple, subject to be barred by a recovery, subsequently suffered by *B.* or his issue, and according to *Smith* v. *Clifford*, 1 *Term Rep.* 738, there cannot be any forfeiture, while according to *Pelham's case*, 1 *Rep.* 146, there may be a forfeiture.] And if one be seised of land in fee and have two sons, *A.* by his first wife, and *B.* and a daughter by his second wife, and he devise the land to his wife for her life, the remainder to *B.* his son in tail, and the reversion of the fee descend to *A.* and the writ of entry is brought against the tenant for life, and she vouch *B.* and he doth vouch the common vouchee, and so a recovery is had without the assent of the heir in reversion; this [by reason of the voucher of the tenant in tail and his voucher over] is a good recovery and a bar to all the estates in possession, remainder and reversion. And if a writ of entry be brought against the tenant for life, and he [the tenant for life] make default after default, and then the next in remainder in tail is received, or he [the tenant for life] pray in aid of him in reversion or remain-

(91) But see *Pig.* 27, where a recovery with *treble voucher* is recommended as preferable, wherein the tenant to the *præcipe* should vouch the tenant for life, who should vouch *A.* who should vouch the common vouchee. The practice seems to be for the tenant to the *præcipe* to vouch the tenant in tail, who vouches tenant for life, who vouches over the common vouchee.

der, and then they vouch over, and so a recovery is had; this is a good recovery and a bar to all the estates in remainder and reversion, [because there was a tenant to the writ of entry, and the tenant in tail was vouched and vouched over.] But if the writ of entry be brought against the tenant for life and him in the remainder in tail together, and they vouch the common vouchee, and so a recovery is had; this will be no good recovery to bar the estate tail (92), [since the tenant in tail has a remainder in tail, and he is named tenant and not vouchee. Had he been a vouchee, the intail and the remainders would have been barred. If the intail be discontinued or turned to a right of entry, in each of those cases also the owner of the intail must be vouched and vouch over, in order to bar the old intail and remainders, &c. and there may be an estate tail, and a right to another estate tail, and one may be barred, because the tenant in tail suffer the recovery as tenant and voucher over, while the other intail will not be barred, because to bar such intail the tenant or owner under the intail must be vouched and vouch over. By a voucher and voucher over both intails would be barred.] [a] And if spiritual persons, as bishops, deans, parsons and such like, suffer a recovery of their ecclesiastical lands, such a recovery is void [or voidable] and will not bind the successor, [for all alienations by them are restrained by the statute law, but it will be good against the incumbent during his time.] [b] But if it be not in some such prohibited case as before, and the recovery be had and suffered by and between such persons, and of such things, and in such a manner as aforesaid, in such cases, albeit there be in truth no warranty made upon which the voucher is had; and albeit there be nothing to be recovered in value (for that the vouchee hath no land to recover over in recompence,) and albeit that no execution be done in the * lifetime of the party against whom the recovery is had, [provided there be judgment in the lifetime of the parties. *Shelley's case*, 1 *Rep.* 93.] yet is the same regularly a perpetual bar to the parties against whom the same is had and their heirs, of all the estates they

[a] See before in fines, & Co. super Lit. 44.

[b] Plow. Manxel's case. Co. 10. 373. l. 94. Plow. 367.

*P. 45.

(92) Accordingly *Leech* v. *Cole*, *Cro. Eliz.* 670. and *Vin. Abr. Recovery*, (D.) See further as to the doctrine of a *joint præcipe*, *Pig.* 36.

have in fee simple, fee tail, or for life, in them, and against all them in remainder or reversion, and the remainders and reversions that are depending upon their estates, with this difference; the recovery with the single voucher [or even with a double voucher, so far as the owner of the intail is tenant to the writ,] doth not bar any estate but such as the tenant in tail hath in possession [*viz.* conferring the right to the immediate freehold,] at the time of the recovery had, so that if the tenant in tail be in any other estate, as by disseisin, [or by his own discontinuance,] or the conveyance of the disseisor, [or his own conveyance, &c.] or the like, this estate [tail] is not barred (93). But the recovery with the double voucher, [in which the owner under the intail is vouched and vouches over,] doth bind and bar all interests, estates and titles that the vouchee hath at the time of the entry into the warranty (94), [for the vouchee comes in of all estates which ever were in him, or in any of his ancestors under the intail. And when a person is tenant in tail in possession, by discontinuace or conveyance, and he is named tenant to the writ of entry and vouches over, he will bar the intail derived from the discontinuance or conveyance, without affecting any old or dormant intail which may be in him. Thus one intail may be barred and another remain in operation or exisence; so as such intail confers, or once conferred, a right to a vested estate tail; for a recovery by a donee, under a contingent interest, in tail, or by an expectant heir in tail, will not bar the issue or those in reversion or remainder; while a fine with proclamations by the owner of a contingent interest in tail, or by an expectant heir under an intail, may extinguish the intail, bar or bind it by estoppel.] All which is further illustrated by the examples following. [c] If the writ of entry be brought against the tenant in tail, and he vouch the common vouchee, and so a recovery is had; this recovery with a single voucher is a good recovery and a bar to the estate tail, if it be then in possession [*i. e.* confer a title to the immediate freehold,] and not put to a right [*viz.* discontinued

Co. 3. 59. Lit. Bro. Sect. 38. Plow. Manxel's case. 12 Ed. 4. 13. 13 Ed. 4. 2.

[c] Co. 3. 5 10. 37.

(93) See fully as to what estate shall be bound by common recovery, with single voucher. 4 *br.* (C.)

See accordingly *Bro. Abr. Taile*, 32. *Bac. Abr. Fines and Recoveries*, (C.) *Wils.*

or devested or changed into a remote estate by alienation, and if tenant in tail were by lease and release to convey to the use of himself and his heirs, it is apprehended the recovery would have the like effect; but this is a new and nice point, admitting of powerful arguments on each side,] and to all the remainders and reversions depending thereupon (95). [d] So if lands be given to *A.* in tail, the remainder to the right heirs of *B.* (*B.* being then living) [so that the remainder is in contingency, because *nemo est hæres viventis*, and consequently the donee of the remainder is not ascertainable,] and the writ of entry is brought against the tenant in tail, and he doth vouch over the common vouchee; this is a good recovery, and a bar to the estate tail and the remainder also, [for remainders are barred, whether they be vested or contingent.] But if the tenant in tail be disseised, and then suffer a recovery with a single voucher; or the disseisor make a new estate in tail to the tenant in tail, and then the tenant in tail doth suffer a recovery with a single voucher; or if the tenant in tail make a feoffment in fee of land, [operating by discontinuance,] and then take back a new estate to himself from the discontinuee in tail or in fee, and then doth suffer a common recovery with a single voucher; by this recovery the [original] intail is not barred, [for in neither of these instances is he seised of the freehold by force of the intail. The like conclusion arises if *A.* be tenant for life, remainder to *B.* for life, remainder to *A.* in tail, and a recovery is suffered by him as tenant, for he is seised of the freehold as tenant for life and not as tenant in tail. But if the seisin be not changed, such recovery may bar. The case of *Machel* and *Clarke*, 2 *Ld. Raym.* 778, is a very leading and important case, and deserves particular attention. If in that case the party had, by lease and release, instead of a covenant to stand seised, made a conveyance to the use of himself for life, &c. the uses would have arisen, and then the recovery with single voucher

[d] Co. l. 135. 136. 3 59. 11 E. 4. 19. 13 E. 4. Ca. 10. 45.

(95) If tenant in tail covenants to stand seised to the use of himself for life, with remainder to his sons in tail, and afterwards suffers a recovery (being himself tenant to the *præcipe*, and vouching over the common vouchee) to other uses in fee, the uses on the recovery will be good; for where tenant in tail covenants to stand seised to the use of himself for life, with remainder to his issue in tail, it is void, and will not alter the estate tail. *Com. Rep.* 119. 1 *Salk.* 619. *Farresl.* 18.

be had of a reversion, and that there is an estate for life in being of the land whereof the recovery is to be had (for an estate for years or any such like estate will not hinder the suffering of a recovery,) there the course is to get a conditional surrender from the tenant for life of his estate to him in reversion or remainder, to the end that he may be perfect tenant of the inheritance, [*read* freehold,] and then the writ of entry may be brought and the recovery had against him (82), [or this estate of freehold may be, and most commonly is, conveyed to some third person that he may be tenant of the freehold, and the tenant in tail generally, and most properly, joins in the conveyance; and this recovery will be good, though the freehold is defeated by the condition: hence the 100,000*l.* clause.

veries suffered, where the tenant to the *præcipe* is made by fine, see fully in *Lord Anglesey* v. *Lord Altham*, 1 *Salk.* 676, and the cases there in margin. S. C. more extensively reported in 11 *Mod.* 210. [This doctrine seems to argue strongly, that a recovery suffered on a tenancy to the writ of entry on a title depending on estoppel, will be binding, as if tenant in tail in remainder, after an estate for life suffer a recovery to the use of himself for life, in tail or in fee, and after the determination of the prior life estate, suffer another recovery on a tenancy of the freehold made by himself, without the concurrence of the tenant to the former writ of entry: in this case, however, it is the general practice, and certainly advisable to call for the concurrence of the tenant to the first writ of entry, or his heirs. See *Appendix*, for an examination of this point. If the conveyance, which makes a tenant to the writ of entry, be good to the whole extent, and the recovery is defective, from the circumstance of not comprising sufficient parcels, then unquestionably the tenant to the writ of entry, or his heirs, is a necessary party.]

(82) And though the tenant for life keeps the possession, yet the recovery will be good. *Pig.* 41. And such *surrender* by tenant for life shall be *presumed* on a recovery of forty years standing. 2 *Str.* 1129, 1267. See further 2 *Burr.* 1069, [except there are circumstances to rebut the presumption.] By the statute of 14 Geo. 2, c. 20, for amending the law of recoveries, it is enacted, that common recoveries suffered *without any surrender of leases for lives*, or without the concurrence, or any conveyance or assurance from any such lessees, or other persons claiming under them, in order to make good tenants to the writs of entry, or other writ whereupon such recoveries shall be suffered, shall be as effectual in law as if such lessees, or other persons claiming under them, had conveyed or joined in conveying a good estate of freehold to the tenants in such writs. [On this account it is advisable to name the tenant for life, as tenant or vouchee.] *Provided* the person or persons entitled to the first estate for life, or other greater estate (in case there be no such estate for life in being) in reversion or remainder, *next after the expiration of such leases*, shall convey or assure, or join in conveying or assuring an estate for life at the least, to the tenants in those writs. The act of 14th G. 2, c. 20, means to preserve the same negative to persons claiming under the family settlement, as they had before. Ld. *M.* 2 *Burr.* 1074. *By this act also* purchasers for a valuable consideration may, after twenty years from the time of their purchase, produce the deeds making tenants, &c. and declaring the uses of recoveries, as sufficient evidence of the recoveries, *in case no record of the recoveries can be found: provided* the persons making the deeds had sufficient estate and power. And by this act also common recoveries shall, after the expiration of twenty years from the time of suffering them, be deemed valid, if it appears upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had sufficient estate and power to suffer the same, *notwithstanding the deed or deeds for making the tenant to such writ should be lost, or not appear.* For the operation of this statute, see 1 *Burr.* 115; [1 *Prest. Convey.* 85, 162; 1 *Prest. Abstr.* 80, 3 *ib.* 141.]

1 *Prest. Convey.* p. 480. Frequently it is advisable (as in case of powers annexed to estates for life, &c. and in questions arising on the existence of contingent remainders) to pass the freehold for a particular estate, only so as to keep a reversion, &c. continuing, to support the powers, and also the remainders if contingent. For instance, tenant for life, with power of leasing, jointuring, &c. should convey to the tenant to the *præcipe* for the joint lives of himself and the tenant, he will then have a reversion, and his powers will continue, and the condition usually added will restore him to the possession after the recovery is suffered. 1 *Prest. Convey.* p. 104. Again, where there is a tenant for life, and it is doubtful whether he is tenant in tail, or whether the limitations over give contingent interests to his children, he should convey the land to *A. B.* for the life of the grantor, to the use of himself, for the joint lives of himself and the grantor, remainder to *A. B.* and his assigns, in trust for the grantor and his assigns for life, and afterwards make a conveyance to the intended tenant. In this mode the freehold taken back by the grantor will enable him to make a tenant to the writ of entry, and the estate remaining in *A.* will support the contingent remainders, if any, and the doubt on the title will not be disclosed by the recovery deed. When there is a question whether a person is tenant for life only, or in tail, and there are not any contingent remainders to be preserved, then a demise should be made for years, to be a protection against forfeiture:] for if a writ of entry be brought against a stranger, [so that there is not a good tenant to the writ of entry,] and he vouch the tenant in tail in possession of the land, and so a recovery is had; or if there be tenant for life of land, the remainder or reversion to another in tail, or in fee, and a stranger doth bring a writ of entry against him in the remainder or reversion, or against a stranger who doth vouch him, and so a recovery is had; these recoveries are not good, [because the freehold was not in the person named as tenant in the writ of entry.] And yet if the writ be brought against the tenant of the land and a stranger that had nothing in the land together, and so a recovery be had, this recovery is good enough, [since the freehold is in one of them. *Et utile per*

would not have barred the estate tail. The covenant to stand seised was, under the circumstances of the case, merely void (96).] But by a recovery with a double voucher in these cases, [so that the tenant in tail is vouched and vouches over,] the estate tail is barred. And therefore as where the tenant in tail doth levy a fine, make a feoffment, or bargain and sell the land by deed indented and inrolled, [as is the common and ordinary practice,] and the writ is brought against the conusee, feoffee or bargainee, and he doth vouch the tenant in tail, and he doth vouch the common vouchee; this doth bar the estate tail and the remainders and reversion depending thereupon: So if in these cases the conusee, feoffee or bargainee, doth make a new estate in tail to the conusor, feoffor or bargainor, or he disseise the conusee, feoffee or bargainee, and then levy a fine, make a feoffment or bargain, and sale to another against whom the writ of entry is brought, and he vouch the tenant in tail, and he doth vouch the common vouchee; by this recovery the first and second estate tail and all the remainders and reversions depending thereupon are barred. So if lands be given to *I. S.* and the heirs males of the body * of his wife engendered, [*read* heirs male of his body engendered on his wife, so that the intail may be in him; for a gift to a man and the heirs male of the body of his wife creates an intail in the heir as a purchaser. It is otherwise if the heirs are to be begotten by him on the body of his wife,] and he hath issue a son, and after his wife dieth, and he discontinue, and take an estate to him and the heirs females of the body of his second wife, and after discontinue again and take an estate to him and the heirs females of his own body, and after discontinue again, and the writ of entry is brought against the last discontinuee, and he doth vouch the tenant in tail, who doth enter into the warranty generally, and voucheth the common vouchee; this is a good recovery and a bar to all the estates in tail, [whether now vested, or once vested, and now existing in right only,] and the remainders and reversions also, [and the rights under

Co. 3. 5. Plow. in Manxel's case, 1. 8.

*P. 46.

(96) Because a recovery with single voucher bars only such estate whereof the tenant in tail was actually seised in law, and not in right only, at the time when the recovery was suffered. *Vin. Abr. Recovery*, (C.) *Pig.* 115.

the devested and discontinued reversions, remainders, &c.] And if *A.*, before the Statute of Uses, had been tenant in tail, and had made a feoffment in fee to *B.*, and he and *B.* had after, made a feoffment to *C.* to the use of *A.* and his wife and the heirs of their two bodies, and then she had died, and after *A.* had entered upon *C.* the feoffee, and made a feoffment to *W.* in fee, against whom *I. S.* had brought a writ of entry, and he had vouched *A.* the tenant in tail; this had been a good recovery and a bar to all the estates; [because, as vouchee,
Co. 3. 5. 6. 3a. he came in of all the estates tail.] And if lands be given to husband and wife and the heirs of the body of the husband, [so that the intail is in the husband alone] with remainders over to strangers, and the husband alone doth discontinue the whole land by fine, feoffment, or bargain and sale indented and inrolled, [with a fine as part of that assurance, for a bargain and sale alone would not create a discontinuance,] and the writ of entry is brought against the discontinuee and he doth vouch the husband alone without the wife, and the husband doth vouch the common vouchee, and so a recovery is had; this is a good recovery for the whole land [*viz.* the intirety,] and a bar to all the estates in tail, and remainder, and reversion; but not to the estate of the wife for her life after the husband's death. [In this instance the husband alone was tenant in tail of the intirety, subject only to a life estate in his wife; and had the freehold of the intirety partly in his own right, and partly in right of his wife. But if a man and a woman, not his wife, are seised to them and the heirs of the body of the man, and the man alone suffers a recovery with single voucher, this recovery, it is said, will be good only for a moiety of the lands. As to the other moiety, the recovery will be defective for want of a good tenant to the writ of entry. In the *Marquis of Winchester's case*, 3 *Coke*, 1, it was held this recovery was good, for one moiety, on the ground that the freehold of the man and his estate tail are parts of the same estate, and not several estates, connected in relation as an estate for life and a remainder. The cases of *Owen & Morgan*, 3 *Co.* 5 a., and also *Clithero* v. *Franklin*, 2 *Salk.* 568, are instances of recoveries with single voucher where the person who suffered the reco-

very had only a remainder in tail, and not an estate tail in possession. See 1 *Est.* p. 337. These cases depend on a distinction which pervades the learning on the power of the owner of an estate tail to bar the estate tail and remainders by recovery. The owner of an estate tail in possession, conferring the right to the freehold, may bar, merely by his voucher over in a recovery, to which he is the tenant; while the owner of an intail in remainder after an estate of freehold, or an intail devested or discontinued, must be a vouchee, and also vouch over.] But if lands be given to the husband and wife, and the heirs of their two bodies, [so that the husband and wife are seised in tail and by intireties] with remainders over to strangers, and the husband alone discontinue, and the recovery is suffered as in the last case; it seems this [recovery, by reason of the learning peculiar to tenancies by intireties] is no bar to the estates in tail or remainder, or reversion, for any part of the land. [See *Cruise on Recoveries*, p. 166, accordingly. This is, on account of the intirety of the tenancy of the husband and wife, and to protect her and the issue of the marriage, since at the common law, when fees were conditional, the husband alone could not in this case make any alienation which would be binding on his wife or her heirs; and it makes no difference in the case of an estate tail, whether the husband die in the lifetime of his wife, or survive her; 3 *Co. Rep.* 3: and yet under the same circumstances, a fine levied by the husband alone, either in the lifetime of the wife or after her death, would bar the estate tail, though it will not preclude the title of the wife or her general heirs. For a fine with proclamations by the husband alone would have barred the heirs in tail.] And yet if lands be given to *I. S.* and *I. D.* in tail, [not being husband and wife at the time,] and *I. S.* discontinue the whole, [the husband cannot discontinue more than a moiety, unless he be seised of the other moiety in right of his wife,] and the writ of entry is brought against the discontinuee; and he vouch *I. S.* alone; this is a good recovery for the one half of the land, and a bar to all the estates [in that moiety: and had the husband and wife been tenants in tail by moieties, or as joint-tenants, prior to the discontinuance, then the recovery would have been ineffectual for that moiety,

which the husband had no right to alien.] And if lands be given as before, to husband and wife and the heirs of their two bodies, [so that they are tenants for an estate tail in possession] and the writ of entry is brought against them both, and they vouch the common vouchee, or the husband alone doth discontinue, and the writ is brought against the discontinuee, and he vouch the husband and wife both, and they enter into the warranty and vouch the common vouchee, and so the recovery is had; these are good recoveries for the whole, and a bar to all the estates in tail, and to the estate of the woman, and to all other estates; [because, in the latter case, the husband and wife join in the voucher and alienation; and in each of these cases there is a good tenant to the writ of entry for the intirety.] Husband & wife.

Bro. 37. And where lands are given to a man and his wife, and the heirs of the body of the wife, [so that the estate tail is in her alone, and is united with and part of, and not distinct from, the freehold] or to the wife and the heirs of her body, and the writ of entry is brought against the husband and wife, and they vouch * the common vouchee; these are good recoveries, and will bar the husbands and wives, and the estates in tail, remainder, and reversion; [since there is a good tenant to the writ of entry, and since the wife has an immediate estate of freehold and inheritance, and she and her husband vouch over.] *P. 47.

Plow. 514. And where a man hath land in which his wife hath a jointure, or to which she will have title of dower after his death, if the writ of entry in this case be brought against them both, and they vouch the common vouchee, [or they be vouched, and whether they do or not vouch the common vouchee,] and so a recovery is had, this recovery will bar them both. [It may operate as a release, in bar to the title of dower, or a jointure rent-charge, if any, or as a conveyance of her life estate, if any.] But the husband alone without her cannot bar her of any such estate [rent, or title of dower] by a recovery, for she may falsify and avoid it after his death (97). And if lands be

(97) Tenant in tail cannot suffer a recovery without the concurrence of the jointress, where the lands are limited to her. *Taylor* v. *Horde*, 1 *Burr.* 116. See also 1 *Brown's Parl. Ca.* 69. If a recovery be suffered of the *wife's lands, by the husband and wife*, this is as effectual to bar the right of the wife *by the custom of London*, as a fine at common law. 1 *Rol. Abr.* 556.

given to husband and wife and the heirs of the body of the husband [as part of the same estate, so that he was sole tenant in tail,] and the writ of entry is brought against the husband alone, and he vouch the common vouchee, and so a recovery is had with a single voucher; this is no good recovery for any part of the land, nor bar to any of the estates, albeit the husband do survive the wife; [this is *vexata questio*, examined in 1 *Estates*, p. 337. The objection is, that the husband and wife were tenants by intireties, and that he alone was not seised of the freehold, or rather that he had not any power of aliening the freehold as against his wife (98). And yet if lands be given to two others, and the heirs of the body of one of them, [and by one connected limitation, so as to make the estate tail part of the estate of freehold,] the remainder over to a stranger, and the writ of entry is brought against one of them, [the person who has the intail,] and he vouch the common vouchee, and so a recovery is had; this is a good recovery and a bar to all the estates for the one half of the land; [and it is apprehended, that the recovery operates as a conveyance of a base fee in the other moiety, defeasible by the entry or claim of the heir intail.] If lands be given to *A.* in tail, the remainder to *B.* in tail, the remainder to *C.* in tail, the remainder to *D.* in fee, and *A.* doth make a feoffment in fee, [being a discontinuance of the tail, &c.] and the writ of entry is brought against the feoffee, and he doth vouch *B.* (being him in the second remainder in tail) to warranty, and he doth vouch the common vouchee; this is a good recovery and a bar to the second estate tail and all the remainders and reversion depending thereupon, and yet it is no bar of the first estate tail which *A.* hath. [Nor will this recovery preclude the right of *A.* or his issue, when they have the freehold to suffer a common recovery and bar the fee acquired by the former recovery.] If the writ of entry be brought against a mortgagee, and he doth [or doth not] vouch the

Co. 3. 5. 1. 12 Ed. 4. 14.

Co. 3. 6.

Curia Mic. 18 Jac. B. R.

(98) Because at the time of the recovery there were no moieties between him and his wife, and the remainder depends upon the entire estate, and the husband was not seised by force of the tail, and *præcipe* brought against him only. See *Vin. Abr. Recovery*, (D 2.) *Pig.* 70. See further as to recoveries suffered by baron and feme of the wife's lands, or where they are jointly seised for life, or in tail. *Com. Dig. Baron and Feme*, (G 2.) *Ca. Temp. Tal.* 164. *Comyns Rep.* 565.

So was it held by most of the judges in the case between Pell and Brown.

common vouchee, and so a recovery is had; this is no good recovery to bar or bind the mortgagor, but that he may enter upon the condition broken [performed] (99). [It is not the proper province of a common recovery to bar any estate or interest except intails, and remainders and reversions expectant thereon, and collateral interests. A recovery by a tenant in fee, whose estate is subject to a limitation over by executory devise or shifting use, will not, as will appear by subsequent parts of the text, bar the executory interest. But a common recovery by a tenant in tail, with a limitation over, by way of executory or shifting use, would bar the intail and the executory devise or shifting use, as a collateral or subsequent interest. And a voucher of the person who has the future executory interest, would operate by way of release or extinguishment, to bar that interest; unless perhaps it be an interest in tail.] So, if one give lands to *B.* and his heirs, so long as *C.* shall have heirs of his body; [for this is a determinable fee, and not an estate tail; 2 *Cruise*, 248; *Fearne*, 314; 1 *Est.* p. 432,] and *B.* doth suffer a common recovery, and vouch the common vouchee; this is no good recovery, to bar the donor of the possibility [of reverter], for in both these cases he that is to be barred hath no remainder or reversion, but an interest or possibility which cannot receive a recompence in value. [The true reason is, the recovery is not suffered by a tenant in tail. So a recovery will not bar a charge on the estate tail, thus a recovery suffered by the tenant in tail, who holds his estate tail subject to a rent created by himself, or reserved to the donor, will not bar this charge; *White* v. *West*, *Cro. Eliz.* 792; *Salk.* 571; 2 *Lev.* 30; *Cruise on Recoveries*, 248.] But, if in these cases the mortgagee vouch to warranty the mortgagor, or *B.* the donee vouch the donor, and so they vouch over the common vouchee, and so the recovery is had; these will be good recoveries to bar both them and their heirs for ever [on account of their concurrence in the recovery.] And if one have an estate in fee simple determinable on a limitation or a condition, [such a limitation in a deed, to take effect

(99) A mortgagee cannot suffer a recovery, so as to bar the mortgagor, if he is not a party; but if he is a party, the recovery will be good. *Cro. Jac.* 592. *Palm.* 135. *Ante*, 39, note 5, as to recovery where the estate is in mortgage.

by the rules of the common law, is void. It is good only in a will or a conveyance to uses, or a declaration of trust,] as if lands be given [by will] to *A.* and his heirs until *B.* pay to him 100*l.*, and then that it shall remain to *B.* and his heirs, and *A.* in this case doth suffer a common recovery and vouch the common vouchee; it seems [indeed it is clear] this is no bar to *B.* and his heirs, but that upon payment of the 100*l.* he shall have the land. [But if the limitation to the first taker had created an estate tail, then his recovery would have barred the limitations over; for a recovery by tenant in tail bars all remainders and reversions after and expectant on an estate tail, and all conditions and all collateral limitations annexed thereto; *Benson* v. *Hudson*, 1 *Mod.* 108; *Page & Hayward*, 2 *Salk.* 570; *Driver* v. *Edgar*, *Cowp.* 379; 1 *Prest. Convey.* p. 11; 1 *Abstr.* 397. But where the estate tail was evidently only a security for money, the court of Chancery decreed the tenant in tail, who had acquired the fee by suffering a common recovery to be merely a trustee for those in remainder, subject to the charge for raising the money.]

*P. 48. So if * one by his will devise his land thus, I give unto *A.* my son, and his heirs for ever my land in *W.*, paying 20*l.* to *B.* when *A.* shall come to twenty-one years of age, and then that *A.* and his heirs shall have it for ever; and if *A.* shall die without heirs of his body, *C.* being then living, that then *C.* shall have it to him and his heirs for ever, and *A.* pay the 20*l.* to *B.* at his full age, and then suffer a recovery of the land, this is no bar to *C.* of his estate [or interest, for *B.* had a fee determinable by executory devise, and not an estate tail.] But here it must be noted, that in Co. 3. 8. the cases before, where it is said that a recovery is void, it is meant as to the heirs [in tail] and them in reversion and remainder, for as to the parties themselves [and their general heirs] that do suffer the recovery, the same is for the most part good, and doth bind them by way of estoppel and conclusion, [*i. e.* by way of release or extinguishment of their interest, or by *conveyance*] (100). [And when-

(100) By the stat. 21 Jac. 1, c. 26, persons levying fines, or suffering recoveries in the name of any other person not privy or consenting to the same, are guilty of felony without benefit of clergy. Vide *Noy.* 99. *Hubert's case*, *Cro. Eliz.* 531. *Day* v. *Hungate*, *Rol. Rep.* 112.

ever the ancestor is bound by estoppel, his general heirs will also be bound; but the heirs in tail are not bound by estoppel, unless perhaps in the single instance of an estoppel precluding the vesting of a contingent remainder in tail. Whether the person claiming under the uses of a recovery, and who has the freehold under the estoppel, created by the recovery, can make a good tenant to the *præcipe*, for suffering another recovery, is a point fully examined in the Appendix.] And it must be noted also that a stranger, that hath right to the land at the time of the recovery suffered, is not barred at all by the recovery or by his laches of *non-claim*, &c. as in the case of a fine; [but he may eventually be barred by the Statutes of Limitation, or by non-claim on a fine.]

Stat. 7. H. 8. cap. 4. Dyer, 31. Co. super Lit. 104.

6. *The remedy of recoverors against the lessees for rents and services and upon waste done.*

The recoverors in common recoveries, their heirs and assigns, [and their *cestuique* uses,] shall [notwithstanding the fiction of law has disaffirmed the tenancy, the privity of estate, &c. so that the recoveror was not the assignee of the lessor, reversioner, &c.] have [by the statute law] the like remedy against lessees for lives or years of the land recovered, their executors or assigns, by distress, avowry or action of debt, for the rents and services reserved upon their leases that shall be due after the same recoveries had; and also like actions for waste done after the recovery had; and like remedy upon a disturbance in a presentation to an advowson, and in like manner and form as the lessor should or might have had if the same recoveries had never been had, albeit the same lessees do never attorn to the same recoverors. And if a man make a lease for years, to begin at Michaelmas, reserving rent, and before Michaelmas he [the lessor] suffer a recovery, in this case the recoveror shall distrain for this rent, [when it becomes due,] which the lessor before the recovery could not distrain for (1), [*viz.* although the lessor had not, at the time of suffering the recovery, any present right of distress.] But if the recovery had not been had, he [the lessor] might have distrained. [And this is the ground on which the recoveror may distrain; for the recoveror and his *cestui que* use are

(1) See accordingly *totidem verbis*, *Pig.* 155.

substituted in the place of the lessor, as to all present and future rights; in short, the recoveror, &c. is his assignee.]

7. Where a recovery may be avoided; or not; and by whom; and how. [Pigot 176.]

A recovery may be defeated, frustrated and avoided (which is called the falsifying (2) of a recovery,) in part, or in all, for many causes; as for that there is some gross and substantial error in the manner of the proceeding; but a recovery is not avoidable for false or incongruous Latin, rasure, interlining, mis-entering of any warrant of attorney, mis-returning or not returning of the sheriff, or other want of form in words and not in matter of substance, because it is done by the consent of the parties. Or it may be avoided, [by the heirs in tail, and persons in reversion or remainder,] for that he against whom the writ of entry is brought is not tenant of the freehold by right or wrong at the time of the writ brought; as when the writ is brought against a stranger that hath nothing in the land, and he doth vouch the tenant in tail in possession of the land. [But if the recovery be suffered by a person who has an estate in fee, the recovery cannot be avoided on this account; for it will be a good recovery by way of conveyance, or, as the books term it, by way of estoppel or conclusion. So it will be good against the tenant in tail personally. So if tenant in tail in remainder is tenant to the writ of entry; or if the issue in tail are vouched in the lifetime of their father; but if the issue in tail are vouched after the death of the tenant in tail, although the issue are bound by the fine of the father, it is the prevailing opinion that this recovery will bar all remainders and reversions expectant on the estate tail.] Or a recovery may be avoided, [as between persons not parties to the recovery, or their heirs,] for that he that hath the estate and [*read* or] the right, is neither party nor privy to the recovery, as when the writ of entry is brought against a disseisor, and he vouch a stranger that hath nothing in the land, or a recovery is had against * the husband alone of the land whereunto his wife hath title of dower, [for neither the disseisee or the wife will be bound.] Or a recovery may be avoided [in part,]

Stat. 23 El. cap. 3. Co. 5. 40. 21 H. 8. cap. 15. Co. super Lit. 46. 104. Co. 3. 78. Dyer, 249. Co 3. 4. 1. 62. Plow. 515.

Fauxifier de recovery.

*P. 49.

(2) See the title "*Falsifying Recoveries*," in *Vin. Ab.* which comprehends very diffuse learning on this head, under the great variety of sub-divisions contained in it. And also *Cruise on Recoveries*, 2 ed. c. 14, p. 288.

for that another hath some estate in the thing whereof the recovery is had at the time of the recovery suffered, [or because an estate, &c. is a charge on the estate of the person by whom the recovery is suffered,] as when there is a recovery had of land whereof there is a lease or estate for years, by statute, *elegit*, [or some estate of freehold inheritance, &c. in another not bound by the recovery,] or the like. These persons may avoid the effect of the recovery as against themselves, or more properly speaking, are not affected by it.] Or it may be avoided, for that the recovery is had by covin, as when it is suffered by tenant for life to disinherit him in reversion (3), or when it is gotten by some undue practice and sinister dealing (4); for in this case it is sometimes made void by a *vacat* or sentence of a court. [Equity interposes in these cases, though courts of law have a concurrent jurisdiction in all cases of fraud.] And where a recovery is avoidable or reversable for any of these or such other like causes, it must be avoided by him whom it doth concern, that is [would otherwise be] barred and bound by the same recovery, [and] that should have had the land if the same recovery had not been, and not by any other whom it doth not concern. As if an erroneous recovery be suffered by tenant in tail, in this case his issues, [inheritable to the intail,] or if they fail, the next in remainder or reversion shall defeat it (5). So also if the land be recovered against a stranger, the tenant in tail shall avoid it; and if the land be recovered against a disseisor, the disseisee shall avoid it; and if the land be recovered against him in reversion or remainder, the tenant for years by statute or *elegit* [having charges on his estate, or anterior to it,] shall avoid it; but in these last cases they shall falsify and avoid it during their particular estates only (6). So also the wife [when her title is to dower, or an estate for life,] shall

(3) This is a forfeiture by the statute 32 H. 8, 31 & 14 Eliz.; and the reversioner or remainder-man may enter for the forfeiture. *Co. Lit.* 362, a.

(4) By 21 Jac. 1, c. 26, persons levying fines or suffering recoveries in the name of any other person not privy or consenting to the same, are guilty of felony without benefit of clergy. See note 100, *ante*, p. 48.

(5) As to the right of a remainder-man to reverse a recovery erroneously suffered, and the manner of doing so, see 1 *Burr.* 416.

(6) By stat. 21 H. 8, c. 15. See 2 *Ld. Raym.* 785, in *Smith and Angell. Pig.* 164. How lessee for years must proceed to falsify a recovery, see 2 *Inst.* 322.

falsify the recovery suffered by her husband alone, as to her title of dower [or other estate] only, and no longer and further. And he in the reversion or remainder shall falsify and avoid the recovery suffered by the tenant for life, either in the lifetime of the tenant, [on the ground of forfeiture,] or afterwards, [in right of his reversion or remainder.] But neither he in reversion or remainder, or any one by or under him, or any other, can falsify a recovery [duly] suffered by the tenant in tail in possession, [reversion or remainder, or having the right of intail by force of an estate once vested,] except it be for some such cause as before, [*viz.* the want of a good tenant to the writ of entry, or a proper voucher, or formal proceedings, as an original writ duly returnable, and the existence of proper *actores fabulæ*, while the proceedings are depending.] And the recoveror himself cannot falsify a recovery (7), [for he is bound by estoppel; nor his general heirs, as distinguished from his heirs in tail.] So neither can a guardian (8), [in his own name, and in his own right;] nor a tenant of a manor; as if one hold land of a manor, and a stranger recover the manor by a feigned title, a tenant of the manor cannot falsify this recovery, [and thus deny the right of the recoveror to the rents, services, &c.] And in all these cases where a recovery is avoidable and a man hath power given him to falsify, he must do the same sometimes by writ of error, as in the case of an erroneous proceeding (9); and sometimes by pleading and the setting forth of the special matter, as in the case where the tenant is not tenant of the freehold, or when the recovery is had by covin against the tenant for life, or the like; and sometimes by the showing and setting forth of the practice to the court, and a motion made that a *vacat* may be made upon the judgment, for the causes alleged (10); [and in some cases the party

(7) Where it is said to be a rule, that a party to a recovery shall not falsify, it must be understood with these exceptions:—1st. If the party can show the recovery was void in law; 2dly, if the recovery was of lands in *D.* and they lie in *C.*; or 3dly, if the recovery was on a writ that is abated. *Pig.* 162. 2 *Cro.* 466.

(8) As to reversal of a common recovery by an infant for nonage, see 1 *Mod.* 49, and the numerous references in the margin of that book.

(9) When costs shall be allowed on a writ of error on a recovery, see *Winn* v. *Lloyd*, 30, and 136.

rther by whom and in what manner a recovery may be avoided. *Cruise Rec.*

having the right may enter, &c. as if no recovery had been suffered, and show the nullity of the recovery. And the writ of error, to avoid the recovery, must be brought within twenty years, by 10 & 11 W. 3, c. 14. The lord only, and not the issue in tail, &c. may reverse a recovery suffered in the Court of Common Pleas, of lands in *ancient demesne*, so far as the error or disceit is in suffering the recovery in that Court.]

And thus having done with the common assurances that are made * by matter of record, we come to the common assurances that are made by matter of *fait*, viz. by deeds and instruments of writing in the country; wherein we must stay a while upon the learning of deeds in general, and from thence we shall descend to the particular kinds of deeds (11). *P. 50.

CHAP. IV.

Of a Deed.

Terms of the law. Co. super Lit. 35.

A DEED is a writing or instrument, [*read* a contract,] written on paper, [vellum,] or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed. [A deed cannot be written on wood, a tally, &c.; and an instrument to which a seal has been affixed by mistake, will not be deemed a deed, but a mere agreement; *Clements* v. *Gunhouse*, 5 *Esp.* 83.] 1. A deed. Quid.

Terms of the law. Co. super Lit. 229. 143. 38 H. 6. 25.

All deeds are either indented, or poll. The deed indented (which is that which is called an indenture) is when the paper or parchment is cut and indented. [And to some, though a few instruments only, as a bargain and sale under the Statute of Inrolments, and under the Bankrupt Statutes, and to appointments in exercise of powers which require the ceremonies of a deed indented, an 2. Quotuplex. Indenture. Deed poll.

Com. Dig. Recovery, (B. 6.) *Bac. Abr. Fines and Recoveries*, (D.) *Pig.* 156. *Bro. Abr.* tit. *Fauxifer de Recovery*. *Vin. Abr. Recovery*, (A a.)

(11) A fine, recovery, and deed to lead the uses, are all together but one conveyance, though they have several operations. *Pig.* 26. [1 *Prest. Convey.* p. 11.] For the doctrine concerning declaring the uses of a recovery, see the books referred to at the end of the chapter on Fines, and also the case of *Stapilton and Stapilton*, 1 *Atk.* 2. [2 *Prest. Convey.* p. 4–71

created, as the first grant of a rent, common, way, &c. estate tail, for life, years, &c. And some of them are conveying, *i. e.* such by which estates, properties and the like, being already created, are conveyed [or restored] to others, as feoffments, bargains and sales, grants over or assignments, surrenders, [releases,] and the like. [A surrender is a species of release.] Those that are of the last sort, are such as do describe and testify some precedent contract for a duty or fact, to be paid, performed or done, released or discharged; of which sort are all acquittances, releases, and other such like matters of discharge.

Note. But here, by the way, two things are to be observed: 1. That there may be, and are, divers other kinds of deeds besides those which are named before; for every agreement put in writing, sealed and delivered, becometh a deed. And attornments, exchanges, surrenders, partitions, authorities, commissions, licences, revocations, and the like, are usually made, given, done and granted by deed; [or rather by an instrument having the forms and ceremonies of a deed. These instruments are not deeds, but instruments sealed and delivered, or *quasi* deeds.] And there are divers other instruments concerning merchants and other affairs; if therefore any of these be done by deed, such a deed is for the most part subject to the rules of deeds herein laid down. 2. Albeit that feoffments, gifts, bargains, [not being bargains and sales to be inrolled,] leases, attornments, exchanges, surrenders, and such like things, may in divers cases be as well made and done without as with a deed; yet if a man will make his claim to any thing given or granted by such feoffment, gift, &c. by deed, the deed must be such a deed as is a good and perfect deed by the rules hereinafter laid down; [namely, if the instrument be pleaded as a deed, and on production it does not appear to be a deed, the party who pleads the instrument will fail, though the instrument would have been effectual for the object, if it had been duly pleaded.]

See West. Symb. 1 part.

*P. 52. 3. *The parts of a deed.* * In every deed or writing there are two parts considerable [to be considered;] 1. the external or material part, *i. e.* the parchment or paper, wax and writing, [sealing and delivery;]

Co. super Lit. 6. 229. a. 3.

2. the internal or intellectual part, *i. e.* the [contract, *viz.*] sense, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers deeds, as feoffments, grants, leases and the like, there are certain formal or orderly parts, [and some of them are, and some of which are not, essential parts,] which make up the whole, of which the law doth take special notice; as, 1. The premises, the office whereof is to rightly set down the name of the feoffor, grantor, lessor, &c. feoffee, grantee, lessee, &c. [and their additions or descriptions, so as to identify them,] and to comprehend the certainty of the thing granted or leased. And herein in some deeds there is also a recital of some things, and in some deeds an exception of some part of the thing granted before by the deed. 2. The *habendum*, [which is a formal, and not an essential part of a deed; 2 *Prest. Convey.* p. 439.] the office whereof is to name again the feoffee, lessee, &c. [though this is form, and not substance, if the grantee be named as grantee in the prior part of the deed;] and to set forth what estate he shall have, and for what time he shall hold the thing given or granted; [2 *Prest. Convey.* p. 467.] 3. There is set down and expressed [when necessary] upon what terms and conditions the estate of [*read* in] the thing granted, shall be held. And therefore, there is sometimes contained therein a *tenendum*, to set forth by what tenure the grantee shall hold the land granted (14). [Before the statute of *Quia emptores* this clause was more generally used to express whether the lands were to be held of the grantor or of the superior lord. In reference to this object the clause became useless when that statute took away the power of subinfeudation.] 4. A reservation or *reddendum*, to set forth by what rent he shall hold the land. 5. A condition. 6. A warranty. 7. Covenants. 8. The conclusion after this manner, *In cujus rei testimonium, &c.* wherein is set forth the date of the deed, [in deeds poll the date is set forth in this clause, but in indentures it is generally set forth in the *exor-*

(14) The *tenendum* is now of very little use, being only inserted by custom: it was formerly used to signify the tenure by which the estate granted was to be holden, viz. *tenendum per servitium militare, in burgagio, in libero socagio, &c.*; but all these being reduced by the statute 12 Car. 2, c. 24, into free and common socage, the tenure is now never specified.

dium clause of this indenture made, &c.] containing the day, month and year, and the style of the king or year of our Lord, [unless accomplished, as is usual in indentures, in the title of the deed.] And all these are sometimes contained under the premises and the *habendum* (15).

4. *The nature of a deed indented, and a deed poll, with the difference that is between them.*

All the parts of a deed indented, in judgment of law, do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party. And albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they do more properly belong to him: for every word that is doubtful shall be applied and expounded to be spoken by him to whom they will best agree, according to the intent of the parties; and they shall not be taken more strongly against one, or beneficially for the other, as the words of a deed poll shall. † If therefore *A.* by indenture enfeoff *B.* upon condition, and then doth enter for the condition broken; in this case it hath been held, that *A.* in his pleading may show forth the deed that he himself sealed, and that this is sufficient. And therefore also it is thought, that an indenture made in the first person is as good in law as an indenture made in the third person, when both parties * have to this [deed] put their seals; for if in an indenture made in the third person, or in the first person, mention be made that the grantor only hath put his seal, and not the grantee, then is the indenture only the deed of the grantor; but when mention is made that the grantee also hath put his seal to the indenture, it shall be said to be the deed of them both (16), [and where in the clause of grant, the name of the grantor was omitted, the court supplied it by construction, 2 *Prest. Convey.* p. 380.]

Plow. 134. 38 H. 6. 24, 25. Lit. Sect 370. 9 H. 6. 35. 35 H. 6. 34.

† 11 H. 7. 22. per Brian.

*P. 53.

Lit. Sect. 373.

And although both parts of the indenture are

Finche's law, 109.

(15) See more fully as to the parts of a deed, *Wood's Inst.* 224. *Noy's Max.* 54. 2 *Bl. Com.* 298. 1 *Wood*, 236.

(16) The indenture in the third person is the most sure, because it is most commonly used. *Co. Lit.* 229, b. And where a deed is made between two parties, and one of them doth seal and deliver his part, and the other doth not, yet the deed so sealed and delivered is *good to charge the person sealing and delivering it.* *Cro. Eliz.* 212.

but as one deed, yet the part of the grantor is as the principal, and the other is not but a counter-part. And therefore if the lessor only seal, and not the lessee, yet it is as good [to bind him] as if both had sealed, [and frequently a grantee may be bound by acceptance, as an estoppel, 1 *Inst.* 143 a;] and if there be any difference between the parts, the counter-part shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk.

Plow. 484. 421. This [indented] deed is the strongest kind of deed of the two; for this worketh an estoppel, *i. e.* doth bar and conclude either party, [his heirs, &c. and all persons claiming under or through him, except heirs in tail; and even the issue in tail, when there is a fine with proclamations,] to say or except any thing against any thing contained in it. For if a lease be by indenture, both parties are concluded to say, that the lessor had nothing in the land at the time of the lease made; so that if the lessor happen to have the land after by purchase or descent, [or the lands vest in him under a contingent or executory interest,] the lessee may [during the term] enter upon him by way of conclusion, [and covenant will lie against a lessee accepting the lease; and a rent reserved on a deed poll granting a fee, &c. or an estate for life or years, must be paid. The acceptance binds the grantee, lessee, &c. *Sullivan's Lect. ch.* 10, p. 100; and *Appendix*, 1 *Inst.* 143 a,] and the lessee by estoppel shall be forced to pay his rent; [but if the indenture operate to any extent to pass an interest, it shall not operate by estoppel, 1 *Inst.* 47; 2 *Prest. Abst.* 216. A fine *sur concessit* for years will also create an estoppel, *Weale and Lower, Pollexf.* 55.] But it is otherwise of a deed poll; for this is commonly but of one part, which is sealed by the feoffor, lessor, &c. only. And this shall be expounded to be the sole deed of the feoffor, lessor, &c. and the words therein contained shall be said to be his words, and shall bind him only, and be expounded altogether in advantage of the feoffee, lessee, &c. and against the feoffor, lessor, &c. and this [deed poll] doth not work any estoppel against either party (17), [nor

Estoppel.

(17) *Sed quære* as to the *feoffor* and *lessor*. In *Co. Lit.* 47, b. it is said, if the lease be made by deed indented, then are both parties concluded; but if it be by deed poll, the *lessee* shall not be estopped to say that the lessor had nothing at the time of the lease made,

will any estoppel be created on an indenture, when the deed operates to any extent to pass an estate in point of interest. There is a difference between an estoppel in evidence, and an estoppel in point of estate. A deed poll cannot create an estoppel in point of estate; but if a deed poll of *A.* recite that *A.* by bond did, &c. *A.* cannot say there is not any such bond.] But if a deed be indented or poll, and there be therein reciprocal covenants between them from one to another, albeit there be but one part, yet if each of them seal it and deliver it the one to the other, this is good for [*read* binding on] both parties; and each of them, that can get the deed into his hand to show or plead, [or can by modern practice and in particular cases, as in the instance of lost deeds, or deeds in the hands of the opposite party, plead the deed without profert,] may take advantage thereof against the other. And in this case the deed is usually kept by one indifferent between them both.

Trin. 38 El. Co. B. per Curiam. Co. super Lit. 143.

5. *When and where a deed shall be said to be good and sufficient. And when and where not, but void or voidable, ab initio.*

Note here first of all, that some deeds are void from the beginning, and do never take effect; and amongst these some are absolutely void against all persons, and some are void only to some purposes, and against some persons. Some also that are not void from the beginning are, notwithstanding, voidable, and that sometimes by the party himself that made them, or any others, and sometimes by others, and not by himself. And some deeds are good in their first creation and well made at the first, but become void by some matter *ex post facto* (18). [But though there be two persons of the same name, the deed will not be void on that account for uncertainty; but under the rule, that *certum est quod certum reddi potest*, the certainty of the person may be averred and proved. But if the evidence fail in ascertaining the grantee, then the deed is void for uncertainty. *Thomas* v. *Thomas*, 6 *Term. Rep.* 676.] And this may be

See grant, infra.

whereby it seems to be implied that the *lessor* shall be estopped. In *Bacon's Abr.* tit. *Leases*, &c. (O.) p. 442, this point is discussed; and it is there said, "it should seem that a lease by *deed poll* binds the lessor himself as much as if it were by *indenture*, because it is executed on his part with the same solemnity, and therefore it should seem he is bound by such lease by way of estoppel." And then it proceeds to mention, that it is generally said that estoppels ought to be mutual.

(18) And some that at the time of making are voidable, may be made good by some after act, as if *feoffment by husband and wife of wife's land rendering rent, the husband dies, wife accepts the rent*, this shall bind her. 2 *Brownl.* 141. *Cro. Eliz.* 749.

either by an extra-judicial act, as rasure, or the like, or by a judicial * act, *i. e.* when by the sentence of a court a deed is damned and made void, which is called a vacat of the deed.

*P. 54.

A vacat of a deed.

Co. super Lit. 225. 35. 36. Co. 2. 4. 5.

To the making of every good deed containing any agreement, these things are requisite. 1. Writing: *i. e.* That it be written in parchment, [vellum] or paper; and that the agreement be legally and formally [or at least effectually] set down, and be sufficient in law for the composition and frame of the words. And this is called the legal part; the judgment whereof belongeth to the judges of the law [and not to a jury. Thus the facts of infancy, idiocy, &c. are to be tried by the jury. The conclusion of law respecting the ability of infants is to be resolved by the court.] 2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that all these be set down by sufficient names (19). 3. Reading: *i. e.* That if it be an illiterate man that is to seal the deed, and he desire to hear it read, that it be truly read, or the contents thereof truly declared to him. 4. Sealing: *i. e.* That the deed so written, be sealed by the party or some other by his appointment, for a further testimony of his consent thereunto. [It now rarely happens that the party seals the deed, the seal is generally affixed by the persons professionally employed, and the party recognises the seal to be his seal; indeed his delivery of the instrument would, without any other ceremony, be a recognition. It seems essential only that the instrument should be sealed, without regarding by whom the seal is affixed, so as it be affixed with the intention to give to the instrument the character and effect of a deed.] 5. Delivery: *i. e.* That the deed so written and sealed be delivered by the party or some other by his appointment as his deed. And these last things being matters of fact are to be tried by jurors. 6. That the ground, foundation, end, and purpose of making the deed be good and not against the law. Otherwise in most of these cases the deed is void *ab initio*. Also in some cases to perfect the contract, and make the conveyance of the thing, intended to be passed thereby, good; some

Things requisite to make a deed good.

Perk. sect. 149. 137.

See infra.

See infra.

Perk. sect. 137. &c.

See infra.

(19) What is a sufficient name or description of the parties to a deed, see *Bac. Abr. Grant*, (C.)

other ceremonies or complements, are requisite, as inrolment, livery of seisin, attornment; otherwise the deed, in part at least, becometh fruitless and vain. For a deed may be void, either for that the writing is not in parchment [vellum] or paper; or being so, is not legally and formally drawn; or being so, there doth want a person able to give, or make, or capable to have, or take, or a thing to be contracted for; or if so, [*viz.* perfect in these particulars,] for that it is not duly sealed and delivered; or if so, for that it is not truly read, [or rather is read falsely to a blind or illiterate person] at the time of the sealing and delivery; or if so, for that it is made void by some special law, as being made upon an usurious contract, by duress, or the like, [or against the policy of the law. As a grant to take effect in case the grantee should commit murder, or as an estate of freehold to commence *in futuro*, in a grant at the common law; 1 *Estates*, p. 216.] Or it may at least in part lose its force afterwards by neglect of inrolment, livery of seisin, or attornment, in cases where these things are requisite, [or it may till duly stamped, and certain penalties are paid, be inadmissible in evidence. In bargains and sales, the freehold passes before inrolment; subject, however, to be considered, as if it had never passed, unless there be inrolment in due time. The like observation applied to grants when attornment was essential to the validity of the grant. But no estate passes by a charter of feoffment, as such, until there be livery of seisin for livery of seisin is the essential act. Also, in deeds of bargain and sale under powers, authorities, &c. to which an inrolment may be requisite, no estate will pass till inrolment; *Hawkins* v. *Kemp*, 3 *East*, 410.]

1. *In respect of the writing of it.*

Every deed well made must be written; *i. e.* the agreement must be all written before the sealing and delivery of it, [or as part of the same transaction, and as a cotemporaneous act, or at latest, while the deed is *in fieri*;] for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed; *Powell* v. *Duff*, 3 *Camp.* 181. But see *Tesciera* v. *Evans*, *infra*, p. 69, and 1 *Anstr.* 228.]

Perk. Sect. 118. Co. super Lit. 171.

2. This writing must be in paper [vellum] or

Co. super Lit. B. 122.

parchment; for if an agreement be written on a piece of wood, linen, the bark of a tree, a stone, or the like, and this be sealed and delivered; this
[b] Co. 2. 3. is no good deed (20). But it may be written in * any language, or in any hand. And therefore it *P. 55. is held that a deed written in French or Latin, and in text, court, or roman hand, is as good as a deed
[c] Perk. Sect. 133. written in English and in a secretary hand. [c] And albeit the writing be beside the lines, or the lines be written crooked, yet this [irregularity] will not hurt the
[d] Perk. Sect. 155. Co. Super. Lit. 225. deed. [d] And if there be any alteration, rasure, or interlining made in any part of the deed before the delivery of it; this [act] will not hurt the deed. But in such cases it is policy to make a *memorandum* of it upon the back of the deed, and to give the witnesses notice of it; for otherwise if it be in any place material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and especially if it be in a deed poll [or an indenture, and there be not several parts, so that one part may authenticate and support the other part,] the deed is greatly suspicious. [A deed of thirty years standing, produced from the proper custody, with an accompanying possession according to the deed, proves its own execution; or, more properly speaking, proof of possession, according to the deed, proves the execution of thedeed itself: but if there be any blemish in the deed, by rasure or interlineation, proof of the execution of the deed, or of the deed and hand-writing of the witness, must,
3] Co. super Lit. 225. if circumstances will admit, be given.] 3. The matter written, must be legal [*viz.* sufficient in law] and orderly for manner and matter; *i. e.* There must be words sufficient to set forth the agreement and bind the parties; for a deed may be void and lose its virtue in all, or part, for repugnancy, incertainty, and divers other matters: (whereof, see in
Fitz. Fait. and feoffments, 5. Dyer 6. exposition of deeds, *infra.*) But it is not material whether the deed be in the first or in the third person, so as the words be aptly applied. For if a deed poll be in the third person, *viz. quod presens scriptum testatur, &c. quod idem* A. *dedit & tradidit,*

(20) Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities, for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. A deed must have the regular stamps imposed on it by the several statutes for that purpose, *otherwise it cannot be given in evidence.* 2 *Bl. Com.* 297.

&c. Or an obligation be in the third person, *viz. Md. quod I. S. debet I. D.* 20*l. &c.* these are good deeds notwithstanding the statute of 38 *E.* 3. *c.* 4. which is meant only of obligations made beyond the seas. So if the words of a deed indented, run in the first person, it is as good as if it were in the third person. Neither is it necessary that the English or Latin, whereby it is made, be true and congruous; for false and incongruous Latin or English, seldom or never hurteth a deed; for the rules are, *falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.* Neither is it necessary that every deed have all the parts of a deed before set down, as premises, *habendum, &c.* for a deed may be good without *habendum*, warranty, reservation, or covenant; [for these are formal and orderly parts only, and not essential parts of the deed; 2 *Prest. Convey.* p. 439; and sometimes the *habendum* may be rejected as repugnant to the premises; *Jermyn* v. *Orchard*, *Show. Par. Ca.* 199.] And a deed is good, albeit these words in the close thereof, *in cujus rei testimonium sigillum meum apposui*, be omitted; and albeit there be no mention made in the same [deed] that the deed was sealed and delivered; so as in truth it be duly sealed and delivered, and the sealing and delivery can be proved. Also a deed is good, albeit it mention no time or place of date or making, or have a false date, *i. e.* be dated at one time and delivered at another; and albeit it have an impossible date, as the 30th of *February*, or the like, for anciently until the time of *E.* 2. and *E.* 3. the deeds had no date; because the law was then held to be, that if a deed were dated before the time of memory, it was not pleadable, except it were of record, but it might have been given in evidence. But he that doth plead such a deed without any date, or with such an impossible date, must set forth the time when it was delivered (21), [and support the averment by proof; so a deed may be pleaded and proved as bearing date, &c. but first delivered, &c. and thus show that the deed supports the title. In deeds, made in exercise of powers, stipulating for attestation, there must be an attestation of the facts to be attested.]

Co. 5. 121. 10. 133. See Oblig. Numb. 3.

Co. super Lit. 6.

Co. 2. 5. Dyer 19. Kelw. 70.

Co. 2. 5. 5. 117. Dyer 28. Perk. Sect. 120. Co. super Lit. 6.

(21) See accordingly *Dodson* v. *Kayes*, *Yelv.* 193. If two deeds bear date the same day, and are manifestly but one agreement, that shall be presumed to be executed first, which shall the clear intent of the parties. *Taylor* v. *Horde*, 1 *Burr.* 106. [2 *Prest. Convey.* 24. 237.]

Co. 11. 73. Plow. 556. Perk. Sect. 1. 119. See Grant. infra. Numb. 4. Feoffment infra. Numb. 12.

*P. 56.

2. *In respect of the persons parties thereunto & matter therein.*

* The second thing required in every well made deed is, that the person making it be able to give, grant, make, or do the thing contained in it; that the person to whom it is made be capable of the thing to be given, granted, made or done thereby; for if it be made by, or to any such persons as are disabled, as infants, aliens, women covert (22), persons attainted of treason or felony, idiots, and such like, it will be void in all or part, [or may become void by disagreement, &c. at a period when there is a person competent to disagree, &c. *Primâ facie*, grants to aliens, infants, &c. are good; but the crown may claim the benefit of the grant to the alien, and grants by aliens are good as against themselves, though voidable by the crown. A grant to an attainted person enures to the benefit of the crown. A grant by a person between conviction and attainder is good, subject to any forfeiture which may have been incurred. A grant after attainder is good, except as against the title by forfeiture, as distinguished from a title by escheat; *sed query*. In *Zouch* v. *Parsons*, 3 *Burr.* 1794, it was decided that a lease and release by an infant trustee was voidable only, and not void. That decision has not been followed, nor can it be safely relied on] (23). But any person natural, male or female, or politic, as sole corporations, or corporations aggregate of many, ecclesiastical or temporal, not disabled by law, may give or take by deed. Also there must be some matter, whereabout the contract may be conversant. It is therefore said, that in every grant there must be grantor, grantee, and a thing to be granted, and in every obligation an obligor, obligee, and thing to which the obligor is bound; and so of feoffments and other deeds.

Co. 2. 9. 11. 27. 14 H. 8. 26.

3. *In respect of the reading of it.*

The third thing required in every well made deed is, that if the party that is to seal it be a blind or an illiterate man, and desire to hear it read, that it be so [*viz.* read;] for if such a man be to

(22) See *Goodright*, on dem. of *Eliz. Carter*, v. *Straphan and others*, *Cowp.* 201, and *Dougl.* 54. Re-delivery by *feme* (of a deed delivered by baron and her during coverture) after death of baron, is good without re-execution or re-attestation, and circumstances alone may be equivalent to such a re-delivery.

(23) *Or voidable*; for deeds executed by infants are sometimes void, and sometimes voidable. See *Perk.* § 12. *Co. Lit.* 2, b. 380, b. *Ante*, p. 7, note 1. *Bac. Abr. Grant*, (A. 3.) *Com. Dig. Enfant*, (C. 2, 3.) But deeds by femes covert are said to be always void. 3 *Burr.* 1805. *Co. Lit.* 42, b. 13th edit. note 4. See further as to deeds by or to the several persons mentioned in the text. 2 *Bl. Com.* 290. *Vin. Abr. Faits*, (F. a.) *Grants*, (H. a. 12.) 2 *Atk.* 398.

seal a deed, and he desire to hear it, or to hear the contents of it read or declared to him first, and it be not done, and he afterwards seal and deliver it, this is no good deed. [This conclusion is doubtful, since the grantor was not deceived.] So, if upon or without any such request made by him that is to seal and deliver it [the deed,] the party himself to whom it is made, or a stranger, shall read the deed, or declare the contents thereof, falsely and otherwise than in truth it is, the deed will be void, at least for so much as is so misread or misdeclared. But if the party himself that is to seal and deliver it, before the sealing and delivery thereof, cause another that is a stranger covinously to read it, or to declare the contents thereof falsely to him, and otherwise than it is, of purpose to make the deed void, this will not hurt the deed; [for the party shall not take advantage of any act of which he is the author. In short, this is a fraud committed by himself on himself. The maxims are, 1st. *Qui vult decipi decipiatur*; 2d. No man can take advantage of his own wrong; 3d. The fraud of the grantor, shall not be available to the prejudice of the grantee.] So if the party that is to seal the deed, can read himself and doth not, or being an illiterate or a blind man, doth not require to hear the deed read, or the contents thereof declared, in these cases albeit the deed be contrary to his mind, yet it is good and unavoidable [at law. On this subject, read *Manser's case*, 2 *Co. Rep.* 3. But equity may correct mistakes, frauds, &c.]

4. In respect of the sealing of it.

The fourth thing required in every well made deed [*read* in every deed] is, that it be sealed: [for a seal is essential to a deed, while signing is not; since no writing without a seal can be a deed; even under the Statute of Frauds and Perjuries, signing is not necessary to the validity of a deed. Signing is often requisite to the valid exercise of powers, &c.; and if the deed exercising the power be required to be attested, the facts of signing, &c. must be attested. 3 *Prest. Abst.* p. 61.] But this sealing of deeds in times past was not used; for the Saxons used only to subscribe their names, and to add the sign of the cross, and to set down a great number of witnesses (24). And afterwards the Normans brought

Terms of the law. Fait. Co. super Lit. 225. Co. 2. 4. 5. Perk. Sect. 129.

(24) And the statute 29 Car. 2. c. 3. revives the Saxon custom of *signing*, and expressly directs it in all grants of lands; and many other species of deeds; *in which therefore signing*

in with them the sealing of deeds, but by degrees; for first the kings and a few of the nobility used it, and to seal with their seals of arms; afterwards all the nobility used it, and then the gentlemen; and about the time of E. 3, all men began to use sealing of deeds, which hath been continued ever since; so that now it is of necessity, insomuch that if a deed be never so well written before, and
Perk. Sect. 130. 131. 134. delivered afterwards, yet if it be * not sealed between the writing and delivery, it is not a good deed. [This proposition is too general: it would at this day be sufficient that there was a seal to the deed at the time of its actual or constructive delivery; and that the party, in terms or by conduct, recognized this seal as his seal. That the seal was affixed prior to engrossment would not vitiate the deed.] But if a stranger seal it by the allowance or commandment precedent, or agreement subsequent, of him that is to seal it, before the delivery of it, it is as well as if the party to the deed did seal it himself. And therefore if another man seal a deed of mine, and I take it up after it is sealed, and [do] deliver it as my deed; this is said to be a good agreement to, and allowance of
Perk. Sect. 130. 131. 132. the sealing, and so a good deed. And if the party seal the deed with any seal besides his own, or with a stick, or any such like thing which doth make a print, it is good; [for sealing is *cera sigillo impressa.*] And although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse. And if there be twenty
Perk. Sect. 134. to seal one deed, and they seal all upon one piece of wax and with one seal, yet if they make distinct and several prints; this is a very sufficient sealing, and the deed is good enough (25). [In general there must be a distinct seal for each distinct person, who is to grant, &c.; yet a deed with one seal, executed by one of two partners in the presence of the other with his consent, and as their act, was allowed to be the deed of both partners. *Ball* v. *Dunsterville*, 4 *T. Rep.* 313. 3 *Prest. Abstr.*

*P. 57.

---

seems now to be as necessary as sealing, though it has been held sometimes that the one includes the other. 2 *Bl. Com.* 306. [This seems to be a mistake; for it is apprehended the statute is applicable only to mere agreements, not to deeds: this will appear very clear from the words of the statute.]

(25) See further as to the sealing of deeds, *Com. Dig. Fait* (A. 2). *Roll. Abr. Fait* (H).

62 & 70. But in *Harrison* v. *Sykes and another*, 7 *T. Rep.* 207, one partner in the absence of the other, and without his authority, executed the deed for both partners; and it was ruled that one partner, as such, could not bind the other *by deed.*]

5. In respect of the delivery of it, and what shall be said a good delivery, or not.

1. In respect of the person that doth make it.

The fifth thing required in every well made deed is, that there be a delivery of it. And for this it must be known, that delivery is either actual; *i. e.* by doing something and saying nothing; or else verbal, *i. e.* by saying something and doing nothing; or it may be by both. And either of these may make a good delivery, and a perfect deed. But by one or both of these [means] it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent; for *omnis ratihabitio mandato æquiparatur.* And when it is delivered by another that hath a good authority, and doth pursue it, it is as good a deed as if it were delivered by the party himself; but if he do not pursue his authority, then it is otherwise. And therefore if a deed, or the contents thereof, be read or declared to a man that is to seal it, and he (being illiterate) doth deliver it to a stranger, and bid him examine it; and if it be so as it was read to him, then to deliver it as his deed, otherwise to redeliver it to him again that made it; in this case if the deed be, in truth, otherwise than it was read, and yet notwithstanding he, to whom it was delivered, doth deliver it to him, to whom it is made, this delivery shall not avail, neither is the deed by this delivery become a good deed (26). [For as the authority to deliver depends on extraneous evidence, the like evidence may be adduced to show that the authority was not pursued.]

Co. 2. 4. 5. Perk. Sect. 137. 9 H. 6. 37.

Perk. Sect. 137. 9 H. 6. 37. Co. 11. 28. 3. 35. 47 E. 3. 3.

2. In respect of him to whom it is made.

And so also a deed may be delivered to the party himself to whom it is made, or to any other, by sufficient authority from him; or it may be delivered to any stranger for, and in the behalf, and

Dyer. 167. Perk. Sect. 137. 8 H. 26. Co. super Lit. 36. 3. 26. 5. 119. 10 H. 6. 26. 13 H. 4. 8.

t shall be deemed a good delivery, see *Vin. Abr. Fait* (I). *Com. Dig. Fait* (A. 3.)

to the use of him to whom it is made, without authority [by letter of attorney. Where one person delivers an instrument as the act of another person, who is present, no deed conferring an authority is requisite. But a person cannot, unless authorized by *deed*, execute an instrument as the act of a person who is absent, and every letter of attorney must be by deed. Hence the distinction, that though an infant may make livery of seisin in person, *Co. Lit.* 52 a. yet livery of seisin by an attorney, appointed by a writing sealed and delivered by the infant, is actually void. The ground of this distinction is, that an attorney cannot be appointed without deed; and an infant cannot, in point of law, make a deed. *Zouch* v. *Parsons*, 3 *Burr.* 1794, falsifies that proposition; but the decision in that case will not bear the ordeal of a minute investigation of principle or decided cases. But if it [the deed] be delivered * to a stranger without any such declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery. And yet if an obligation be made to the use of a third person expressed by the deed, and the obligor deliver it to him to whose use it is made; this is said to be a good delivery. [When an instrument is delivered to a stranger, and nothing is said at the time of delivery, no inference of intent arises merely from the act of delivery. But if the delivery be to the party, this act raises the presumption, that the instrument is to become the deed of the party.] And albeit it be delivered before or after the day of the date of it, yet it is good enough; but if it be delivered before it be sealed, it is nothing worth (27). And where it is delivered before the date, yet in the pleading of it, it must not be so set forth. [It may be pleaded generally as bearing date, but either party may show and prove the time of delivery; hence under a power to make leases in possession, a lease to hold from the first day of next February, is *primâ facie* void; but it may be established by proving that the lease was executed after the 1st of February, or perhaps

[3 Prest. Abstr. 70.]

*P. 58.

Dyer, 192.

Co. 2. 4. Plow. 492.

3. *In respect of the time.*

(27) A deed takes effect by the delivery, and it is not material whether the delivery be before, or after, the date; if it is delivered before the date, and one of the parties dies before the date, yet the deed is good; for though the party is estopped to plead the deed to be delivered before the date, yet the jury may say the truth. 2 *Co.* 4 *b.*

on the 1st February. So of feoffments and grants, which import to grant an estate of freehold, to commence *in futuro*, may be good under similar evidence. 1 *Prest. Estates*, 217.]

4. In respect of the manner and order of delivery.

If I have sealed my deed, and after I deliver it to him to whom it is made, or to some other by his appointment, and say nothing, this is a good delivery; so if I take the deed in my hand, and use these or the like words: "here take it," or "this will serve," or "I deliver this as my deed," or "I deliver it to you," these are good deliveries. So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of seisin of the land; this is a good delivery [of the deed, and also of seisin; for though the deed was delivered in the name of seisin, the circumstances of the case also show that it was delivered as the deed of the party, since the deed was to be the principal evidence of the transaction.] So if the deed be sealed and lying in a window, or on a table, and I use these or the like words, "there it is, take it as my deed;" this is a good delivery, and doth perfect the deed; for as a deed may be delivered by words, without deeds [*viz.* facts,] so may it also be delivered by deeds [*viz.* in fact] without words (28). But if a man seal and acknowledge before a mayor, or other officer appointed for that purpose, a writing provided for a statute, or a recognizance, this acknowledgment before such an officer shall not amount to a delivery of the deed, so as to make it a good obligation, if it happen not to be a good statute or recognizance (29).

Co. 9. 137. Dyer, 192. 167. Co. super Lit. 36. 49. 35. Ass. pl. 6.

Adjudged, Trin. 37. El. B. R.

As an Escrow. Quid.

The delivery of a deed [*read* writing] as an escrow, is said to be where one doth make and seal a deed [*read* writing,] and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed [*viz.*

19 H. 8. Kelw. 88. 14 H. 8. 22. 18 H. 6. 42. Perk. Sect. 140. 141. 142. 138. 143. 144. Fits.

---

(28) But if a man throws a writing on a table and says nothing, and the party takes it, this does not amount to a delivery, unless it be found to have been put there with intent to be delivered to the party. *Ow.* 95. 1 *Leon.* 140. And if a patron draws a presentation in writing, and puts his seal to it, and leaves it in his study, and the party for whom it is, gets it without the privity or licence of the patron, and brings it to the bishop, and is thereupon instituted and inducted, yet it is all void. *Yelv.* 7.

(29) Debt may be brought upon a statute staple, or merchant; for the words "*obligari et teneri*" make it an obligation, although it be not a statute to some intent; and by delivery of the party it is an obligation, but not a statute, until the mayor's hand be put to it. *Cro. Eliz.* 356.

Feoffments & Fait. 4. 13. 15. 4 Co. 9. 137. super Lit. 48. 36.

writing or grant] is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made (30). The words therefore that are used in the delivery must be after this manner: I deliver this [writing] to you as an escrow, [namely, *scriptum*, a mere writing; thus negativing the application of the terms to a perfect deed;] to deliver [it] to the party as my deed, upon condition that he do deliver to you 20 *l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this, as an escrow to you, to keep until such a day, &c. upon condition that if before this day he to whom the escrow is made shall pay to me 10 *l.* or give to me a horse, or infeoff me of the manor of Dale, or perform any other condition, that then you shall deliver this escrow to him as my deed. For if, when I shall deliver the deed to the stranger, I shall use these * or the like words: I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions: or, I deliver this to you as my deed, to deliver to him to whom it is made when he comes to London; in these cases the deed doth take effect presently, [because the party hath made the writing his deed by the mode of delivery; for as he has delivered the writing as his deed, the writing shall have that effect,] and the party is not bound to perform any of the conditions, [and its operation cannot be defeated or suspended by reason of the conditions; but equity will relieve if the conditions be not performed.] So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself to whom it is made, as an escrow, upon certain conditions, &c. in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and, [in reference to the legal operation of the deed,] the party is not bound to perform

*P. 59.

(30) See accordingly *Whyddon's case*, Cro. Eliz. 520. *Ibid*, 835, 884.

the conditions; for, *in traditionibus chartarum, non quod dictum, sed quod factum est inspicitur.* [At this day, the jury would be directed to draw their conclusion from all the circumstances.] [a] But in the first cases before, where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it and laid it by me, and not delivered it at all; and therefore in that case, albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good; [and equity has, in some cases, adopted this rule as to deeds of voluntary gift retained by the grantor, though duly executed. *Naldred* v. *Gilham*, 1 *P. W.* 577. *Biron* v. *Blagrave*, *Ambl.* 264.] [b] But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were [had been] delivered immediately to the party to whom it is made, [c] and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not, at the time of making thereof, disabled to make it. He therefore that is trusted with the keeping and delivery of such a writing, ought not to deliver it before the conditions be performed; [but though the conditions are performed, there must, if the original delivery so required, be a second delivery to give effect to the instrument;] and when the conditions be performed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect before he hath delivered it over to the party, according to the authority given him. [Perhaps this point may depend on the words, language, or terms of the first delivery; therefore, if the party deliver this writing to be his deed when certain conditions shall be performed, it may be true that no second delivery is requisite; but if the terms of the first delivery stipulate for a second delivery, then such second delivery is of necessity, and essential to the validity of the writing as a deed.] Howbeit it seems the delivery is good; for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life-time of the parties;

[a] Fitz. Faits & Feoffments, 13.

[b] Idem.

[c] Co. 3. 35.

Co. 5. 84. 3. 36.

& postea consummata existens by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery. [The argument does not establish the conclusion. As no estate passes till the second delivery, the grantee hath not any estate till that time, and consequently cannot alien or lease. It is only from necessity, and for the purposes of title, that there is any relation. As to collateral acts, there shall not be any relation; for if the obligee, &c. doth release before the second delivery, such release will be void if the release be founded on the instrument as a complete and perfect bond.—It was also, in one case, resolved that to some intent the second delivery hath relation to the first, and to others not; and yet the second delivery hath all its force by the first delivery, and the second is but an execution and consummation of the first delivery.] And therefore if an infant, or woman covert, deliver a deed as an escrow to a stranger, and before the conditions are performed the infant is become of full age, or the woman is become sole (31), yet the deed in these cases is not become good, [because the grant was made during infancy, coverture, &c.] And yet if a disseisee make a deed purporting [to be] a lease for years, and deliver it to a stranger out of the land as an escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it [the delivery] hath relation to the time of the first delivery, and to some purposes not (32). [Though this lease, delivered after entry, would be good; yet if the lessor had not any title at the first delivery, the lease would have been void; 3 *Rep.* 35; *sed query*; and see 3 *Rep.* 35; *Vin. Abr. Faits*, N. pl. 1.]

Co. 3. 35. 36.

See infra, at Numb. 8.

Relation.

Perk. Sect. 154. 12 H. 6. 27.

* In case where a deed is merely void, and doth take no effect by the first delivery, as where a woman covert doth seal and deliver a deed, or the

*P. 60.

Double delivery.

(31) But by re-delivery, after feme becomes sole without re-execution, does become good. *Goodright* v. *Straphan*. *Cowp. Rep.* 201.

(32) See further as to the delivery of a deed as an escrow, *Vin. Abr. Fait* (M). (O). 2 *Roll. Abr. Fait* (M).

like, and she after, being sole, [*viz.*] after her husband's death, doth deliver the deed again, in this case the deed is become good; [or rather, is now good from that *time*, as being the time of delivery.] So where a deed originally good, doth become void by matter *ex post facto*, as by breaking the seal, or the like, [with an intention to cancel it,] if the party to the deed seal and deliver it again, by this means the deed is become good again; [or rather is a new deed; *viz.* the party adopts the writing as his deed.] But regularly there may not be two deliveries of a deed; for where the first delivery doth take any effect at all, the second delivery is void. [In *Williams* v. *Ashet*, *Cro. Eliz.* 181, it was questioned, and not decided, whether the same deed could have two deliveries, so as to operate on two distinct parcels of land.]

[h] And therefore it is held that if an infant, or a man by duress of imprisonment, do make, seal and deliver a deed, [*read* a bond, because there may be a difference between a bond and a grant,] &c. (in which cases [of a bond] the deed is not void, but voidable,) [i] and after the infant being of full age, or the man imprisoned being at large, do deliver this deed again the second time, this second delivery is void; *debile fundamentum fallit opus* (33). So if a man be disseised, and make a lease for years in writing, and deliver the deed, and after deliver it upon the ground, this second delivery is void, [it has been determined otherwise as to a corporation, and why not as to an individual?] for the first delivery made it his deed; but if he had delivered it as an escrow, to be delivered as his deed upon the ground, this had been a good second delivery. [At this day, the courts would in all probability reject these distinctions, as a refinement.]

[h] Perk. Sect. 154.

[i] Co. 5. 119.

Co. super Lit. 48.

Subscribing of the parties name or mark not necessary.

And by all this that hath been said, it appeareth, that the putting to or subscribing of the parties name or mark to the deed he is to seal, is not essential; for a deed [even since the Statute of Frauds and Perjuries,] may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and deli-

New Terms of the law, tit. Fait. 9 Jac. Scot's case.

(33) See accordingly *Bro. Abr. Faits, pl.* 28, where the first delivery is void, the second shall aid it; but if the first delivery was *voidable* only, as by an infant, or person under ...ll not be made good by a re-delivery at full age, or when at large. See further ...elivery, and in what cases necessary *Vin. Abr. Fait* (N). *Roll. Abr. Fait* (N).

vered (34). But it is the best and surest way notwithstanding, to have the name or mark of the party subscribed, for by this means the deed may be the better proved when the witnesses are dead (35). [*Query*; for the mode of proving a deed is by calling the witness, or one of the witnesses, if living, or proving the handwriting if dead, and proof of handwriting is evidence of the fact attested: The better reason for signing the names, is to be more secure from forgery, &c.]

Note here, that albeit a writing or escrow, that is not sealed and delivered in manner as aforesaid, may not be used nor pleaded as a deed, yet it may serve and be used as an evidence and proof of the agreement contained therein. And whatsoever may be done by word without any writing, may much more and better be done by writing unsealed or sealed, though it be not delivered as aforesaid. Note.

6. *In respect of the ground and end of it.*

And the last thing required in every well made deed is, that it have a good foundation, and be to a good end; for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, sealed and delivered, yet it may be void, or at least voidable, for other causes; as when it is either unjustly gotten and obtained, or corruptly in pursuit and execution of some dishonest agreement, or to a dishonest end or purpose made; [these propositions are too general.] A deed therefore, whether it be a feoffment, gift, grant, lease, release, confirmation or obligation, that is made or obtained by *menace* or *duress*, *i. e.* when one doth threaten another to kill or maim him, if he will * not make him such a deed; or doth imprison another, until he make him such a deed; and thereupon he make the deed; a deed thus obtained by force, and through fear to avoid danger, [*viz.* personal danger; for danger to goods, &c. is not regarded by the law, so far as to avoid a deed,] is void, and will not bind him that made it, nor avail him to whom it is made. In which matter these things must be observed:—1st. That there must be some threatening of life or member, or of imprison-

Co. 1. 9. Perk. Sect. 16. Dyer, 143. 45 E. 3. 6.

Menace or *Duress. Quid.*

*P. 61.

Bro. Duress in toto. 9 H. 7. 25. 21 E. 4. 13.

(34) See *ante*, p. 56, note 24, as to the necessity of the deed being signed by the party under the stat. 29 Car. 2. c. 3.

(35) With respect to the attestation of witnesses to the execution of a deed, see 2 *Bl. Com* 307, 378. 2 *Inst.* 78.

ment; [and it is questionable whether a threat of imprisonment be sufficient,] or some imprisonment or beating itself; for if it be only a threatening to take away goods, or to burn a house, or the taking and keeping of a man's goods, or the like, this will not make the deed, made upon that occasion, to be *per duress*. 2. It must be a threatening, beating, or imprisonment of the party himself that doth make the deed, or of his wife; for if it be a threatening, beating, or imprisonment of any other besides the party himself that doth make the deed, or his wife, this will not make the deed to be by *duress*. 3. The threatening, beating, or imprisonment, must be to this end; and hereupon the deed must be made; for otherwise the deed shall not be said to be by *duress*. As for examples: If four do threaten one to imprison him, if he will not seal a deed to one of them four, and he do so; this deed shall be said to be gotten by *duress*, and therefore void. And if one threaten a man to kill him, unless he will seal a deed to him and three others, and he do so; this is void as to all the four. For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so; this is void as if it were to the party himself. If one threaten to kill, wound, or imprison me, to make me swear or promise to seal him such a deed, or imprison me until I do so; and afterwards at another time and in another place, when I am at liberty, I do it accordingly; this shall be said to be made by *duress* and void. [This is a fact to be decided by a jury.] If I be in prison at one man's suit, and then another man doth cause me to be used more severely in prison, to compel me to make him some deed, which I do thereupon make to him; this deed shall be said to be gotten by *duress* and therefore void (36).

But if I be imprisoned at one man's suit, (be the cause just or not,) and being in prison I make

(36) A man cannot plead *non est factum* to a deed obtained by *duress*; for it is his deed at the time of the action brought, but he may avoid it by special pleading with conclusion of judgment, *si actio*, 5 *Co.* 119. See fully as to the execution of deeds by persons under *duress*, what deeds may be avoided by them, and how, 2 *Inst.* 482. *Bac. Abr. Duress. Vin. Abr.* same title, *in toto*, and 1 *Atk.* 409. A deed may be set aside in equity, which has been obtained by *misrepresentation*; where there is either *suppressio veri*, or *suggestio falsi*, it is a constant rule of the court to vacate the deed. 1 *Vern.* 20. and 1 *Pr. Wms.* 240.—In 2 *Pr. Wms.* 270, a distinction is taken between a *deed*, and a *will*, obtained from a weak man through misrepresentation; equity will not vacate the *will*, that being *revocable*.

an obligation or any other deed to a third man; this shall not be said to be by *duress*, but is a good deed. [See the rule of court which regulates the execution of warrants of attorney by persons in prison.] So if one threaten me to take away my goods, burn or break my house, enter upon my land, kill or wound my father, or mother, brother, or sister, or friend, or do imprison any of them, and thereupon I seal a deed; this is good and shall bind me (37). So if one distrain my beasts, to compel me to seal a deed, and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seal the deed he will kill me, and thereupon I seal the deed; this is a good deed and shall bind me; [because there is not any menace of personal danger, except in an event from which I may escape.] If I be arrested upon good cause, and being in prison, or under arrest, I make an obligation, feoffment, or any other deed to him at whose suit I * am arrested, for my enlargement and to make him satisfaction; this shall not be said to be by duress, but is good and shall bind me. And therefore if auditors in an account do commit an accountant to prison, and then he make an obligation to his master for the arrearages, this is good (38). And if one in prison for felony grant a reversion of land to another, to help him out of his trouble, this is a good grant (39), [except as against the lord entitled to the year, day, and waste. Even after conviction and attainder, the grant may be good as against the lord claiming by escheat.] If *A.* and *B.* enter into an obligation upon the threatening of *B.* only, this is a good obligation by *A.* that was not threatened (40).

*P. 62.

Bro. Defeasance, 17.

And if one make an obligation by duress, and after being at large take a defeasance upon it, this makes the obligation good again, and the obligee is

Estoppel.

(37) For if he should suffer what he is threatened, he has remedy by action, and may recover damages in proportion to the injury done him; 2 *Inst.* 483. *Perk.* § 18.

(38) Debt upon arrearages of account, defendant showed that before the account, plaintiff of his own wrong did imprison defendant, and assigned auditors to him in prison, and so the account was made by *duress*; plea held good, and judgment accordingly for defendant. 1 *Leon. Rep.* 13.

(39) But this should be *before* conviction; for *after*, the reversion is forfeited. 1 *Wood*, 803.

(40) And it is not avoidable by *A.*, though it is by *B.*; for it is said, that no one shall avoid his own bond for the imprisonment or danger of any other than of himself. *Cro. Jac.* 187, *Huscombe* v. *Standing*.

concluded to say it was by duress; [for the acceptance of the defeazance is an admission that the bond is the deed of the party.]

Usury. Quid. A deed also made upon or in pursuit and execution of an usurious contract, *i. e.* such a contract, as whereupon the lender is sure to have in money, or monies worth, for the loan of the thing, above the principal, more than after the rate of 8 *l.* [now 5 *l.*] for the 100 *l.* by the year, also is void. In which matter these cases are to be observed. If one 6 *Decembris* borrow 30 *l.* until the second day of *June* next following, to pay then for it 33 *l.* for the principal loan, if the son of the obligee be then alive; and if he die before that time, that then he shall pay but 27 *l.* which is less than the principal; in this case the contract is usurious and corrupt, and therefore the deed that doth contain it, is void (41); for it is a mere shift.

Terms of the law. Co. 5. 70. 37 H. 8. chap. 9. 39 El. c. 18. 21 Jac. ch. 17. 13 El. ch. 8.

If one borrow 100 *l.* and for this mortgage land above the value of 8 *l.* by the year, on condition that if the mortgagor pay the money at the year's end, that the estate shall cease; this is an usurious contract, and therefore the deed, whether it be a deed of feoffment, grant, or lease containing it, is void (42). [This point is over-ruled; for as he is accountable in equity for the profits, and there is not any express stipulation that he should retain them, such contract would not be deemed usurious.] So if I lend another man 10 *l.* for a year, and take security, by statute or obligation, that the borrower pay me the lender 20 *l.* for it; this contract is usurious, and therefore the statute and obligation void. But if the agreement and statute or obligation be, that if the borrower pay not the 10 *l.* within the year, that then he shall pay 20 *l.* for it; this is no usury; and therefore in this case the deed is good. [Equity, however, would relieve from the bargain as against conscience. So that court would relieve against a previous stipulation to pay compound interest.] If one come to me to borrow 500 *l.* of me, and tell me he is unable to pay it together, and therefore he desires he may pay it in twelve or thirteen years, and doth offer

Corflet's case. Pasch. 7. Jac. B. R.

(41) See accordingly the case of *Reynolds* v. *Clayton*. *Mo. Rep.* 397. S. C. in 2 *And.* 15, and further in *Vin. Abr. Usury* (G).

(42) This case seems to be upon the presumption that the mortgagee receives the whole profit of the mortgaged premises, or so much thereof as would exceed 8 *l.* per cent. per annum.

therefore to give me for my kindness 200*l.* over and above besides the use to let him have it so, and then the 500*l.* the interest, and the 200*l.* is cast together, and so we agree upon an annuity of 80*l.* per annum for fourteen years, which is assured by conveyances unto me; in this case the contract is usurious, and all the assurances made to perfect it are void. [Hence the difference between annuities granted for years and for lives: annuities for lives are exempt from the laws of usury, even though granted subject to be repurchased. Annuities for years certain, though not necessarily usurious, may, it is apprehended, be usurious, if founded on a treaty for loan of money; see *Comyn on Usury*, p. 70. An annuity was agreed to be granted, and was granted in fee, so as to yield 10*l.* per cent. per annum for the price. By the most eminent lawyers of the day, it was advised, that the transaction was not usurious; but it was doubted whether equity would not treat the transaction as a mortgage, *viz.* redeemable on payment of the price, and 5*l.* per cent. interest.] And yet regularly, where the principal money is lost, the contract is not usurious, [as in the common and ordinary case of the grant of an annuity, in which there is not any loan, but merely the sale of an annuity for a price; and though the seller has the option of repurchasing the annuity, this option will not make the transaction usurious, for this is an option to him for his benefit. But a stipulation, obliging him to repurchase the annuity, would render the transaction usurious.] If a man desire to borrow of me 100*l.* for a year, and I am content to let him have it for the use of 8*l.* [the rate of interest being then 8*l.*] * but withal I compel him to take a lease of me of a house at 60*l.* rent, which in truth is worth but 30*l.* this contract is usurious, and therefore the assurances thereupon made are void, [and equity will, in cases not strictly usurious, relieve against bargains to obtain leases connected with a loan of money. *Per Redesdale, Drew* v. *Porrer*, 1 *Sch. & Lef.* 182.] *Et sic de similibus.* But if a man the 17th of July 1579, grant me a rent of 20*l.* per annum for the loan of 100*l.* to be paid every half-year, and the first payment at Christmas 1580, and it is agreed between us, that if he pay the 100*l.* the 17th of July 1580, that then the rent

Curia Hil. 14 Jac. B. R. Saunder's case.

*P. 63.

Ca. 5. 69.

shall cease; this contract is not usurious; and therefore the assurances, thereupon made, are not void, but good, [because the party may relieve himself from the interest by payment of the principal before the time.] But if in this case there be a private or collateral agreement between us, that he shall not pay the 100 *l.* and redeem the rent, and that clause be put in only to evade the statute, then [there is a shift, and] the contract [is] usurious notwithstanding, and the deeds and assurances thereof void. *Et sic de similibus.* If one borrow 100 *l.* after the rate of 8 *l.* per centum, and the borrower do afterwards pay part of the principal, and all the use, within the year; and the lender doth receive it, or the lender doth sue for his money within the year; these subsequent acts do not make the contract or deeds or assurances thereof void; for it is a rule, that if the original contract be not usurious, no matter *ex post facto* can make it so. [But though the original contract be good, and free from the vice of usury, yet the party may be guilty of usury by accepting a larger rate of interest than is allowed by the statute. The acceptance, however, of such usurious interest would not vitiate the original contract.] If one borrow of me 10 *l.* and bind himself to pay me by a day, and moreover bind himself that if he pay it not by the day, that he shall pay me 20 *l.* for it; this contract, and the deed for perfection of it, are good; and this is not usurious, for all obligations with conditions, for payment of money lent, are of this nature, [equity, however, may relieve against the penalty.] And yet if one borrow 100 *l.* of me, and for this mortgage land to me of a greater value than 8 *l.* per annum, on condition that if he pay the money at any time before the year's end, then the assurance to be void; this should seem to be an usurious contract, for in this case I am sure to have by the agreement more than after the rate of 8 *l.* per centum, and so it is not in the last case before (43). [Such contract would not at this day

Hill 7 Jac. B. R. Curia.

[Difference between usury and usurious taking.]

Bro. Obligation 79.

(43) When the former editions of this book were published, the rate of interest allowed by the statute 21 Jac. c. 17. was 8 *l.* per cent. per annum, which by the statute 12 Car. 2. c. 13. was reduced to 6 *l.* per cent. and by 12 Ann. stat. 2. c. 16, to 5 *l.* per cent. the utmost legal interest that can be now taken. See 13th edit. *Co. Lit.* 4. a. note 1.—The reasonableness of taking interest for the use of money, and the advantages arising from it to a commercial nation, are explained, in 2 *Bl. Com.* 455. For the doctrine of usury, what shall be deemed and the punishment for it, see *Com. Dig. Bac. Abr.* and *Vin. Abr.* tit. *Usury*; also the

Per Just. Brigman, Hill. 7 Car. 1.

be deemed usurious.] If one borrow 100*l.* for a year, and give the broker 20*l.* to procure it; this will not make the contract usurious, nor the assurances void: but for this the broker may be punished (44).

Obligations made to a sheriff contrary to the statute.

Also all obligations, made to a sheriff, contrary to the statute of 23 H. 6, c. 10, are void or at least voidable by pleading. But of this see in obligations *infra*.

Stat. 27 El. ch. 4. Co. super Lit. 3. stat. 39 El. ch. 18.

Collusion in fraudulent conveyances. 1. To deceive purchasers.

A deed also made, containing the grant of any thing, with intent and of purpose to deceive and defraud one that shall afterwards buy the same thing, is void. For it is to this purpose provided by a statute law, that all fraudulent conveyances of land, or any rent or profit out of land, made by whomsoever, with intent to deceive or defeat any that shall purchase the land, or any rent or profit out of it, for money, or other good consideration, of the fruit and effect of their purchase, shall be void against such purchasers for so much as they buy, and against all others that come in by or under them. But all such conveyances as are * made *bonâ fide* and upon good consideration, [this proposition is too general,] are not to be accounted fraudulent (45), [though the purchase be without notice of them. Concealment and secrecy are only evidence of fraud, and therefore the presumption arising from such evidence may be rebutted, by proving that the deed was made *bonâ fide* and on good consideration.] For the better understanding of which statute, and the law in these cases, observe, that conveyances *bonâ fide* are op-

*P. 64.

Co. 3. 1.

---

cases of the *Earl of Chesterfield & others* v. *Janssen*, 2 *Ves.* 125. 1 *Atk.* 301. *Loyd* v. *Williams*, 3 *Wils. Rep.* 250. *Murray* v. *Harding*, ibid, 390.—*Morrisset* v. *King*, 2 *Burr.* 891. *Abrahams & Bunn*, 4 vol. 2251. At what time interest shall commence on securities, legacies, &c. see *Com. Dig. Chancery* (3. S).—And when interest shall become principal and bear interest, see *Powell's Mortgages*, 384, 387, 399. This may be done three ways—by assignment of mortgage with mortgagor's consent, 3 *Atk.* 271. Secondly; upon a master's report confirmed, and not before. 1 *Wil.* 478. 2 *Eq. Ab.* 530. And thirdly; upon a fair agreement between mortgagor and mortgagee when interest is actually due, and not before. *Salk.* 449. 2 *Atk.* 331.—When a legacy carries interest, *Com. Dig. Chancery* (3 Y. 9.) *Vin. Devise* (N. d.) 8 vol. 411. *Bac. Abr. Legacy* (K. 3). 1 *Eq. Ca. Abr.* 301.

(44) By the statute 12 Car. 2. c. 13. § 3. (confirmed by 13 Car. 2. c. 14.) which inflicts a penalty of 20*l.* and imprisonment for half a year on scriveners, brokers, and others, who take more procuration money than *five shillings for every* 100*l.* for a year. The statute 17 Geo. 3. c. 26. § 7, allows brokers to take 10*s.* for the loan of every 100*l.* advanced, as the consideration for an annuity.

(45) Although they are concealed, or were secretly made, *Cro. Jac.* 455.

posed to such as are upon and with any trust express or implied: and good considerations are set down in the statute to distinguish from such as are not valuable, as nature, blood and the like (46). [Marriage is a valuable consideration, so is a stipulation by one branch of the family for the benefit of another branch of the family, as in the case of a release of a jointure, or the exoneration of part of the lands from the same jointure. See *Roe* v. *Mitton*, 2 *Wils. Rep.* 356.] If one convey land with a present or future power of revocation, or alteration, at his will that doth convey it, [so that he settles and leaves himself at liberty to be discharged from the settlement;] this shall be said a fraudulent conveyance, as against him that shall afterwards purchase this land. So that if one convey his land to the use of himself for life, and after to the use of divers of his blood, with a future power, as after the death of *H.* or after such a day to revoke it, and before the day he sell this land to a stranger for a valuable consideration; in this case the first deed shall be said to be fraudulent and void as to him that shall purchase the land to do him any hurt (47), [whether he has notice or not of the former settlement, for notice is not material, as the statute makes the former settlement void. *Gooch's case*, 5 *Co.* 60; 2 *Levinz.* 105.] And if one convey land with such a power of revocation, and after, with an intent to defraud a purchaser, make a feoffment to a stranger to extinguish the power, and after sell the land for valuable consideration to a stranger, in this case both the first and the second deed, as to the purchaser, shall be said to be fraudulent, and therefore void. [On such powers and the means of taking them out of the application of the statute, see *Booth*'s opinion in the Appendix to this work.] And if there be grandfather, father and son, and the grandfather

Co. 3. 82. 83.

Co. 6. 72.

(46) Consideration of blood, or natural affection, is a *good* consideration: but not such a good consideration as is intended by the stat. of 27 Eliz. for a *valuable* consideration, as money, marriage, or the like, is the only *good* consideration within that act, 3 *Co.* 83. b. See further *Vin. Abr.* tit. *Consideration*; and *Lloyd* v. *Spillit*, 2 *Atk.* 148, and *Stiles* v. *The Attorney General*, ibid, 152.

(47) Every *voluntary* conveyance shall *primâ facie* be deemed fraudulent as to a purchaser, 2 *Lev.* 147. 1 *Ca. Ch.* 100, 217; for a conveyance with a power of revocation is in the same degree as a conveyance by fraud, *Mo.* 618. See further, how a power of revocation shall make a deed fraudulent, and how it must be reserved to be executed, to make it so, *Com. Dig. Covin.* (B. 3).

makes a lease for 100 years to the father, and the father, to prevent the drowning of the lease by the descent of the reversion to him, doth assign over the lease to certain friends of his, to the use of his son an infant under pretence to pay debts, the grandfather dieth, the father doth continue the occupation of the land, and maketh estates, and doth all acts as owner of the land, the son payeth no debts, and the assignment (albeit divers persons of quality were named assignees) was delivered to one of the assignees of mean estate in private, and after the father doth sell the land for valuable consideration, in this case this assignment shall be taken to be fraudulent and void as to the purchaser. And if the father make a fraudulent conveyance, and after continue the occupation of the land, and it descend to the son after the father's death, and he sell it for valuable consideration; in this case, the purchaser may avoid the conveyance made by the father, as well as if it had been made by the son himself; and that, whether the son be privy to the conveyance made by the father or not. [*Purefoy* v. *Rogers*, 2 *Saund.* 380, is *contra*, and with good reason, for no estate descended to the son. But if a conveyance be made by a father for the benefit of his son without any consideration, so that it might be avoided as fraudulent, yet if the son sell for a valuable consideration, or settle the property on his marriage, the settlement which at first was voidable will become good, and cannot be impeached as against the purchaser or the objects of the settlement. *Langham* v. *Prodgers*, 1 *Siderf.* 133.] And if the fraudulent conveyance be made to the king, [11 *Co.* 74,] yet it is void as to a purchaser, as if it were made to a common person. And therefore if there be tenant in tail, the remainder in tail or in fee, and he in the remainder, perceiving the tenant in tail doth intend to sell the land, and bar him by a common recovery, doth sell his remainder by deed inrolled to the king, and after the tenant in tail doth sell the land by common recovery for good consideration, in this case the * purchaser shall avoid this deed to the king [as a fraud on the tenant in tail. For though the tenant in tail might bar his issue, he could not bar the king, if the re- *P. 65.

mainder was duly vested in the king] (48). Whereby also it appeareth, that a fraudulent conveyance within this statute may be by way of bargain and sale [for a nominal or a colourable consideration.] And so it was ruled by the Lord Chief Justice *Hide* in evidence to a jury at Guildhall, 3 Car. 1. M. 4. Jac. Cowell & Bart. case.

And if there be a lease for years, and the lessor make a fraudulent conveyance in fee, and then for good consideration, maketh another lease to begin at the end of the former lease; this conveyance shall be void, as to the second lessee. And if *A.* make a lease to *B.* for years upon good consideration, and after he makes another lease to *C.* of the same thing, for the same term, to begin at the same time, upon good and valuable consideration, and *B.* doth not discover this, but drives this bargain with *C.* and is witness to this second lease, and the first lease is not excepted in the second lease; it seems in this case the first lease shall be void [in equity, though good in law] as to *C.* [On this point, and the postponement of a first to a second mortgagee, by reason of fraud in the second mortgagee, see *Pow. on Mortgages*, 463, 472.] Per 2 Just. Hil. 18. Jac. B. R.

And in all these and such like cases, albeit the purchaser, before *he make his bargain, have notice of the fraudulent conveyance*, yet shall he avoid it as if he were ignorant of it (49). [For at the same time that he has notice of the fraudulent conveyance, he knows that the statute has rendered it void as against him. But in equity, in all other cases, notice of a prior title is material; and the general maxim of the law is *qui vult decepi decipiatur*.] But such conveyances and deeds, made as before, shall never be said to be fraudulent and void, as against him that, shall have the thing afterwards, *if he do not give a valuable consideration for it.* [For a person claiming under a second voluntary settlement or lease, cannot defeat a prior voluntary settlement or lease. As between volunteers, the rule of law, that *qui prior est tempore* Co. 5. 60. Co. 3. 82.

(48) As being fraudulent within the statute 27 Eliz. the conveyance of the remainder to the king, being with intent to deceive a purchaser, is directly within the words and purview of that act. 11 *Co.* 74, b.

(49) A purchaser for a valuable consideration shall hold against a prior voluntary settlement, though he had *express notice thereof* at the time of his purchase; such voluntary settlement being made void by 27 Eliz. against a purchaser, with, or without notice. *Per Cur. Abr. Eq. Ca. Notice* (C.) *Tomkins* v. *Ennis*. See also *Vin. Abr. Fraud* (I).

potior est jure, is equally the rule of equity, and governs their rights. So a devisee, because he is a mere volunteer, shall not impeach a prior voluntary settlement.] And therefore if one make a lease, that would be fraudulent and void as to such a purchaser, to *A.* and after make another lease *bonâ fide* to *B.* but without any rent or fine given for it; in this case, the first lease shall not be said to be fraudulent, as against the second lessee, and therefore [shall] not [be] void. So if one covenant for the advancement of his heirs males, &c. to levy a fine of land by a day, to the use of himself for life, and after of his issue male; and before the day he make a lease that is fraudulent [voluntary] for many years, of purpose, and after he doth levy a fine accordingly; in this case this lease is good, and shall not be said to be fraudulent and void by this statute, as against the issue in tail [since the lessee and issue are both volunteers: for in point of law, the lease is prior to the fine, and the fine is the material part of the assurance; and the lease operated on the seisin, which afterwards passed by the fine.] So if a man that is somewhat foolish, and given to waste, be persuaded to settle his lands upon some of his friends, of purpose to maintain himself with it; and after some of his lewd companions inveighle him, and get him for a small sum of money to convey it to them; in this case, the conveyance, first made, shall not be said to be fraudulent, as against these purchasers, and there-
Ca. super Lit. 3. fore it is good against them (50). And if one, that hath a term for sixty years, if he live so long, make it away, and then he doth forge a lease for ninety years absolutely; and after by indenture, reciting this forged lease, for valuable and good consideration doth bargain and sell this forged lease, and all his interest in the land to *I. S.* in this case it seems that the first lease is not void [because the forged lease, and not the valid lease, was purchased,] and that the purchaser shall have nothing but the forged lease. [This is not a case within the statute, for a person who purchases a term, which is a non-entity, cannot, in respect of such purchase, claim

(50) And by the same statute 27 Eliz. c. 4. § 3, any person party or privy to such fraudulent conveyances, who puts the same in use, and avows the same to be made on good consideration, to the prejudice of the purchaser, or his heirs, shall forfeit one year's value of the lands so purchased, one moiety to the crown, and the other moiety to the party aggrieved.

another estate which was not in his contemplation. But the conclusion, that the purchaser should have nothing but the forged lease, is not warranted by the particular circumstances of the case. Lord *Coke* admits, that the term of sixty years passed by the general words, and all his interest in the land. *Co. Lit.* 36.]

2. To deceive creditors and others of debt, and such like duties.

*P. 66.

A deed also made of any thing with intent and purpose to deceive and defeat creditors of their just debts and duties, is void also as against such persons. For it is provided to this purpose * by other statutes, that all feoffments, gifts, grants, alienations, bargains, and conveyances of lands, tenements, hereditaments, goods, and chattels, or any rent, profit, or commodity out of land, made by fraud, or collusion of trust, to him that made the same, or otherwise with intent to hinder and delay, or put off, or put by creditors, or others of their just and lawful actions, suits, debts, accompts, damages, penalties, forfeitures, heriots, mortuaries, or reliefs, shall be void, as against them to whom such things shall belong, and he [*read* they] may recover the thing nothwithstanding; but all such as are made *bonâ fide*, and upon good consideration, are not to be accounted fraudulent by this statute, [and after a man has made a voluntary settlement he cannot compel a purchaser to accept his title in opposition to the settlement, *Smith* v. *Garland*, 1 *Meriv.* 123. On the other hand, the persons who claim under the voluntary settlement cannot interpose in equity to enjoin the sale, or to have the purchase money impounded.] For the better understanding whereof, these cases following are to be heeded. If a man, a little before his death, make a conveyance of his land to his children, or friends of his blood, with a proviso to make it void at his pleasure, and he take the profits of it as his own; or make a conveyance of it to friends, to the intent they shall not be subject to the payment of his debts, having bound himself and his heirs by any specialty, [so that the lands may be assets;] or to the intent that a warranty and assets shall not bind his son for other land, or the like; in this case this conveyance shall be void as to them that should have relief upon this land by descent, [if it has descended,] and especially when the conveyance is

Stat. 3 H. 7. 4. 1 R. 2. ch. 3. 13 El. ch. 5. Co. 3. 82.

Co. 5. 60. 3. 82. Dyer, 295.

made after the suits begun, [the existence of the suit makes the evidence of fraud more decisive,] and more especially when any judgment is had upon the suits against him that doth make the deed. And so also is the law for goods. And
Ca. 3. 80. 83. Bro. Done. 20. Plow. 54. therefore if one be indebted to *A.* 20 *l.* and to *B.* 40 *l.* and be possessed of goods to the value of 20 *l.* and *A.* doth sue the debtor for his 20 *l.* and, hanging this suit, the debtor secretly makes a general deed of gift of all his chattels real and personal to *B.* in satisfaction of his debt, and yet doth afterwards continue the occupation, and use the goods as his own, and after *A.* geteth judgment and execution; in this case the deed of gift to *B.* shall be said to be fraudulent, and therefore void as against *A.* So if in this case he give all his goods to *B.* in satisfaction of his debt, and before any suit begun by *A.*, with any express or implicit trust; as to the intent that *B.* shall be favourable to the debtor; or that if the debtor provide the money that he shall have the goods again; or that he shall suffer the debtor to enjoy and use the goods and pay him as he can; in these, and the like cases, the deed shall be said to be fraudulent and void, for howsoever it be made upon good consideration, yet it is not made *bonâ fide.* So if one [being materially indebted, or in prospect of being indebted] in consideration of natural affection, or for no consideration, give all his goods to his child, or cousin, *bonâ fide*, this shall be a void deed as to the creditors. *Et sic de similibus.* [On this point see *Cooke's Bankrupt Laws, ch.* 4, and *Buller's Nisi Prius*, p. 257.] So if one [fraudulently to defeat his creditors, or without any other motive than mere volition,] give all his goods and chattels to his executor in his lifetime by deed of gift, this shall be said to be fraudulent, and shall be void as to creditors. And albeit those to whom the deed of fraud is made, know nothing of the fraud, yet is * the deed fraudulent in that case also, as well as where they are privy to it. If *P. 67.
Ca. 2. 25. after a commission of bankrupt be sued out, [or after an act of bankruptcy, or in contemplation of insolvency, and to prefer one creditor to another,] the debtor make a deed of gift of all his goods to one of his creditors in satisfaction of his debt; in this case this deed shall be

void, as against the rest of the creditors and as to the commissioners, and they may order it with the rest of the estate notwithstanding. [This consequence flows from the bankrupt laws, since the bankruptcy preceded the gift, or was the consequence of the gift. Had the gift preceded the commission, it might have been an act of bankrupt, and thus void as against the creditors; and a deed may be fraudulent and an act of bankrupt, though given *bonâ fide* as to one creditor, if it be at the same time voluntary and fraudulent, with reference to other creditors. In *Hunt's Bankruptcy, MS.* from the certificate of Judges and Decree.] But if *A.* *bonâ fide* and for valuable consideration mortgage his land, whereof he hath a term of years, to *B.* upon condition that if he repay the money to *B.* a year after, that he shall re-enter, and *B.* doth covenant with *A.* that he shall take the profits of it until that time, &c.; *A.* doth not pay the money, and *B.* hoping that he will pay it in time, doth suffer him to continue in possession and take the profits of it two or three years after, and in the interim judgment is had against *A.* upon a bond, and execution awarded; in this case execution shall not be made of this lease; for this deed of mortgage shall not be said to be fraudulent as to the creditor; for when a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter *ex post facto* (51). [And possession of land is not the only or material *indicium* or evidence of property; while possession of goods is to the world the *indicium* of property. This point of the text, therefore, depends on the difference between property in land or real estate, and property in personal chattels; see 1 *Atk.* 159, *Ex parte Marsh*; and therefore if a similar mortgage were made of personal chattels, and the possession retained by the mortgagor, the deed would be void as against creditors; *Ibid.* But this doctrine does not extend to choses in action, (if notice of the assignment be given to the debtors,) or to fixtures, &c. annexed to houses, and which are

By the two Judges of Assize, Aug. 5 Car. in Com. South. Lady Lambert's case.

(51) But if a deed be fraudulent in its creation, yet it may become *good* by matter *ex post facto*; as where a fraudulent feoffment is made, and the feoffee makes a feoffment to another for a valuable consideration, and the first feoffor does afterwards, for a valuable consideration, make a second feoffment; the feoffee of the feoffee shall hold in preference to the second feoffee of the first feoffor. 1 *Sid.* 134. *Prodgers* v. *Langham.*

included in the mortgage; nor to bills of sale of vessels at sea, if possession be taken of them as early as circumstances will admit.]

Mich. 19 Jac. Co. B. Miller & Pot's case.

If *A.* be seised of the fifth part of the manor of *B.* and *B.* of the sixth part, and *M.* cometh to *A.* to buy his part, and after *M.* saith to *A.* "my counsel tells me I cannot safely buy of you unless *B.* join," and after *B.* [not being privy to this arrangement,] doth grant a rent-charge of 15*l.* per annum, out of this manor, to *C.* her son, and the heirs of his body, in consideration of natural affection, (and this was about 10 Jac. *C.* being then about three years old,) with proviso that if *D.* (whom *B.* did then intend to marry) grant to the said *C.* the like rent of 15*l.* and for the like estate, out of 20*l.* land by the year, of the land of *B.* then the said grant to be void, and after the said *A.* bought the sixth part of the said manor, of *B.* and *D.* her husband, [they] being intermarried, and after *A. B.* and *D.* her husband join in the grant to *M.* in this case it was ruled that this grant to *C.* was not fraudulent and void; [for *A.* not *B.* was the seller. Besides, the deed was made in contemplation of marriage, and as a provision for a child, without any intent to defraud *A.* or *B.* A settlement by a woman previous to marriage, for the benefit of the children of a former marriage, will be supported even against her husband; *Bowes* v. *Strathmore*, 2 *Bro. Ch. Ca.* 345; unless there was an express fraud against him by false representations.] If one doth hold his land, to pay a heriot at the death of every one that dieth tenant in fee simple, and he infeoff his son and heir in consideration of natural affection, and marriage to be had between the son and *I.* and the son (to prevent the dower of his intended wife during his father's life,) makes a lease for forty years unto his father, if his father live so long, and afterwards the marriage is had, the father payeth the rent, the son doth suit of court for the land, and after the father dieth; in this case this lease shall not be said to be fraudulent as to the lord to deceive him of his heriot, because it was made to another end, [and on a good consideration; and that which was done was an incident to the rights and ownerships of the parties, and done without any view to defraud the lord. In

Co. 10. 56, 57.

these cases, it is the motive or intention which raises the question of fraud. In some cases, however, the nature of the gift, as being in favour of children, wife, &c. with a reservation of a power of revocation, &c. are evidence of the fraud, partly by the construction, and partly by the words of the statute. As the son became tenant to the lord by the lord's acceptance of suit, &c. the evidence of fraud was rebutted; for if the son had died before the father, the lord would have had a heriot from the son.]

3. *To deceive lords of their wardships, &c.*

A deed also made to defeat the king or other lord of his wardship, [wardship is now abolished,] shall be void, as to a third part of the thing conveyed. And therefore, if any tenant that holdeth of the king or any other lord, make a feoffment or other conveyance of his land, to defeat and defraud the king or lord of his wardship, primer seisin, or any other benefit appointed and preserved for the lord by the statutes of 32 and 34 H. 8. it shall be void, as to a third part thereof, against the king or other lord, who shall notwithstanding have their wardship and other benefits, as if none such were made. As if such a tenant by deed enfeoff his lineal or collateral heir within age, or make a lease for life, the remainder to his heir, [to the person who is his heir; for he could not, by the common law, make his heir a purchaser *eo nomine*; [1 *Inst.* 22, b. *Bac. Abr. Remainder*, p. 725;] or make a gift in tail, the remainder in fee to [the person who is] his heir, or make a feoffment on condition that he shall re-infeoff his heir at his full age, or make a feoffment for the payment of his debts, or preferment of his wife and children, or infeoff another, to the intent that he shall take the profits till he have an heir male, and then to re-infeoff him; all these are fraudulent and void, as to a third part of the land, and as against the king or other lord, in respect of the benefit they are to have of and by the land. But no conveyance in these cases shall be said to be fraudulent and so void, for two parts of the land, [for the conveyance is good as between the parties.] And if one make a feoffment of land to two (whereof his heir is one) and their heirs, [or to one being his heir, and his heirs,] for money or other valuable consideration, this shall not be said to be a fraudulent

Stat. 5 & 6 H. 8. c. 9. 34 H. 8. ch. 5. Co. 6. 76. Lit. sect. 59. Plow. 49. Co. 8. 164. 9. 129.

*P. 68.

conveyance of any part. So if such a joint-tenant make a feoffment of his moiety to a stranger. †And in cases where the feoffment is fraudulent for a third part as before, if the feoffee die or make a feoffment over *bona fide* before the death of the ancestor, in these cases the deed is [even as against the lord, &c.] become good again, and the collusion gone; [for there is a new tenant, and the lord receives the fruits of his seigniory sooner than he would have done if the first feoffment had not been made.] If a man, for fear of debts, convey his lands to friends, with condition that upon payment of 10 *l.* they shall convey it to those whom he shall appoint, in this case the conveyance shall not be said to be fraudulent as to the king or other lord; for it was done to another end, and therefore it is a good conveyance against all men but the creditors (52). Where deeds shall be void in part or in all, for want of inrolment, attornment, livery of seisin, or the like, see afterwards.

† Dyer, 2. Co. 2. 94.

Dyer, 268. Co. 10. 57.

6. Where a deed good in its creation, may become void by matter ex post facto. And what will make such a deed void, or not.

1. By rasure.

Co. 11. 27. 5. 119. Dyer, 59. 261. Perk. Sect. 123. 135. Kelw. 162. Fitz. Release 27. 14 H. 8. 25. Bro. fait, 9.

If a deed that is well and sufficiently made in its creation, shall be afterwards altered by rasure, interlining, addition, drawing a line through the words (though they be still legible,) or by writing new letters upon the old, in any material place or part of it; as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted, or in the limitation of the estate; or if it be in an obligation, when the word [heirs] shall be inserted, or the sum increased, or in the date of either, or the like; be the same either by the party himself that hath the property of the deed, or any other whomsoever, except it be by him that is bound by the deed, [or by his order or consent, for he shall not take advantage of his own wrong,] and be the same with [modern cases seem to have over-ruled this branch of the distinction. The case in *Cro. Eliz.* 626, is reconciled with the case in 2 *Levinz* 35, by the circumstances that in one case the addition was made without the knowledge of the obligee, while in the case in *Levinz* all the parties were consent-

(52) Fraudulent conveyances and gifts are only void against purchasers and creditors, and shall bind the parties themselves and their representatives. *Cro. Jac.* 270. See further as to the construction of the statute respecting fraudulent conveyances and gifts as to purchasers and creditors, and the cases determined under them both in the courts of law and equity, in *Bac. Abr. Fraud* (C.) *Com. Dig. Covin* (B. 2).

ing; *Per Hale*;] or without the consent of him to whom it is made or doth belong: in this case, and by either of these means, the deed hath lost its force and is become void (53). [At this day, alteration by a mere stranger would not vitiate the deed, if the contents of the deed could be proved. The case of *Tesciera* v. *Evans*, seems to have over-ruled this branch of the distinction. In *Tesciera* v. *Evans*, at Guildhall, Tr. Term 1774, in an action on a bond tried before Lord *Mansfield*, the bond had been executed in blank, and the plaintiff had advanced money on it to a broker, after which the names and sums had been inserted in the blanks by the broker. The defendant pleaded *non est factum*, and Lord *Mansfield* ruled that the bond was well executed, and that the broker was to be considered as the attorney authorized by the defendant to fill up the blanks, and the plaintiff had a verdict; 1 *Lud. Elect.* 240; 1 *Anstr.* 228, *S. C.* But *query* if this case be law? It assumes that there could be an attorney without deed. In *Powell* v. *Sheriff of Middlesex*, the bond was executed, and a condition afterwards added, without any evidence of commandment, &c. the bond (being a bond to the sheriff) was ruled to be void. So in *Weeks* v. *Maillardet*, 14 *East*, 568, a schedule was an essential part of the deed, and being added by the witness after the execution of the deed, and having been in fact signed after the deed was executed, it was no part of the deed. In *Zouch* v. *Clay*, 2 *Lev.* 35, a bond, intended as the deed of two jointly and severally, became the bond of three by addition of a third obligor, with the consent of the other parties. Lord *Ellenborough* observes, this was an internal alteration, and distinguished from an extrinsic alteration.]

*P. 69. * And if the alteraton be made by the party himself that owneth [*i. e.* entitled to the benefit of] the deed, albeit it be in a place not material, and that it tend to the advantage of the other party, and his own disadvantage, yet the deed is hereby become void. But if the alteration be made by the party himself that is bound by the deed, in any ma-

(53) *A.* and *B.* sealed and delivered a bond to *C.*, and after, the name and addition of *D.* was interlined, and *he also sealed and delivered the obligation*, with the consent of all parties; held to be a good obligation of all three. 2 *Lev.* 35.

terial or immaterial part thereof; or if a stranger, without the privity or consent of the owner of the deed, shall make any such alteration in any part of a deed not material, as if it be a deed of a grant containing a lease for years, and there be inserted between "to have and to hold" and "for thirty years," these words, "from henceforth;" [because this is the conclusion of law, unless a different period be limited for the commencement;] or, if it be an obligation, and there be inserted between "*obligo me*" and "*per presentes*" these words "*et executores meos*," in both which cases those words are needless and without any fruit at all; hereby the deed is not hurt, but it remaineth good notwithstanding; [but as the heirs would not be bound unless they were specially named, the addition of the word heirs would [according to the old cases] vary the operation, and consequently be a destruction of the deed; and the word heirs is for this purpose so completely a term of art, that it cannot be expressed by any *circumlocution*. The terms exchange, warrant, &c. are terms of the like description.] But if the alteration be before the delivery of the deed, be it whatsoever, or by whomsoever, it will not hurt the deed, [for in that case there is not any deed till delivery, and then the addition constitutes part of the deed, as it originally and for the first time began to operate.] And herein it must be observed, that then a rasure, &c. is most dangerous, and the deed thereby most suspicious, when it is in a deed poll, and there is but one part of the deed; and when the rasure or other alteration is in any material part of the deed; and when the alteration makes to the advantage of him that doth own [*i. e.* is to benefit by] the deed, and to the disadvantage of the other that made it; and when there doth appear some other thing to be written before, [and it is cancelled, erased or obliterated;] and when there is no other part of the deed, recital, defeasance, or other matter to which this may be compared, and that may make it appear to be before the delivery; and when there be other parts of the deed, or other matters whereunto this being compared doth not agree in that part wherein the alteration is; and when the deed hath been in the smoke, or any such like means hath been used to cover [*i. e.* conceal] the altera-

Perk. Sect. 123, 124. Bro. Fait. 6. Perk. 127, 128, 129.

Made see Bullen mke to 135 Left 135

tion, [for these circumstances increase the suspicion, and presumption of falsity.] And in these cases the matter was anciently used to be tried by the judges upon the view of the deed; but it is now used to be tried by jurors, whether the rasure, or other alteration, were before the delivery of the deed or not (54). [Additions made by endorsement, or otherwise, before the execution of the deed, may be part of the deed.] Co. super Lit. 225.

2. *By breaking or defacing of the seal.*

And if after the sealing, delivery and perfection of a deed, the seal thereof happen to be broken off, or to be utterly defaced, so that no sign or print thereof can be seen, or it appeareth to have been broken off and it is glued, or the wax new heated and set on again, or the label of the deed hath been broken off from the deed, and is sewed on again, or the deed is new sealed with other wax; be the same by whatsoever means, or whomsoever, unless it be by him and his means that is bound by the deed; in these cases, and by either of these means, the deed is become void. [A different rule of evidence prevails at this day; for if the seal, &c. be broken by accident, or by a stranger, or by the obligor, or eaten off by mice, &c. the deed would remain in force, on proof that it was sealed and delivered, and thus accidentally or wrongfully cancelled. To destroy the deed there must be a cancellation *eo animo*; and as to deeds which pass an estate of freehold, it is now the settled rule of law that no cancellation of the deed, *Gilb. Eq. Cas.* 285, can devest the estate, on this point, and the distinctions which are taken. See *B. N. P.* 267, 268. The case in *Levinz* (see note 55) was on a bill of sale of goods, and there was not any evidence that the *third assignee* was consenting to the cancellation. Such evidence possibly might have materially varied the case.] But if any piece of the seal remain fixed to the deed, and there be any print left upon that piece, the deed doth continue good. And if after a seal of a deed be broken off, the party that sealed it, do seal and deliver * it *de novo*; by this means, it Dyer, 59. Co. 11. 28. 5 23. Dyer, 112. Perk. Sect. 135. 136. Bro. Oblig. 83.

*P. 70.

(54) When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*; because, at the time of the plea, it is not his deed. 11 *Co.* 27. a. See further in what cases rasure or interlining will vitiate a deed. *Vin. Abr. Faits* (T). *Com. Dig. Fait* (F. 1). *Roll. Ab. S. Faits* (T. U.)

seems the deed is become good again (55), [or rather there is a new bond.]

Trin. 36 El. Co. B. Dyer, 112.

3. By re-delivery, or by cancelling of it.

And if a deed [*viz.* a bond] be delivered up to the party that is bound by it to be cancelled and it be so; or if he that hath the deed doth by agreement between him and the other cancel the deed; by either of these means the deed [provided no estate passed] is become void. But if an obligee deliver up an obligation to be cancelled, and the obligor do not afterwards cancel it; but the obligee happen to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force at law (56); [but the obligee would be relieved in equity. And note, that as bonds are merely *choses en action*, no one claiming under the obligee can be in a better situation than the obligee himself was; the assignee will take subject to all the existing equities. And this rule has been extended even to assignees of mortgagees who had received part of their money; for the assignees must claim on the footing of the account between the mortgagor and mortgagee.]

Co. 3. 26. 5. 119. Dyer, 5. 167. [Thompson v. Leach. ventr. Vin. Abr. Disagreement.]

4. By disagreement.

And if an obligation be delivered as an escrow to a stranger, to be delivered to the obligee on certain conditions; or to a stranger to the use of the obligee, and when this is after tendered to the obligee he doth refuse it and disagree to it; or if an obligation be made to a feme covert, and her husband disagree to it; [or if a lease be made to her while under coverture, and she disagree to it when sole, see *Co. Lit.* 37, 3 *Abstr.* 104; or if a conveyance be made to her while under coverture, and she when sole, or if she die before agreement then her heirs disagree to it. *Co. Lit.* 3 a, 3 *Abstr.* p. 104; or if a conveyance, &c. be made to an infant, and he, &c. when adult disagrees to it, or if

(55) It seems in a *several* deed, if the seal of one of the parties is broken off, it does not vitiate the deed as to the others, though it is otherwise, if the deed was *joint*. *Cro. Eliz.* 408. 2 *Lev.* 220. Upon proof made how the seal was broken off, the deed may be admitted to guide the uses of a recovery. *Latch*, 226.—Where the seal is broken off, *non est factum* is a good plea. 5 *Co.* 119. b. See further *Com. Dig. Fait* (F. 2). *Vin. Abr. Faits* (X).

(56) See accordingly *Cro. Eliz.* 483; and further as to the effect of cancelled deeds at law, where they shall be relieved against in equity; and what remedy may be had against persons cancelling or destroying deeds. *Vin. Abr. Faits* (X. 2. 3. 4). Assignment by commissioners of bankrupt to three, that being cancelled, and another made to two of them; the cancelling the first does not alter the property. 2 *Lev.* 113.

his heir disagrees after the death of the infant, who died during his minority, or after he was adult, and before agreement;] in all these cases the deed is become void. And like law is of other deeds in divers such like cases. But the party bound by the deed may not in these cases plead *non est factum* to the deed, [but must plead the special matter, so as to show the disagreement. *Dyer* 167, 1 *Co.* 119, are *contra.*] And in these cases when the party [being free from coverture, infancy, &c.] hath once by his agreement made the deed good, he cannot afterwards by his disagreement make it void: and when once, by refusal and disagreement he hath made the deed void, he cannot, by agreement or acceptance afterwards, make it good; [and if a conveyance be made to two as joint-tenants, and one of them disagree, the other shall take solely. 4 *Leon.* 207; *Townson* v. *Tickell*, 3 *Barn. & Ald.* 31. But it has been supposed that under grants by deed, the estate vests in both till disclaimer on record. *Litt.* § 684. 3 *Abstr.* 107; but if one of several tenants in common disagree, the deed will be void as to his share, and good as to the other shares, without any disclaimer. 4 *Leon.* 207.]

Agreement.

5. *By judgment of a court.*

A deed also good in its original creation, may be afterwards damned or avoided by sentence and order of a court; and this is usually done in the Star Chamber, and in the Chancery; and it is when it appeareth that the deed was obtained by some fraud, force, circumvention, or such like practice, or when it doth appear to be forged, or the like. [Hence, in one case, Lord *Loughborough* decreed the deed to be void, that no reconveyance might be requisite. In many cases the deed is good, though equity will relieve against its consequences, and decree a reconveyance on terms.]

Crom. Jur. 29. 40. Bro. Fait. 38.

Vacat of a deed.

7. *When & where a deed may be good in part, and void in part. Or good against one person, and void against another, or not.*

For the answer of this question these differences must be observed:—1. When a deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the deed which is void in part from the beginning, is entire, and when it doth consist of several clauses: and when it doth consist of several clauses, when the several clauses are absolute and distinct, and when they are several, and yet the one hath dependency upon the other.

Co. 11. 27. 14 H. 8. 27, 28, 29.

For if any [some] of the covenants of an indenture, or the conditions of an obligation be against law, and the rest of the covenants or conditions be good and lawful; in this case those that are against law, and the deed as to that part, are void *ab initio*; and the rest, and the deed as for that part, are good *ab initio*. So if three distinct obligations are written upon a piece of parchment, and the one of them only is read to the obligor, and he being an illiterate man seal and deliver the deed; in this case, this is a good deed, for that which was read, and void for the rest *ab initio*. But if an obligation be for 20 *l.* and it be read to the obligor [as] an obligation of 20 *s.* this is void for the whole *ab initio*, [for in one case the duty is entire, and cannot be apportioned, while in the other case, there are several and distinct duties.]

Co. 11. 27. Kelw. 70. 3 E. 30, 31. * If a deed be read as containing the grant or gift of an estate tail, and a letter of attorney to give livery of seisin, and in that sense the party doth seal it, and in truth it is a feoffment and conveyance of an estate in fee simple; in this case, albeit the letter of attorney were truly read, yet, because it hath dependance on the estate, it is void for all, [because on the circumstances, the act cannot be done under the authority, and therefore the authority, though not void simply and *per se*, is void in reference to the act intended to be done.] *P. 71.

Co. 11. 28. Fitz. Feoffments and Faits, 57. 47 E. 3. 3. If a man be indebted to me 20 *l.* on a contract, and 100 *l.* on an obligation, and he pay me this 20 *l.* and I am to make a release for it, and the intendment of the release is no more; and it is so read to me being an illiterate man, but in truth it is a general release; in this case it seems it is good for so much as it is intended and was declared, and void for the rest. [This proposition is questionable: for how can a release, which must be pleaded merely as a general release, and is void as such, be used as a release for a purpose not particularly expressed. The short answer to such a release would be, that the words relied on were mis-read, and on that account not binding on the party. See *Weeks* v. *Maillardet*, 14 *East*, 568, for the principle.]

Dyer, 27. If the condition of an obligation be altered by rasure, &c. the obligation also is hereby become void, because the condition and obligation are one

deed; but if the rasure, &c. be in the defeasance of an obligation, this will not make the obligation void, [for the defeasance is a distinct instrument, and whatever act destroys the defeasance leaves the obligation in full force. A bond or a covenant may be void, because it is given *pro turpi causa*; as to induce a criminal intercourse. *Coleman* v. *Sarell*, 3 *Bro. C. C.* 12; and the fact may be averred and proved, though it do not appear in the bond or covenant. 2 *Wils.* 341; or the bond may be void, because the condition is, that the bond shall be void on the commission of murder or other crime. 1 *Inst.* 206 b; or because the condition is repugnant or impossible, under these circumstances the condition is rejected, and the bond remains in force. So a limitation may be void, because it is to give an estate on an illegal act, as on the commission of murder. *Plowd.* 64 b; 1 *Inst.* 206 b; or because it has a tendency to create a perpetuity against the policy of law; or the gift may be good, and the condition void, because the condition aims at perpetuity, *i. e.* to restrain alienation against the rules of law, or to cease an estate in part and not entirely, or to induce a crime, as to render the estate absolute on the commission of murder, &c.; or because the condition is repugnant in itself or to the law, or is inconsistent or contrariant. The distinctions will be found in the chapter on Conditions. And as a general rule, no estate can commence, on a condition precedent, *viz.* a conditional limitation, unless the event shall happen on which the estate is to arise, agreeable to the intention expressed in the gift; nor unless the act required to be done is an act which may be done consistently with the policy of the law.]

If a deed contain divers distinct and absolute covenants, and any of these covenants be altered by addition, interlineation, rasure, or the like, by this means the whole deed, and not that part only, is become void. 14 H. 8. 25, 26. Co. 11. 28.

If there be divers grantors, obligors, &c. named in a deed, and one of them only do seal the deed, this is a good deed as against him that doth seal, and void at to all the rest that do not seal. [And though the several persons were intended to be jointly bound or to covenant jointly, this instrument Co. 5. 23. 11. 28. 3 H. 7. 5. [B. N. P.]

may be pleaded as the bond, or covenant of that person alone, who shall execute. The like rule applies to grants. But in the execution of joint-powers and authorities, a different rule prevails, for one alone has no authority. But if a deed be executed by one of two executors, although both be named as grantors, the deed will be effectual; because one executor has singly and alone an authority to release, assign, &c.] And if divers enter into covenants by a deed severally, and the seal of one of them is broken from the deed; in this case the deed is good still as to all the rest, but void as to him. But if an obligation, or the covenants of a deed, be joint and not several, or joint and several, and the seal of one of the obligors or covenantors is broken; or the obligation, or covenants, be altered by rasure or the like; hereby the whole deed is become void. [It is a general rule, that when two persons are jointly bound or liable to a duty, that though they be bound severally as well as jointly, a release of one will be a release of both. Hence the necessity which sometimes exists in practice of covenanting to release a party, or covenanting to sue him only for conformity, instead of releasing him. So in equity, whatever act is a discharge of the principal, will be a discharge of the surety, though the surety be not released at law. This rule is to avoid circuity; since, if the surety remained liable he would have his remedy against the principal, to be reimbursed: so that the release to the principal, unless it also discharged the surety, would not in effect be of any advantage to the principal.]

14 H. 8. 29. Perk. fo. 2. If I be bound in an obligation to a monk and *I. S.*, this deed is void as to the monk, [because he is *civiliter mortuus*,] but good as to *I. S.* [as a sole grantee; for a grant to two persons of whom one only is capable, is a grant to the person who is capable; 18 Ed. 3. fo. 29. But a grant or gift to a class of persons may, under the rule against perpetuities, be void as to all, though some of the individuals came in *esse* in due time; *Leake* v. *Robinson*, 2 *Meriv. Rep.* 362; *Audley* v. *Gee*, *Cox Rep.* 324. If a grant be to several persons, as tenants in common, those who are capable will take their respective shares, and the grant will be void as to the shares of those persons who are incapable. On the foun-

dation of the same principles, if a devise be to two persons jointly, and one of them die in the lifetime of the testator, the survivor will take the entirety. But if a devise be to several persons, as tenants in common, and some of them die in the lifetime of the testator, there will be a lapse for their shares, unless carried over by a remainder or a clause of substitution.] So if a monk and I be bound to another; this is good as against me, but void as against the monk, [and this is a several bond as against me.] And so it is in case of a grant.

By a power of revocation, or a condition, a deed may be made void in part and continue in his [its] force for another part. [On this point there is a difference between conditions at the common law and conditional limitations, in the nature of executory devises, shifting uses, &c. A common law condition must defeat the estate wholly and entirely, while a proviso in a conveyance to uses, or in a will, may defeat it partially by postponing it, introducing another intermediate estate, &c.; but in these cases the proviso or gift is of the nature of a limitation rather than a condition: it partakes partly of the nature of a limitation, and partly of the nature of a condition; 2 *Prest. Abstr.* 146, 3 *ibid.* 285, 1 *Prest. Estates*, 45. Even in a conveyance to uses, a proviso, in the nature of a condition, cannot suspend an estate, so as to be in *esse* at one time, and not in *esse* at another time; *Mary Portington's case*, 10 *Rep.* 42 a, nor introduce interests which are repugnant to the rules of law; *Butler's Fearne, last edit.* 258.] And therefore it seems, in the usual case, where a deed is made upon condition, that if such a thing be or be not done, the deed thall be void, or these presents shall be void; that in these cases the whole deed, and all the covenants therein contained, are void: But if the frame of the condition be, that upon such a thing to be, or not to be done, it shall be lawful for the feoffor, lessor, &c. to re-enter, or that the demise shall be void, without more words; in these cases the estate only, and those covenants that are incident thereunto, as for quiet enjoying and the like, and the deed as to
*P. 72. * that part only is void: and for other covenants that are collateral, and have no dependance upon the estate, that part of the deed doth remain in

Co. 1. 173. Dyer, 127. See in Leak's Numb. 13.

force and is good still; for a man may grant two acres upon condition to re-enter into one of them. If it be intended that the whole deed shall be void, the best way is to use these words, "then these presents, and every thing therein contained, shall be utterly void."

Co. 2. 4 b. 5 H. 7. 26. Plow. 491. Dyer, 307. 315. Fitz. Feoffments & Fait. 87. 63. 85.

8. How and to what time a deed shall have relation: and when it shall begin to take effect.

All deeds [in point of obligatory force, with a view to the priority of title] do take effect from, and therefore have relation to, the time, not of their date, but of their delivery: and this is always presumed to be the time of their date, unless the contrary do appear. [The first branch of the proposition is, the rule of law: the second branch is, the rule of evidence. Proof of the time of delivery, renders the date immaterial. But the date cannot controul the evidence of the time of actual delivery.] And hence it is, that if a statute be acknowledged the 26th day of May, and the conusee make a release of all demands dated the 25th day, and deliver it the 27th day; by this release the statute is discharged [*infra*, 71.] And that if the defeasance of a statute do bear date before, and the delivery of it be after, the statute; the conusor may show this [by proving the time of delivery,] and take advantage of it in avoidance of the statute. And that if a writing be dated in the minority of an infant, and be sealed and delivered by him when he is of full age, this is a good deed and will bind him. And that if a release be supposed to be made by a husband, to bar a duty due to the wife, and it be dated during the coverture, but in truth it is sealed and delivered by the husband before the coverture [*viz.* before he had any rights as husband;] this shall not bar the wife: the time therefore of delivery of a deed is material in all these and the like cases, and this is always to be tried by a jury. And hence it is also, that if the next presentation to a church be granted to two several persons, by several deeds, of several dates, and the deed that beareth the last date be first delivered; in this case, he to whom this deed is made, shall have the presentation, and not the other, whose deed albeit it be dated first, yet is delivered last. And hence it is also, that if a lease be made for years, to begin from henceforth, or *à confectione presentium*, or *a die confectionis*; this lease shall be said to begin from the time of the

Fitz. Feoff. & Fails, Barre. 147.

first delivery, and not from the time of the date. [And if there be a power to lease in possession, or there be a freehold lease, and the *habendum* in such lease, or in a lease under the power be to hold from a day to come, and the lease under the power be delivered, or there be livery under the freehold lease, after the day for commencement, the lease will be good. But in a limitation for years, from the day of the date, the computation, except under special circumstances, is from the day of the date of the deed, without any regard to the time of delivery; and, according to many cases, a lease to commence from the day of the date, excludes the day of making; but according to *Pugh* v. *The Duke of Leeds*, *Cowp.* 714, it will depend on the intention, whether these words shall be construed exclusive or inclusive.]

Relation.

And where deeds have a kind of double delivery, as in case of a delivery as an escrow, there they shall take effect from, and have relation to, the time of the first delivery, or not, as circumstances may require, and *ut res valeat*: for if relation may hurt, and for some cause make void the deed, (as in some cases it may,) there it shall not relate. But if relation may help it, as in case where a feme sole deliver an escrow, and before the second delivery she is married, or dieth, in this case, if there were not a relation, the deed would be void, and therefore in this case it shall relate (57). So if one disseise me of two acres of land in *D.*, and I release to him all my right in my lands in *D.*, and deliver it to an estranger as an escrow, &c. until a time, and before that time he disseise me of another acre there; in this case this release shall not by relation extend to this other acre to bar me * of that also. [The relation depends on the nature of the transaction, and the presumable intention of the parties. In point of title (admitting the parties who are grantors are competent as to ownership and free from disability,) the deed will take effect from the first delivery, so as to overreach all intermediate encumbrances.] But as to collateral acts, there shall be no relation at all in

Co. 3. 35. 36. 18 H. 6. 9. 27 H. 6. 7. Plow. 344.

*P. 79.

(57) See accordingly *Jennings* v. *Bragg*, *Cro. Eliz.* 446. So also it is of a deed of feoffment, and letter of attorney therein to make livery, by a man *sanæ memoriæ*, which is delivered by the attorney when the feoffor is *non compos mentis*; yet it is good, because it hath relation to the authority before.

this case. And therefore if the obligee release before the second delivery, the release is void, and will not bar the party obligee of the fruit of his obligation (58). [It should seem that this inchoate or imperfect obligation might be released by appropriate language. If it be not released as an obligation, the reason is, because, in fact, there is not any obligation till the second delivery. But, at this day, it would probably be decided, that the release, even by these inartificial terms, was effectual.]

Co. 10. 92. super Lit. 267. 317. 225. 231. 5 74 Lit. Sect. 375. [B. N P. Ch. Evidence.]

9. When & where a deed must be shown in court. And how long it shall abide there. And who may take advantage of it.

If a man, that is party or privy in estate or interest, or one that doth justify in the right of one that is such a party or privy, shall plead a deed in any court; although he claim but parcel of the original estate, yet in this case, he must show the original deed to the court; and the reason of this is, to the end that the legal part of the deed (the trial whereof belongeth to the judges) may approve itself; *i. e.* that it may be seen whether the composition of words be sufficient in law or not; and then that it may appear whether the estate be with condition, limitation, or with power of revocation, &c. to the end that if there be any such thing in it, and there be no other part of it, the other party may take advantage of it; and then that it may appear to be without rasure, or interlining, and the like; and also that it may appear to be well sealed and delivered, (the trial whereof doth now belong to the country.) [To this general rule there is an exception. When the deed is lost, or is in the hands of the adverse party; under these and the like circumstances, the party may aver the loss of the deed, or the possession by the adverse party, as a reason for not making the profert. So, in case of rights depending on presumable releases, &c. the practice now is to plead such a release, &c. and to aver that it is lost, and to go before the jury to try the facts on which the presumption is grounded.] But strangers in estate, that are neither parties nor privies, shall not be compelled to show the deed, though they make use of it (59).

(58) In what cases subsequent acts shall bind by reason of their relation to precedent ones. See *Vin. Abr. Deeds* (O.) *Relation* (E.) *Com. Dig. Bargain and Sale* (B. 9.) *Confirmation* (D. 5.)

(59) See fully in what cases it is necessary to show the deed or not. *Com. Dig. Pleader* (O.) (P.) *Wils. Rep.* 1 vol. part 1. p. 121. 2 vol. p. 1. *Vin. Abr. Faits* (M. a.) But in cases of great and notorious extremity, which have occasioned the destruction of the deed, as by

And when a deed is thus showed in court, it must remain in that court, all the term wherein it is showed, in the custody of the *custos brevium*; [on a profert, the practice now is to give a copy,] and at the end of the term, if the deed be not denied, the law doth adjudge the possession of the deed in him to whom it doth belong. But if the deed be denied, then it is to be kept there until it be determined. Also when a deed is showed in court, the adverse party may take any advantage by it that it will afford him; as if a feoffment be made by deed poll on condition, and the feoffee doth break the condition, and the feoffor doth enter, and the feoffee doth sue him, and makes his title by that deed, the feoffee may take advantage of the condition [by pleading it.]

Dyer, 315. 12 H. 6. 1. Co. 2. 4, 5.

10. *Where one may say his deed was delivered at another time, or in another place.*

Any man that hath occasion to use or plead a deed, may set forth the delivery thereof to be at any time [before or] after the date of the deed [by averring the time of delivery;] and in some cases he must do so, if he will have any advantage by it, [since in the absence of such averment the opposite party might demur.] As if he plead a release to an obligation, and it [the release] beareth date before the obligation; in this case he must aver, that it [the release] was delivered after [the obligation, or show the error in the date of the obligation,] or it [the release] will not avail him. But a man may not, in pleading, set forth the delivery of a deed to be before the date of the deed. [Why not? The text proceeds on a mistake of law. 2 *Rep.* 5.] And yet if it be so that a deed be dated after the time of the delivery of it, the deed is good; and therefore if he that doth use such a deed, do plead and set it forth as a deed made before the time of the delivery, [*read* as bearing date before the day on which the deed is delivered. *Goddard's case*, 2 *Rep.* 5.] and the party that made it plead *Non est factum* to the deed, a jury upon the trial may find the truth of the case; but if he by his pleading set forth the deed to be delivered before the time of the date, then the jury

Estoppel.

casualty of fire; in that case, he who suffers so great a loss, may be permitted upon the general issue to prove the deed in evidence to the jury by witnesses, in order that affliction may not be added to affliction. 10 *Co.* 92. b. The evidence on a casual destruction of a deed, is the same in a court of equity, as in a court of law. 1 *Ves.* 235. In what cases relief may be had in equity on the destruction or loss of a deed, see 1 *Ves.* 392.

is concluded as, well * as the party himself, [to find contrary to that fact;] for a jury is estopped to find any thing contrary to that which is apparently admitted in the record. In debt brought by an executor, the defendant pleaded the release of the testator, which did bear date after the death of the testator; but he did aver the delivery of it in the life-time of the testator, and the court did not allow of this plea. [The law is so stated in 2 *Co.* 5, *Goddard's case*, and the court agreed to it; but as it is admitted that such a release is good, there seems no reason for over-ruling the plea, since the plea puts the material fact of the case in issue. At this day such plea would, it is apprehended, be allowed; for the date of a deed is not an estoppel against stating and proving the time of delivery. The averment of the time of delivery is perfectly consistent with the statement, that by indenture bearing date, &c. But *Goddard's case* proves that such special declaration is not necessary, since the jury may find the fact, and of course it admits of proof. The proper way is to plead the deed, as bearing date, &c.: with an averment, if the occasion requires it, of the time of delivery. But if, in describing dates, there be a material error, the deed, when produced, will not support the issue; and therefore a deed, bearing date the 1st of January, cannot be given in evidence to support an issue or a declaration, which describes the deed as bearing date the 2d of January. And yet in *Goddard's case*, 2 *Co.* 5, it is said, that the mistaking of the date of a deed will not hurt, upon a plea of *non est factum* pleaded; but there is nothing in that case which warrants this general conclusion, and it is in opposition to the rules of evidence: for as far as the court or jury can judge, the bond produced in evidence may be, and apparently, is a different instrument from the deed pleaded. But this objection does not exist when a deed is pleaded as bearing date (for that is the fact) on one day, and as first delivered on another day; for in such case the issue is on the time of delivery, and not on the apparent date.]

*P. 74.

12 H. 6. 1. [5 Rep. 8.]

Co. super Lit. 6. Sometimes antiquity added the place where the deeds were made, as *datum apud B.* and this was in disadvantage of him to whom the deed was made; for if the deed be in general, and without this

addition, he may allege the deed to be made where, [*viz.* in any county, &c.] he will [so as to fix the *venue*.] An obligation made beyond the seas may be sued here in *England* in what place the obligee will, and if it bear date at *Bourdeaux* in *France*, it may be alleged to be made in *quodam loco vocat. Bourdeaux* in *France*, [*viz.*] in *Islington*, in the county of *Middlesex*, and there it shall be tried; for whether there be such a place in *Islington* or not, the fact is not traversable [Fines of lands in the colonies are frequently levied in the courts of Westminster-hall, on this suggestion, and such fines are allowed to be effectual in the local jurisdictions of the island. Lord *Eldon*, when C. J. of C. B. at first thought such a fine ought not to be permitted to pass; but, on consideration, he gave it his *allocatur*; still objecting to the fine on principle, as *coram non judice*; but the true ground on which such fines ought to be allowed, is, not because they are records in this country, but because they are a species of assurance recognized by the local jurisdiction in the colonies.] Co. super Lit. 261.

Non est factum; *Quid.* And where this may be pleaded to a deed, or not.

Non est factum is an answer to a declaration, whereby a man denieth that to be his deed whereupon he is impleaded. [The plea of *non est factum* puts sometimes the identity, and sometimes the validity of the deed in issue; and the identity or validity of the deed, is the only point to be tried. Thus in covenant, if the defendant plead *non est factum* alone, there is no occasion to prove the breach of covenant, except for the purpose of ascertaining the damages.]

If any deed or writing be used against a man in any court, and it want writing, [on paper, vellum or parchment,] sealing, or delivery; or it be not sealed, written, and delivered as before is set forth, the party that is sued upon it, or against whom it is pleaded, may plead this plea to it. So also if a deed, by any alteration of rasure, &c. become void; in this case the party may plead this plea to avoid it. So also where a deed doth become void, or lose its virtue by the not reading, or not true reading of it to an illiterate man, or by refusal or disagreement, as in the cases before, the party may plead this plea to avoid it; [but sometimes the plea must state all the special circumstances, and conclude *sic non est factum*.] But

in all cases where the deed is voidable, and so remaineth at the time of the pleading; as if an infant, or man of full age by duress, seal and deliver a deed; or if an obligation be well sealed and delivered by two, and the deed be joint, and the obligee sue one of them [solely, in the life of the other, or after his death, and without averring his death;] in these, and such like cases, the party bound by the deed may not plead *Non est factum*; for in the first, and such like cases, he must avoid it by special pleading, with conclusion of judgment *si actio*, &c.; and in the last he must plead in abatement of the writ, &c. And if an obligation, or any other deed, be by any special Act of Parliament made void, the party that is bound by it cannot plead this plea of *non est factum* to it; but he must avoid it by special pleading of the matter, and taking advantage of the statute, and so with conclusion of judgment *si actio*, &c. (60).

And now we come to the exposition of deeds.

CHAP. V.

Exposition of Deeds.

IT is further to be observed, that deeds for the most part consist of these things, [*i. e.* parts,] *viz.* the premises, *habendum*, *tenendum*, *reddendum*, or reservation, condition, warranty, and covenant. And in the premises there is sometimes a recital, and sometimes an exception contained; but all these are not essential parts of a deed: for a deed may be good, albeit it have not all these parts, or it be not so formal and orderly drawn and made.

Co. super Lit. 6. 7. Co. 11. 51. 2. 55. Plow. 196.

The premises of a deed are all the foreparts of the deed before the *habendum*. And yet this word is sometimes taken for the thing demised, or granted, by the deed. [In this sense, the word premises hath reference to the things demised, and

1. *Premises. Quid.*

(60) Accordingly 5 *Co.* 119, 11 *Co.* 27, a. See further by whom the plea of *non est factum* may be had, in what cases, and at what time, *Vin. Abr. Faits*, (N. a.) N. a. 2.) *Com. Dig. Pleader*, (2 W. 18.)

to those only as being parcels *comprised* in the demise. But this word is also often used in reference to facts or transactions, which are recited in a former part of the deed, and seems to refer to all those things which are *præmissa* or preceding, 14 H. 8, fo. 13 b.] And the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted, either by express words, or by that which by reference may be reduced to a certainty, [and *certum est quod certum reddi potest,*] and the exception, or thing to be excepted, if there be any. And in this part of the deed is the recital, (if there be any in the deed,) for the most part contained.

And herein also is sometimes (though improperly) set down the estate. [Beyond all doubt, it is more proper that there should be an *habendum* in every deed to limit the estate which is to pass by the grant; but it is equally certain, that it is an error on the right side, (if it be an error at all,) to limit the estate, as well in the premises, by the clause of grant, as after the premises by the clause of *habendum*. The only thing to be regarded is to pass the same estate by one clause; and by the other, when the intention requires that effect. One estate, however, may pass by the grant in the premises, and another estate by the *habendum*. *Thurman* v. *Cooper*, *Poph.* 138.]

2. *Habendum. Quid.*

The *habendum* of a deed, is that part of the deed which doth begin with, *to have and to hold.* And this [clause] doth properly succeed the premises. [Sometimes there are two or more grants, and only one *habendum*. This form, though sufficient in point of law, is a very inartificial mode of preparing a *deed*. In other instances, there is one clause of grant, with several *habendums*. This form is perfectly correct; and even requisite, when it is necessary or *convenient* to introduce property held for different estates in one and the same clause of grant; as in the instances of grants of property in the West India islands, freehold and leasehold lands intermixed, &c. &c.] And the office hereof, is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. And herein also is sometimes, though needlesly, [when there is

Co. super Lit. 6. 7. 10. 107.

only one *habendum*,] set down again the thing granted. [When it is proper and necessary, and when unnecessary to enumerate the parcels in the *habendum*, depends on the circumstances of the case. In no case, when the same parcels are to be passed to the same person for the same estate, is such description or rehearsal necessary in the *habendum*; on the contrary, when the parcels are to be taken by the same person for one estate, in one part of the parcels, and another estate in the other parcels, the description, at least a reference to the description, is absolutely necessary, for the purpose of making the proper distinctions.] But the deed that doth usually consist of all these parts, may be good, notwithstanding some of them be omitted, and it be not so formally made. For an estate may be made by a deed without any *habendum* at all. As if one give or grant land to another, and his heirs, without any more words in the deed; or if one give or grant land to another, and limit no estate, without any *habendum* in the deed, and seal and deliver this deed, and make livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made. And if the name of the grantee be not contained in the premises, yet if it be in the *habendum*, it may be good enough, [1 *Inst.* 7, a.; but *Bustard* v. *Coulter*, *Cro. Eliz.* 902, *contra*. The point is now settled by *Spyve* v. *Topham*, in favour of the validity of the grant, 3 *East*, 115. 2 *Prest. Convey.* 380, 433. 1 *Abstr.* 77. 2 *Abstr.* 98.] (61.) As if one give or grant land, *habendum* to *B.* and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee simple. And yet if the thing granted be only in the *habendum*, and not in the premises of * the deed, the deed will not pass it. [Probably this proposition is too general.] And therefore if a man grant black acre only, in the premises of a

Where a deed is good, notwithstanding some seeming fault in the premises or in the *habendum*.

*P. 76.

Plow. 152. Dyer 96. Perk. Sect. 251.

(61) One who is not named in the premises, may nevertheless take an estate in remainder, by limitation in the *habendum*, 2 *Roll. Abr.* 68. *Hob.* 313. In 3 *Leon. Ca.* 60, it is said, that the *habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder. See more amply in *Vin. Abr. Faits*, (C. a.) [Z.] [The cases warrant the conclusion, that a person may not be bound by an indenture, unless he be formally named therein as a party. By a deed poll, a person may be bound by any language proceeding from him.]

deed, *habendum* black acre and white acre; white acre will not pass by this deed. But if the thing, newly added, be implied in the thing granted by the premises of the deed, as being an incident [or appendant] thereunto, or otherwise; or it be the same thing, and expressed in other words only; in these cases the premises and the *habendum* may stand together. As if one grant a manor, *habendum* the manor, with the advowson appendant to the manor, [for the rule is different, if the advowson be in gross;] or if one grant a reversion of land, by the name of a reversion, in the premises, *habendum* the land itself; in both these cases the deed is good, and the advowson, and reversion, will pass; [for they were in effect, and in point of law, included in the former description by force of the livery, independently of the charter.] So also if livery of seisin be made of the thing newly added, in this case perhaps it might pass by the livery. [At this day *a writing*, (whether by deed or without deed, is immaterial,) is essential to *the validity of a feoffment*; 29 Car. 2, c. 3. But why may it not be said, that since the livery is the operative part of the conveyance, it shall be sufficient, if the words reduced into writing show an intention to pass the property; and, *query*, if for this purpose there is not a difference between livery made with reference to the charter, and a charter made in evidence of the livery; for when livery is made *secundum formam chartæ*, the operation of the livery depends on the terms of the charter.] And if the thing granted be left out in all, or in part, in the *habendum*, yet the grant is good, [by force of the premises.] And therefore if one grant land to *A. habendum* [without naming the land] to *A.* his heirs, &c.; or if one grant white acre and black acre to *A. habendum* white acre to *A.* and omit black acre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases. And if a feoffment be made to one, *habendum* to him and his heirs, without the word assigns; this is a good feoffment, and the estate thereby made is assignable, [1 *Prest. on Estates*, p. 126. And a condition, affecting a general restraint on alienation, would be repugnant to the nature and quality of this estate, and be void. But a condition, which restrained the ali-

Lit. 1. Co. super Lit. 46. Co. 6. 35. Terms of the law, tit. Assigns.

enation to a particular person, or which required an alienation to that person, or which restrained the alienation only for a limited and reasonable time, would be good.] As where a lease is made to one, his executors and administrators, without the word assigns, this is a good lease, and assignable. [But if in a lease to *A.* his executors, administrators, and assigns, there be a condition, generally restraining the right to assign, the condition will be repugnant, and be rejected. But a condition to restrain an assignment, without consent, or to a particular person, would be consistent and operative. So a condition annexed to a lease, to a man, his executors and administrators, without naming the assigns, and which imposes a general restraint on alienation, is good, because there is a tenure created, and the condition is consistent with the grant. But note, the assignor of a lease cannot annex a condition in general restraint of alienation. He is in the same predicament, in this respect, as a tenant in fee simple.] So if one grant land to *A. habendum* to him for one hundred years; or *habendum* to him and his assigns for one hundred years; these are as good leases, as the lease that is made by these words, *habendum* to *A.* his executors, administrators, and assigns, for one hundred years. So if a lease of land be made to *A. habendum* the land to him and his heirs for one hundred years, this is a good *habendum*, and the word [heirs] is void, and it shall go to his executors, [because the heirs cannot take a chattel in succession, unless in special cases, as heir-looms; as a horn, &c. by which the land is held, &c. *Toller, Executors*, p. 153,] &c. When the fee may pass by mere operation of the deed; the deed will pass the fee, and the *habendum* will be rejected. But if any ceremony, as livery, be requisite to pass the inheritance, then the term would pass immediately; that the deed may have present and immediate operation. *Baldwin's case*, 2 *Co.* 91; and see the distinctions in that case; and *query* if they are law at this day.] As also where land is granted to *A. habendum* to him and his successors for one hundred years; this is a good lease, and the word [successors] void, for it shall go to executors, &c.; [for even a sole corporation, except the chamberlain

of London, cannot have a term transmissible to successors, and on this account the word successors is rejected. 2 *Prest. on Estates*, p. 46.] And if a lease be made *habendum* for years, and say not how many years, this is a good *habendum*, and a lease for two years (62.) [*Query*, if the lease be not void for uncertainty, by reason of the omission to define the number of years; but in *Bath's case*, 6 *Co.* 36, it is said such a lease is good for two years. *Prest. on Estates, ch. Years.* Many and nice distinctions occur in the books on the law applicable to this clause of *habendum*. A general summary of the distinction is introduced into 2 *Prest. Convey.* p. 467. A detailed and masterly discussion of the subject will be found in *Powell's* edit. of *Wood's Convey.* vol. 1, p. 212.]

3. Recital. Quid. A recital is the setting down, or report of something done before; [and the recital of a lease for a year, in the deed of release, is, in most cases evidence thereof. 2 *Prest. Convey.* p. 443. And in Ireland the recital of the lease is, by Act of Parliament, made a substitute for the lease. *Ibid*, p. 444, (62 a). And a *recital* is often highly important to the exposition of the deed. *More* v. *Magrath*, *Cowp.* 9. In the celebrated cause of *Cholmondeley* v. *Clinton*, the judgment of *Plumer*, M. R. was materially governed by the intention, as that intention was collected by means of the recital. The words of gift, standing singly and alone, would have conferred a title on the complainant, Mrs. *Damer*, (Aug. 1820, MSS.) *Com. Dig. Parols.* Frequently a recital is introduced, as prefatory to each, of different clauses of grants. This practice is very common in cases

---

(62) See further, as to the exposition and operation of the *habendum*, *Com. Dig. Faits*, (E. 9,) and how far the *habendum* may enlarge or abridge, explain or qualify, the premises. *Lilly's Conveyancer*, 215. *Co. Lit.* 183, 299, a. *Vin. Abr. Grants*, from (I. a.) to (N. a.)

(62 a) Recital of itself is nothing, but being joined, and considered with the rest of the deed, is material; *per Clinch*, 1 *Leon.* 122. A recital is not a necessary part of a deed, either in law or equity.—It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect, or operation. 3 *Chan. Ca.* 101. A recital is not conclusive, because it is no direct affirmation. *Co. Lit.* 352, b. It is said covenant will lie upon a recital. See *Graves* v. *White*, 2 *Eq. Ca. Abr. Portions*, (C.) But recitals shall not make an estoppel, for they are not material. *Finch's Law*, 33. Recital of a lease in a deed of release, is good evidence of a lease against releasor, and those that claim under him. *Ford* v. *Lord Grey*, 6 *Mod.* 44. See fully in what cases *recital* is evidence, in *Com. Dig. Evidence*, (B. 5.)

of attendant terms and covenants, for the production of title-deeds.]

Co. 1. 45. Dyer, 77.

4. *Where it is needful, or not.*

When a man is to take any new estate from the king, of a thing whereof there is any estate in being, there the former estate, if it be good and of record, must be rehearsed and recited in the deed, or else the second grant will not be good. [*Shep. Abr. ch. Prerogative.*] (63.) But in case of a common person there needs no such recital; neither when a man is to derive an estate out of a former, or assign over a term of years, is it needful there should be any recital of the former estate in being.

Co. 4. 74.

5. *Where mis-recital will hurt a deed, or not.*

If one recite or rehearse an estate made for term of years, and * then after grant over that term to another, and mistake in the recital; this mistake may make all void (64). As if a *fieri facias* come to a sheriff to levy a debt, and he by writing recite that the defendant hath a term of years, and doth suppose it to begin 1 *Maii*, 2 Jac. when in truth it doth begin the 20th of *August*, and then sell the same term; in this case this sale is void; [because there is not any such deed or term, and consequently there is a reference to a nonentity.] But if he add withal these words in the deed, "and all the interest that the defendant had in the land;" or if he make sale of it [the land] for a certain number of years only, this grant may be good notwithstanding the mis-recital; [because the land itself is granted for all the estate, or for a particular time, and the deed is, in this part of the description, independent of the recital. So if a man, having a lease dated the 1st *January* 1820, should recite it as dated the 2d *January*, and then assign all the lands demised by that indenture, the assignment would be void in law,

*P. 77.

(63) For the doctrine of grants by the king, and when they shall be good or void, see *Vin. Abr. Prerogative of the King*, (G. b. 2,) &c. In what cases recital shall make them void, *ibid*, (Q. b.) When a recital is necessary in them, *ibid*, (Q. b. 2; and further in *Bac. Abr. Prerogative*, (F.)

(64) If a lease is misrecited, and then the land comprised in it is granted, *habendum* for twenty-one years after the expiration of that lease: it is a good grant for twenty-one years after the expiration of the former lease, notwithstanding the misrecital. 1 *Lev.* 235. [But if the party had granted all those messuages, &c. which were demised, &c. by the indenture of, &c. here the recital is rendered material, and as the grant depends on the recital, it will fail, unless the recital is correct in its material parts. It is therefore very important in the assignment of terms, to be careful that the indenture creating the term is correctly recited.]

though in favour of a purchaser equity would correct the mistake. To avoid the injurious consequences of error in the recital of dates, &c. the safe and correct practice in conveyancing (a practice inadmissible in pleading) is to recite deeds as bearing date on or about, &c. thus allowing the deed to be produceable in evidence in support of the title, though the date be mistaken. A declaration or plea which stated a deed as bearing date the 1st *January*, would not be supported by the production in evidence of a deed dated the 2d *January*.]

If one recite a former lease to be made such a day to *I. S.* and then make a new lease to begin after the end of the former lease, and mistake the date of the old lease; in this case the deed is good notwithstanding this mistake, [and the term will commence, in interest and computation, immediately; *Preston on Estates, ch. Years.* This is rather a singular case, and depends on the different modes of giving evidence. To postpone the lessee's right to a present and immediate estate, it must be shown there was such a lease as is recited, at least after the lessee hath produced some evidence to raise the presumption that there was not any such lease; while the lessee, to show that his estate is not expired, must give evidence of the former lease; at least after there hath been some evidence, on the part of the lessor, to raise the presumption that no such lease as is mentioned in the recital, existed; at least it is difficult to account for the determination of this case, on any other ground.] Dyer, 93, 160.

If one grant a reversion, and in reciting the lease in possession, mistake the date of it only, and recite all the rest truly, this will not hurt the grant. [The effect must depend on the mode in which the grant is expressed, for the reference may make the recital so material as to defeat the grant; as a grant of the reversion expectant on the said term of years, when in truth there is not any such term as the term which is recited.] No more than where a man doth recite that such land came to him by forfeiture, and then doth grant it by name; for in this case, albeit it did not come to him by forfeiture, but by surrender, yet this mistake will not hurt, [because the land itself, respecting which there is not any 8 H. 7. 3. Fitz. Grant.

uncertainty, is granted.] And yet, in case of the king, such a mis-recital may make the grant void, [on the ground of his being deceived, and the interest being different from that interest he intended to grant.]

Dyer, 50. 87. 276. If I grant to *I. S.* all the lands in *Dale* which I purchased from *I. D.* or which came unto me by descent from *I. D.* or I give all my goods to *I. S.* which I have as executor to *I. D.* and in truth I have no such lands or goods, but I had them by some other means, or of some other person; in these cases, and by this mistake, the deed is void; [for these words, purchased, &c. are of the essence of the description, and the grant fails for want of a subject on which it may operate.] But if I grant to *I. S.* all my lands in *Dale* by name, as *White Acre*, [being the substance of the grant,] which I purchased of *I. D.* [being a circumstance of description, and false,] and in truth I did purchase them of another, in this case this mistake will not hurt the deed, [because there is a certainty of the lands. Lord *Hobart*, in citing this case, distinguishes it from the judgment in *Doddington's case*, 2 *Rep.* 32, by saying, by grants of particulars sufficiently once ascertained, another mistaking will not frustrate, though it be false. *Bacon* gives the rule, *falsa demonstratio non nocet.* Another rule is, *utile per inutile non vitiatur.*] So if I grant twenty load of wood in *Dale*, [being a sufficient grant, by its own terms,] in the great wood which I had of the grant of my father, [being an accumulative description, and a false demonstration only,] and in truth I had it not of the grant of my father, but of the grant of another, in this case the grant is good (65); [and if a man grant 10 *l.* (part of an annuity of 20 *l.*) and in truth there is not any such annuity, the grant is void. But if it be granted to receive out of such a sum, and there is not any such sum, the grant is good to charge the person of the grantor with 10 *l.* a year; *F. N. B.* 341.] But of this matter see more in Grant, *Numb.* 4. part 5.

Plow. 361. 195. Dyer, 59. Perk. Sect. 625. An exception is a clause of a deed, whereby the feoffor, donor, grantor, lessor, &c. doth except some- 6. *Exception, Quid.*

(65) When a recital is necessary, see in *Com. Dig. Grant*, (G. 10,) how far it shall be considered as evidence, *ibid*, *Evidence*, (B. 5;) and further in *Vin. Abr.* tit. *Relation*.

what out of that which he had granted before by the deed (66), [or which was comprised within the generality of the terms of the deed.] And this [clause] doth most commonly and properly succeed the setting down of the things granted, and is made by one of these words, *except', præter, salvo, sinon*, or such like. And hereby the thing excepted is exempted, and doth not pass by the grant, neither is it parcel of the thing granted; as if a manor be granted excepting one acre thereof, hereby, in judgment of law, that acre is severed from the manor; [and sometimes it may, by an exception, be severed for a time only; see *Vin. Abr. Manor*; and an exception, out of an exception, leaves the subject so excepted out of the exception, and at large to pass by the grant; *Owen*, 20.] But this [exception] may be in any part of the deed, and so hath it been resolved. *Hil.* 17 Car.

Co. super Lit. 47. 3 H. 6. 45.

B. R. Fregunnel's case. Perk. Sect. 62, &c.

7. *What shall be said a good exception; or not.*

In every good exception these things must always concur; 1. This exception must be by apt words. 2. It must be of part * of the thing granted, and not of some other thing. 3. It must be of part of the thing only, and not of all, the greater part, [its being of the greater part is no objection; as if I grant all that my messuage and farm, which consists of one hundred acres, and I reserve ninety-nine acres, the exception would be good, since there is not any repugnancy;] or the [whole] effect of the thing granted (67). 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have, and doth properly belong to him. 6. It must be of a particular thing out of a general, and not of a particular thing out of a particular thing, or of a part of a certainty. [This proposition is not quite correct; because I may grant a house or a shop, reserving a part of it, and yet this is an exception of a particular thing out of a particular thing. The rule only means that you cannot grant twenty manors, twenty houses, or twenty trees, excepting one of them; for in this instance the exception is repugnant to the

*P. 78.

Plow. 19. Co. super Lit. 47.

(66) And being the act and words of the feoffor, &c. shall therefore be taken against him *stricte*, 10 *Co.* 106, b.

(67) For if the exception extends to the whole thing granted, or demised, it is void. *Dorrel* v. *Collins*, *Cro. Eliz.* 6.

grant, since the exception negatives the right to one of those things particularly described or comprehended by the numbers, for nineteen houses are not twenty houses, &c.] It must be certainly [or sufficiently] described and set down; [since otherwise the exception would be void for uncertainty; and in leases for years there may be an exception for a particular time, &c. as for two years; *Dyer*, p. 167; since there is only a contract for the possession. But such exception is inadmissible in grants which pass an estate of freehold, except estates of freehold granted *de novo*. See 1 *Prest. on Estates*, p. 220.] As for examples, [a] If a man grant all his lands in *Essex*, saving, besides or except his lands in *Dale*, or all his lands in *Dale*, excepting one house, or one acre in certain; or one house, excepting one chamber in certain; these and such like exceptions are good (68); [unless, as it is apprehended, the grantor has, in point of seisin, those things only which are excepted, and then the exception would be void, as it would wholly defeat the grant; *sed query*.] [b] And if one grant a manor, excepting one tenement, (parcel of the manor,) or excepting the services of *I. S.* (who doth hold of the manor,) or excepting one close, or excepting one acre, or excepting the advowson appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the gross trees; these are good exceptions.

[a] Plow. 195. Perk. Sect. 641.

[b] Dyer, 103. Plow. 104. 361. 67. Co. 8. 63. 11. 47. 5. 11. Perk. Sect. 642. 3 H. 6. 35.

[c] And if one grant a messuage, and houses thereunto belonging, excepting the barn, or excepting the dove-house, it seems [indeed there is not any doubt on this point] this is a good exception, for they may pass [inclusively] by the grant of a messuage, &c. [d] And if one grant land, excepting the timber trees thereupon, or excepting the trees thereupon; or if a man sell a wood, excepting twenty of the best oaks, and show which in certain; [or to be taken at his election, or by assignment of the grantee;] these are good exceptions. [So, though the trees are not ascertained, and though there be no clause of election, it is apprehended the law would give to the grantor a right to make his election; the grantor being the person

[c] 14 H. 8. 1.

[d] Co. 8. 63. 5. 23.

(68) See distinction between a *saving* and an *exception*, in *T. Raym.* 359. *Plowd.* 361. An *exception out of an exception*, or a saving out of a saving, is good enough, and makes the thing as if it had never been excepted. *Leigh* v. *Shaw*, *Cro. Eliz.* 372.

who is to do the first act; 1 *Inst.* 145, a.] [d] So if one have a manor, wherein is a wood called the great wood, and he grant his manor, excepting all the woods and underwoods that grow in the great wood, and all the trees that grow elsewhere, this is a good exception. [f] And if one grant a messuage, and all the lands and tenements thereunto belonging, excepting one cottage; this is a good exception. [g] And if one grant a reversion, excepting the rent, this is a good exception of the rent, and doth keep it from passing by the grant; [and the rent is severed from the reversion, and becomes a rent in gross.] So if a man have a rent-charge out of land, and he release his right in the land, except the rent; so if the lord release to his tenant *salvo dominio suo*, &c. [saving his seigniory, rent, &c.] these are good exceptions. [So if he confirm the estate of the tenant; but these releases or confirmations must operate only by way of *mitter le droit*, and not of conveyance. On a conveyance in fee, no services can be reserved, since the statute of *Quia Emptores*, 18 *Ed.* 1. c. 2.] [h] And if one grant all his horses, except his white horse, this is a good exception of the white horse. [But if a man have only two horses, and one of them be white, and he except the white horse, this exception is repugnant to the terms of the grant, and void. If he had three horses, and all had been white, one would have been effectually excepted.] [i] And if a man be seised of a manor, and lease it by deed indented for life, *exceptis & reservatis quod bene liceat* to the lessor *succidere, dare & vendere omnes grossas arbores in dicto manerio crescentes*, &c. it seems this is a good exception of the trees (69). But if the exception be of another thing than the thing granted; [for then there is not any grant thereof; and as there is not a grant, there cannot be any exception thereof. There is only an exclusion by terms, instead of by construction;] [k] as if one grant a manor or land, excepting 12 *d.* [the 12 *d.* not being part of the services of the manor,] or excepting the tithes, [for the tithes are a distinct inheritance from the land,] or excepting one acre of ground, which is no parcel

[d] In the case of Haward & Fulcher. Hil. 3 Car. B. R.

[f] Co. 11. 64.

[g] Perk. Sect. 113. 644. Dyer, 157.

[h] Plow. 361.

[i] 3 H. 6. 45. Perk. Sect. 643.

[k] Perk. Sect. 639. Dyer, 59. Plow. 361. 67. 370.

(69) If a man lets his manor, *exceptis omnibus boscis*, the soil of the wood is excepted; but it remains parcel of the reversion of the manor, and shall pass by a grant, or lease, of the manor. 5 *Co.* 11. *Cro. Eliz.* 591.

of the manor or of the land before granted; or if one grant the land descended to him of the part of his father, excepting the land descended to him of the part * of his mother, [for no lands descended from the mother are within the compass of the grant;] these exceptions are void. [It is to be observed that tithes do not issue out of, nor are they *chargeable* on the land; for this reason, they cannot be suspended or extinguished in the land; hence the necessity of naming the tithes, in fines and recoveries: but when lands are exempted from the payment of tithes in kind, by a modus or real composition, then in truth the tithes remain an ecclesiastical inheritance, and the modus, &c. are the tithes, and therefore there is not any occasion to name the tithes, since the party has no ownership of the tithes. But the tithes are to be named when the grantor has the ownership of the tithes under an impropriation.] [1] Or if the exception be such as is repugnant to the grant, and doth utterly subvert it, and take away the fruit of it; as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting [all] the grass of it; or grant a manor, excepting the services; [for as a manor must consist of demesnes and services, an exception of the services would destroy the manor, as it would take away one of its essential parts;] these are void exceptions. [As a man may grant, so it is apprehended he may except, the tonsure or vesture of the meadow; in short, whatever a man may grant in direct terms, he may, it is apprehended, except. However, we must except things created *de novo*, for they are not in *esse*; thus a rent, &c. though it may be granted, cannot, before it is created, be excepted.] [m] So if one grant his house, chambers, cellars and shops, excepting his shops, it is said this is no good exception, [for as the shops are expressly granted, the exception of them is repugnant to the grant. It would have been otherwise if a particular shop, out of two, three or more shops, had been excepted.] And by the like reason if one grant his meadow and pasture grounds, except his meadow grounds, this exception is not good; no more than if one grant two manors, or two acres, excepting one of them. And of this opinion

*P. 79.

[1] Dyer, 97. 264. Co. super Lit. 47. Plow. 153. 103, 104. 14 H. 8. 1. Doct. & Stud. 98.

[m] Dyer, 59. 263.

was the chief justice in *B. R. Hil.* 3 *Car.* in the case of *Haward* and *Fulcher*. [So that there is a difference between a grant of several things by a general name, and by a particular enumeration; and it should seem that if a man has only two manors, and grants his manors, excepting one of them, the exception would be repugnant, inasmuch as the words of the grant are not satisfied unless two manors pass.] [a] And yet if a man make a lease for years of a mill, excepting the profits thereof during the life of the lessor, it is said this hath been adjudged a good exception. But I doubt of this case, for the exception of the profits of a thing is the exception of the thing itself. [The exception is only for a time, and was in a lease for years, which is in law deemed a mere contract for the possession; and Lord *Holt* says an exception may be qualified, as it may be for part of the term. 1 *Show.* 316.] And a man cannot grant an estate and reserve a part of the estate, as make a feoffment in fee and reserve a lease for life, [for this would be a freehold to commence *in futuro,*] or grant an advowson and reserve the presentation for his life. [But a man may covenant that he and his heirs shall stand seised to certain uses to commence after his death, &c. or from a future time, and then (according to the circumstances of the case) he will either have an estate for life by implication, or retain the fee till the springing use can take effect. See *Pybus* and *Mitford*, 1 *Ventr.* 372; *Vin. Abrid. Reservation*, T. *Dyer*, 264 b. So a man may bargain and sell a future use, or convey to uses for his own benefit as tenant for life or in tail. So if a man grant his term after next Michaelmas, some books state the grant to be void. *Plow.* 524; 7 *Taunt.* 626, and cases there cited; or assign a term of years and reserve a particular interest. *Jermyn* v. *Orchard, Show. Parl. Cas.* 199; because a man who has an estate cannot make a grant of that estate, or of the land for the estate, reserving a portion of it. He must either grant the whole estate or make an under-lease. *Jermyn and Orchard, Show. Parl. Cas.* 199. But there are authorities that a term may be assigned to commence from a future day, *infra* 79. The rule is, that no man can be an assignee unless he has the whole estate and ownership; and formerly, it was supposed the grantor

[a] Plow. 524. Dyer, 264. Br. Grant. 60. 38 H. 6. 38.

could not reserve any estate to himself, unless that reservation leaves in him a reversion, and of course the ulterior right and not the present right of enjoyment. It is agreed that an assignment of a term, to hold from and after the death of the grantor, cannot be sustained as a valid assurance.] [o] Or if the exception be of an inseparable incident, and [*read* or] a thing that cannot be granted [or held] by itself and from another; as if a manor be granted, excepting the court baron; or land be granted, excepting the common appendant thereunto belonging, these exceptions are void, [for as no lord, except the lord of the manor, can hold the court; and as no one, except the owner of the land, can have right to this species of common, the exception is void, as purporting to reserve that which does not admit of a reservation. This species of common is, however, releasable to the owner of the soil charged with the right of common.] But exceptions of several incidents are good. [p] Or if the exception be of such a thing as the grantor cannot have nor doth belong to him by law; as if a lessee for years assign over all his term in the land, excepting the timber trees, earth or clay; this exception is not good (70). [In this instance the exception is void for want of interest or ownership in the thing excepted.] But if lessee for life make a lease for years, or lessee for twenty-one years make a lease for twenty years; or tenant by the curtesy, or in dower, grant over their estate, excepting the timber trees; these are good exceptions, [on account of their reversion and right to have the benefit of the trees for shade, &c. at the expiration of the under-lease, and to exclude the under-tenant from estovers, &c.] And if a lessee for life or years open a coal mine, and then assign over his estate, excepting the mines or the profits thereof; these are void exceptions, [for he had not any interest in the mine. It was waste in him to open it, and he could not give any right or interest in the mine; it would have been otherwise if the mine had been open before the lease, or if the lessee had a right by grant to open the mine. *Spencer's case*, 5 *Rep.* 17.] [q] Or if the exception be of a particular thing out of a particular thing, [or rather

[o] Co. super Lit. 150.

[p] Co. 5. 12. Hil. 9 Jac. B. R. per Curiam.

This difference hath been agreed.

[q] Co. super Lit. 47. Plow. 53.

(70) Those things not being in his power, for they do not belong to him by law, 5 Co. 12, b.

of a particular thing which is granted,] as if one grant white acre and black acre, excepting white acre, [for white acre is expressly granted,] or grant twenty acres of land by particular names, excepting one acre of them; these exceptions are void. [Or without particular names, since the grant of twenty acres excludes the right to except any one of them; otherwise if the grant is of all that close containing twenty acres, excepting one acre, for in this instance the close, and not the twenty acres, is granted; and the mention of the acres is merely in description of the close, and on that account the exception is consistent and good.] [r] Or if the exception be set down uncertainly, as if one grant a house, excepting one chamber; or grant a manor, excepting one acre; but doth not set forth which chamber, or which acre it shall be, these exceptions are void [for uncertainty (71). However, *query*, for there are authorities to the contrary, namely, that the exception may be available by election.]

[r] Perk. Sect. 643. 641.

8. *Tenendum, Quid.*

A *Tenendum* is a clause of the deed whereby the tenure was heretofore created [or expressed.] And this [clause] doth most commonly and properly succeed the *habendum*, and was made by this word *tenendum per servitium, &c.* But since the statute of *quia emptores terrarum*, * [18 Edw. 1, c. 2.] when the fee simple doth pass, the tenure is always [and necessarily] of the chief lord; and is thus set forth, *tenendum de capitalibus dominis, &c.* And this clause at this day is for the most part omitted altogether (72).

Co. super Lit. 6. & Co. 9. 130.

*P. 80.

9. *Reservation or reddendum, Quid.*

A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the *tenendum*, and is made by one or more of these words, *reddend'*, *reservand'*, *solvend'*, *faciend'*, *inveniend'*, or such like. This [part of the deed] doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing de-

Co. 10. 107. Plow. 132. Co. super Lit. 47. Perk. Sect. 625.

(71) See further by what words an exception may be made, the effect of it, and when it shall be void, in *Com. Dig. Fuit*, (E. 5.)

(72) *Ante*, 51, note 1.

mised that was not in *esse* before, so that this [clause] doth always reserve that which was not before, or abridge the tenure of that which was before.

10. *What shall be said a good reservation; and what not.*

In every good reservation these things must always concur. 1. [a] It must be by apt words. 2. It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. 3. It must be [out] of such a thing whereunto the grantor may have resort to distrain. [All that seems necessary is that a distress may be taken to enforce the payment of the rent reserved. The specific thing reserved is never taken in a distress, as if a pair of gilt spurs are reserved; the party cannot in a distress take the pair of spurs, as the article reserved, but he must distrain to have the spurs rendered.] 4. It must be made to [all, some or] one of the grantors, and not to a stranger to the deed. As for examples. [b] If a man grant land, yielding and paying money or some such like thing [as a rose, a pound of cummin, &c.] yearly, [or at any other period,] this is a good reservation. But if the grantee covenant to pay such a sum of money, or to do such a thing yearly, this is no good reservation, but a covenant to pay a sum of money in gross, and not as a rent, [but whether a clause shall amount to a reservation, or to a covenant, is frequently a question of construction (73).] [c] If a lease be made for years, rendering a rent to the lessor or his heirs, in the disjunctive; or rendering a rent to the lessor, without saying "and his heirs, &c.;" or rendering a rent during the said term, and doth not say to whom; or rendering 10*l.* to the lessor, [during his life, and after his death,] 5 *l.* [part thereof] to his heirs; all these reservations are good, [and generally speaking (except in the case of leases under statutes) it is most advisable to have the reservation at large, without specifying to whom it is made, for then the rent will be annexed to the reversion, and belong to the person for the time being entitled to the reversion.] But if a lease be made, rendering rent to the heirs of the lessor, [being a rent which did not commence in the lessor,] this reservation is void, because the rent is not reserved to himself first, [for this mode

[a] Plow. 13 Part. Sect. 626. Co. 8. 78.

[b] Plow. 132.

Covenant.

[c] Co. 5. 11a. 8. 71. super Lit. 214. 213. 99.

(73) See accordingly *Athowe* v. *Heming*, 1 *Roll. Rep.* 80. 2 *Bulst.* 281, S. C.

of reservation would make the heirs purchasers, and the right to the rent would be distinct from the reversion. On principles very similar the heir cannot be bound in a covenant or bond, unless the ancestor hath bound himself as well as his heirs. 1 *Inst.* 209 a.] [d] If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation: but if the reservation be of the grass, or of the vesture of the land, or of a common, or other profit to be taken out of the land, these reservations [considered as rents] are void. [e] If one grant a manor, messuage, land, meadow or pasture, or the vesture or herbage of land, meadow or pasture [being a corporeal or manurable subject,] rendering a rent, this is a good reservation. But if one grant tithes, rents, commons, advowsons, offices, a corody, mulcture of a mill, a fair, market, privilege or liberty, reserving a rent, this reservation is void, [because these hereditaments are incorporeal, and a rent cannot be reserved out of them, as they do not admit of actual occupation or manurance, so that a distress may be taken. But in certain cases, by the statute law, a rent reserved out of tithes is good.] And yet such a reservation in case of the king is good, [by his prerogative.] And in case of a subject also, if a lease be made by deed in writing of any such thing for a term of years, reserving a rent, this may be good by way of contract to * produce an action of debt, though not as a rent to be distrained for. And thus by apt words, an apt rent out of manors, and such like memorable [should be *manurable*] things, or divers rents, may be reserved upon one grant. As if one grant the manors of *A.* *B.* and *C.* rendering for *A.* 20*s.* for *B.* 20*s.* and for *C.* 20*s.* these are good rents, and several, [and a different distress must be taken for each rent; and no lands, except those charged with the particular rent, can be distrained on; but if the rents had been issuing out of all the lands, then only one distress would be necessary.] So if one grant the manors of *A.* *B.* and *C.* rendering 3*l.* *viz.* for *A.* 20*s.* for *B.* 20*s.* and for *C.* 20*s.* this is a good reservation; but in this case the rent is entire, [for the *viz.* cannot divide one rent into several. As far as it attempted

[d] Co. super Lit. 142.

[e] Co. super Lit. 47.

Co. 5. 3. Perk Sect. 626.

Prerogative.

*P. 81.

Deed.

Co. 555. Dyer, 308. Co. super Lit. 47. 164. 213.

to sub-divide the rents [the *viz.*] is repugnant (74). Also one may reserve one rent [for] one year, and another rent [for] another year; as 10*s.* [for] one year, and 20*s.* [for] another year: or one may reserve a rent to be paid [at the end of] every second or third year, and no rent [for] the other years; or one may reserve one kind of rent [for] one year, and another kind of rent [for] another year; and these reservations are good. And these reservations may be by fine, as well as by deed; or it may be in case where the lessor hath a reversion of the land, or upon a partition to make an equality, without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed, [and then the deed operates as a grant of the rent; while in the case of a partition between coparceners (and it is as between them alone that the text is applicable) the rent arises by way of reservation, and is distrainable of common right without an express grant of a right to distrain; and such rent will descend as the lands would have done, *viz.* to the heirs of the first purchaser, &c. 2 *Prest. Abstr.* p. 74, *ipsæ etenim leges cupiunt ut jure regantur.*] [f] If two joint-tenants join in the grant of their land by deed indented, and the rent is reserved to one of them; this is a good reservation, [by estoppel or conclusion,] and shall go to him alone. But if it be by word or by deed poll, that the lease is made, the rent shall go to them both. [For nothing, except a fine or indenture, can create an estoppel. [g] And if a man possessed of a term, join his wife with him, and they both assign over this term by indenture, rendering a rent to them two, and the survivor of them, and she doth not seal the deed; in this case the reservation as to the wife is void. [Putting this case on the footing of a reservation, it is perfectly correct, for since there was not any grant by the wife, there could not be any reservation to her. And in the B. R., and also in the Exchequer chamber, the court (contrary to the opinion of *Berkely*, J.) held, that the *reddendum* must operate by way of reservation, and not of grant. The ground for this conclusion seems to have been

Co. super Lit. 225. 8 H. 7. 9. Bro. Fine, 36. Reservation, 4.

[f] Co. super Lit. 214. 143. 47. Dyer, 222.

[g] Adjudged Mich. 8 Car. in Bland's case.

(74) And if *A.* makes a lease of three manors, rendering 10*l.* rent, (*viz.*) 5*l.* out of one, and 5*l.* out of another; this will be a good lease and reservation, and the third shall be discharged. *Moor*, 880.

that the clause must operate as a reservation *quoad* the husband: and it should not operate in two modes; so as to be a grant *quoad* the wife, and a reservation *quoad* the husband.] And if the reservation be of the rent to a stranger that is no party to the deed, and to him only, this reservation is void; [for it cannot be either reservation or grant.] And therefore if the father and his son and heir apparent, by indenture, [*query* if the indenture was not an estoppel,] lease his [the father's] land for years, to begin after the father's death, rendering rent to the son, it [the reservation] is void. [For the rent only is void, and the lease is good. So, if a man seised in fee reserve a rent to him and his executors, neither the heir or executor can take advantage of this reservation. The heir cannot have the rent, because he is not named; and the executor cannot have the rent, because he is not privy in estate.]

Hobart's Rep. 130. Oates & Frith, Co. 3.

[Co. Lit. 213 b. and Ld. Nott's MSS.]

10. *Condition, Quid.*

A condition is a clause of restraint in a deed; or a bridle annexed and joined to an estate, staying and suspending the same, and making it incertain whether it shall take effect or no. [Conditions which stay and suspend an estate are properly denominated conditional limitations, or conditions precedent. In truth, they are an essential part of the limitation, and those clauses alone are strictly and properly denominated conditions, which are to defeat an estate; 1 *Prest. Abstr.* p. 147, 3 *ibid.* 397, 1 *Prest. Estates*, p. 45—48.]

11. *Warranty, Quid.*

A warranty is a clause or covenant made in a deed by the one party unto the other, whereby the feoffor, donor, or lessor, doth, for him and his heirs, grant to warrant and secure [the] land granted to the feoffee, donee, or lessee, and his heirs during the estate [or for some particular time. See *infra, ch. Warranty.*]

12. *Covenant Quid.*

A covenant is a clause of agreement contained in a deed, whereby either party is bound to do, perform, or give something to the other. And of all these, see at large afterwards.

13. *How and to what purpose a deed of grant in gross shall enure, and be construed and taken.*

In the construction of deeds it must be considered,—1. How a deed in the gross shall be taken and enure. 2. How it shall be taken and expounded in the several parts and pieces of it. And for the first, these rules are to be known; 1. If divers join in a deed, and some are able to make such a deed, and some are not [able], this shall

Co. super Lit. 302. Perk. Sect. 66.

be * said to be his deed alone that is able; as if divers join in the grant of a thing by deed, and one alone hath all the estate, and the rest have nothing in the thing granted; it shall be said to be his grant alone that hath the estate. And so *e converso*. [And it must be pleaded accordingly. In point of law it is the grant of the person who is qualified to make the grant and the confirmation of the other party.] If a deed be made to one that is incapable, and to others that are capable, in this case it shall enure only to him that is capable. [And if they were to be joint-tenants, the person who is capable shall take the whole. But if they were to be tenants in common, he shall have only his particular share. And if it be to a class of persons, as children living at a particular time (being a period too remote,) it may be void as to all, though some of the persons were in *esse*, capable of being purchasers, under the rules of law; *Jee* v. *Audley*, 1 *Cox Rep.* 324; *Leake* v. *Robinson*, 2 *Mer.* 363.]

*P. 82.

Dyer, 251. Co. 2. 35. & super Lit. 49.

A deed that is intended and made to one purpose, may enure to another; for if it will not take effect [in] that way it is intended, it may take effect another way; [provided it may have that effect consistently with the intention of the parties.] And therefore a deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *è converso*. [But a grant of the reversion by the name of a reversion, will not pass land in possession.] And if a man have two ways to pass lands by the common law, and he intendeth to pass them [in] one way, and they will not pass [in] that way; in this case, *ut res valeat*, it may pass the other way. As if a man be seised of two acres of land in fee, and letteth one of them for years, and after intending to pass them both by feoffment, maketh a charter of feoffment, [by deed,] and maketh livery of the acre in possession in the name of both the acres; in this case the acre in possession only doth pass: but if the lessee of the other acre attorn, then the reversion of that acre will pass also. [So that the same instrument may operate as a charter of feoffment, as to one acre, and as a deed of grant as to the other acre.] But where a man may pass lands by the common law, or by raising of a use, and settling it by the statute, there in may cases it is otherwise. [This point is now over-

ruled. See *Roe* v. *Tranmer*, 2 *Wils.* 75; *Willes*, 682. According to that case, deeds intended to operate as a lease and release, and which are void in that form, may amount to a covenant, to stand seised to uses, and be effectual in that mode.] As if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made; in this case no use shall arise to the son. So if a man, in consideration of marriage, make a feoffment with a letter of attorney to give livery, and no livery is made; in this case no use will arise. And so it was held by Chief Justice *Popham*, B. R.: for the intention of the parties doth work much, in the raising and direction of uses. And therefore it is said, that when a man doth intend to pass land one way, it shall never pass another way, contrary to his intent; as if one covenant for good considerations to levy a fine of land to the use of *I. S.* and his heirs, if no fine be levied, no use shall arise upon the covenant. [This proposition is not true as a general rule; though it may be true in application to the particular instance; for as there was not any fine, there was not any seisin out of which the uses could arise, and the covenant did not contain any words which could give it the effect of a covenant to stand seised.] If one, by the words bargain and sell, give and grant, make a feoffment of his house for money, and intending to pass it by way of bargain and sale and inrolment, the deed being made, there being a master of the Chancery in the house whereof the feoffment is made, he doth acknowledge and deliver the deed before him; in this cass if the deed be not inrolled, the conveyance is void, and that delivery shall not amount to a livery of seisin. [This case depends on its particular circumstances. In truth, there was not, in fact or in intention, any livery of seisin. But sometimes, after a long interval and peaceable enjoyment, livery of seisin may be presumed; and this instrument might have operated as a grant, or as a release in enlargement of estate, if circumstances would have allowed of its operation in that mode; 1 *Prest. Abstr.* 296.] And yet, when the intent is apparent to pass it one way, or another, there it may be good either way; as where one doth make a feoffment in fee, with a letter of attorney to

Dyer, 96.

19 Eliz. Thorold & Gorden's case.

Experientia.

make livery; and in the same deed doth covenant, in case livery of seisin be not had to perfect the deed, to stand seised to the uses of the feoffment; in this case, albeit no livery of seisin be made, or attornment had, to perfect the feoffment or grant,
*P. 83. yet if it be in such a case where there is a * consideration sufficient to raise the uses by the covenant, the uses will arise by the covenant (75). [This rule is now extended. All the law regards is, the intention to convey, and allows the party to use or plead the deed in any manner, in which it may have the effect of fulfilling the intention to pass the lands, without restraining the operation of the deed to the particular mode which was in the contemplation of the parties; *Roe* v. *Tranmer*, *Wils.* 75; *Willes*, 682.] 3. When a deed may enure to divers purposes, he to whom the deed is made, shall have election which way to take it, and he may take it that way as shall be most for his advantage; [*viz.* he may at the instant, or at any future time, and so may any person deriving title under him, plead this instrument in any mode most beneficial for his purpose.] As if a deed of grant be made by the words *dedi & concessi*; this, in law, may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender; and it is in the choice of the grantee [or his heir, alienee, &c.] to plead or use it in the one way or the other. So, if a lease for years be made to me of land for money, by the words demise, grant, bargain, and sell; I may take and use this by way of bargain and sale, or by way of demise, at my pleasure; [1 *Prest. Convey.* pp. 41. 183.] So if one have a rent out of land, whereof I and my wife are jointly seised, and he doth by his deed release, give and grant this rent to me; in this case, I may use this as a release to extinguish the rent, or as a grant of the rent, as it may make most for my advantage [or I may prefer.] *Et sic de similibus.* [And presumptively this is a grant, and not a release of the rent; since a grant is most beneficial to the husband. An instrument well prepared should express by declaration, whether the deed should operate as a grant or release.] But where any inconvenience may grow by such an election,

Co. super Lit. 301. Dyer, 251.

Co. 2. 36. Dyer, 30. 302.

Dyer, 109. 319.

Co. 2. 35. 36.

(75) See accordingly *Bac. Use of the Law*, 151. *Gilb. Law of Uses*, 84, *post*, 165; and fully in the chapter on Uses.

there the grantee shall not have an election, but it shall enure as it may; as, where a man may pass land by the common law, or by raising of an use and settling it by the statute, there sometimes it is so. And therefore if, in the same case before, a father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made; hereby no use will arise to the son, as it will in case of a covenant; [*Roe* v. *Tranmer*, 2 *Wils.* 75; *Willes*, 682, has negatived this rule and the distinction.] And if a lease for years be made of a manor, by the words bargain, sell, demise, and grant, and this is to begin at a day to come; in this case it must pass entirely as a demise at the common law, or entirely as a bargain and sale, and the lessee hath not election to take or use it otherwise, or to use it for part one way, and for part another way. [But he may elect to have this lease operate as a common law demise, or as a bargain and sale, and the rule which restricts election applies only to one and the same plea, &c.; for at different times he might plead the deed in different modes: and so might alienees of part of the land, &c.] 4. It shall enure as much as may be according to the apparent intent of the parties. And therefore it is, that if a feoffment be made of a manor with an advowson appendant; or a bargain and sale of land in possession, and land in reversion together, be made; and the feoffment is not well executed for want of livery of seisin or attornment, or the deed of bargain and sale is not inrolled; in these cases, albeit the advowson may pass without livery or attornment, and the reversion without inrolment, yet because the intent doth appear to be that all shall pass together, therefore neither the advowson nor the reversion will pass by this deed. [The advowson will not pass, because it is annexed to and parcel of the manor, and there was not any intention to sever the advowson; but no objection exists against the right of using the deed as a grant of the reversion. And as to the bargain and sale, it is apprehended to be unquestionably clear that the lands in reversion might pass by the deed of intended bargain and sale, if that deed might have the effect and operation of a grant. And it may be remarked that the fourth and fifth rules are properly several branches of the same

Finch's law, 58.

rule, and that rule may be properly expressed in this manner: It shall enure as much as may be, according to the apparent intent of the parties, where the intent may prevail; and where that intent may not prevail, then the deed shall enure as it may, so that it may have and take the most effect that may be according to reason. And it is far from being clear that a deed, though inrolled and capable of effect as a bargain and sale, may not be pleaded as a grant, so that uses may arise from the person, or estate of the grantee.] 5. When a deed is made, it shall enure as it may, and so as it may have and take the most and best effect that may be according to reason; [and if the words are not properly arranged to give effect to the intention of the parties, the law will transpose and marshal them in construction, that the intent may be fulfilled; 1 *Inst.* 217, b.;] as if tenant for life or years, and he in remainder or reversion in fee, join in a feoffment by deed; this [assurance] shall enure, in the first case, as the lease of the tenant for life, and the confirmation of him in the remainder or reversion, and in the last case as the feoffment of him in the reversion, &c. and the surrender of the lessee for years to the feoffee, and no forfeiture of the estate in the lessee for life. But if in this * case the feoffment be by word, it seems it shall enure first as a surrender of the estate of the tenant for life, and then [as] the feoffment of him in reversion, *ut res valeat.* [So that an act done to one intent enures to another intent, for the purpose of accomplishing the principal object. *Cum quod ago non valet ut ago, valeat quantum valere potest*; *infra*, p. 87. Hence the doctrine of *cy pres.*] And if *A.* be tenant for life, the remainder to *B.* for life, the remainder to *D.* in tail, the remainder to the right heirs of *B.*, and *A.* and *B.* join in a feoffment by deed, in this case, this is the feoffment of *A.* and confirmation of *B.* but a forfeiture of both their estates, whereof the tenant in tail may take present advantage (76.) [The point of forfeiture is so stated in the books; *Com. Dig. Forfeiture.* It is now questionable; and it is decided that if a tenant for life hath a remote estate tail, or a remote estate tail is in another person,

Plow. 140. 59. Co. super Lit. 302.

[6 Rep. 15. 1 Inst. 147 b.]

*P. 84.

Forfeiture.

(76) See accordingly, *Co. Lit.* 251, b.

and a recovery is suffered by or with the concurrence of the tenant in tail, this recovery will not be a forfeiture. *Smith* v. *Clifford*, 1 *Term Rep.* 738; see *Pelham's case*, 1 *Co.* 14, b. *contra*; 1 *Prest. Convey.* p. 111.] If tenant for life grant a rent-charge to him in reversion, in fee, [*i. e.* by words importing to pass the fee, (for there is at first a life estate only in the rent,)] and he by his deed doth grant this rent over to another and his heirs; this is a good grant and confirmation also, to make the rent pass to the second grantee in fee simple, [so that there is an enlargement of the estate in the rent.] So if a disseisor make a lease for life, the remainder to the disseisee, and the disseisee doth grant the remainder over; this is a good grant and confirmation also. If *A.* do bargain and sell his land to *B.* by indenture, and before inrolment they do both grant a rent-charge to *C.* by deed, and after the indenture is inrolled; in this case, after the inrolment, this shall be said to be the grant of *B.* and the confirmation of *A.* and if the deed be not inrolled, it shall be said to be the grant of *A.* and confirmation of *B.* [So that the deed has different operations at different times. The construction of law is, that every alienation is the lease or grant of the person from whom the right of possession passes, and the confirmation of the other parties till their interest comes into possession; and from that time, it is their lease or grant, and the confirmation of the other person.] If one makes a charter of feoffment of one acre of land to *A.* and his heirs, and another deed of the same acre to *A.* and the heirs of his body, and deliver seisin according to the form and effect of both deeds; it seems this shall enure by moieties, *viz.* he shall have an estate tail in the one moiety with the fee simple expectant, and a fee simple in the other moiety. [Why should he not have an estate tail in the intirety, with the remainder in fee? this seems the most genuine interpretation.] If two several tenants of several lands join in a lease for years by deed indented; these be several leases, and several confirmations from each of them from whom no interest passeth, and doth not work by way of estoppel; [for a lease shall never operate by estoppel when it passeth an interest; 2 *Prest. Abstr.* 216.] If *B.* tenant for life of *C.*

Co. 5. 15.

Co. super Lit. 147.

Co. super Lit. 21.

Co. super Lit. 45. [Treport's case, 6 Co. 15.]

and he in remainder or reversion in fee of the same land, join in a lease for life or years, by deed indented; this [grant] shall enure during the life of *C.* as the lease of *B.* and the confirmation of him in reversion or remainder; and after the death of *C.* as the lease of him in reversion or remainder, and [as] the confirmation of *B.* without any estoppel. If tenant in tail, and he in reversion, grant a rent-charge in fee, it shall be taken to be the grant of the tenant in tail, and the confirmation of him in reversion; but when the tenant in tail dieth without issue, it shall be taken to be the sole grant of him in reversion. [So if two tenants in common join in a lease, this is a several lease as to each of them, as far as respects his or her share, and the confirmation of the other; see 6 *Co.* p. 15, *Treport's case*; and if a demise or ejectment be laid on this lease, as the lease of both, the evidence will not maintain the issue, since it ought to be stated in all pleadings as the lease or demise of each.] If two joint-tenants be in fee of an acre of land, and they lease it to a stranger for life, and the lessee grant his estate to one of the lessors; in this case, it seems, it shall enure for a moiety by way of grant, and for the other moiety by way of surrender; [namely, it is a surrender in law as to the original moiety of the grantee, being a restoration of his former ownership; and as to the other moiety, it operates as a grant. The surrender in law is a consequence of the union of the freehold and inheritance. If there had been an express surrender, both joint-tenants would have taken the benefit of it.]

Perk. Sect. 80.

Perk. Sect. 81. Dyer, 140. If there be lord and tenant, and the lord grant his seigniory to his tenant, and to a stranger; this shall enure for a moiety to the tenant by way of extinguishment, * and for the other moiety to the stranger by way of grant. If tenant for life of the grant of a woman sole, grant his estate to the husband of the [same woman being then his] wife, this [assurance] shall enure for the whole by way of grant.

*P. 85.

Perk. Sect. 82, 83.

If a lease be made for life, the remainder for life to a stranger, and the lessee grant his estate to his lessor, this [transaction] shall enure by way of grant, [on account of the intermediate estate, and eventually this particular estate may merge.] If there be lord and two joint-tenants in fee, and the lord

grant his seigniory to one of his tenants in fee; it seems this shall take effect for the whole by way of extinguishment, [on account of the seisin *per my et per tout*, and because the same person cannot be lord and tenant.] If there be lessee for life, and the reversion descend to two coparceners, and one of them take a husband, and the lessee grant his estate to the husband and wife; this [assurance] shall enure by way of grant for the whole, [to preserve the title of the husband under the grant; and because there are not any moieties between husband and wife.] If the disseisee, and the heir of the disseisor (being in by descent,) make a feoffment by one deed, and livery of seisin thereupon; this is the feoffment of the heir only, and the confirmation of the disseisee (77). [It would have been the feoffment of the disseisee, if there had not been any descent; for by this arrangement the title is made consistent with the right, and the livery would purge the disseisin; but in the text the descent took away the entry, and the heir had merely a right of action; and therefore the livery proceeded from the heir of the disseisor, as the person who had the seisin, not defeasible by mere entry.] 6. If one have divers estates in land, [as for life and in fee,] and he make any charge or grant upon or out of it, this [grant or charge] shall issue out of all his estates. And if one have a possession and an ancient right, and grant a rent-charge out of the land, or make a lease of the land, this [grant or charge] shall issue out of both the estates, [*i. e.* shall be binding on the estate as an estate; and amount to a confirmation as to the right,] and it shall enure from him having several estates, as it shall enure from several persons having the same estates; [*viz.* different estates in themselves respectively.] *Quando duo jura concurrunt in una persona, æquum est ac si essent in diversis.* 7. If one that hath a rent-charge out of a manor, by grant reciting his grant, grant the same rent to a lessee for life of the manor out of which the rent doth issue, to have and perceive to him and his heirs, and surrender to him the deed;

Co. super Lit. 372. Co. 7. 14. 1. 147, 148. 5 E. 4. 2.

Perk. Sect. 592.

(77) What is deemed a disseisin, see *Co. Lit.* 153, 181, F. N. B. 177. The consequences of *actual disseisin*, considered *as such*, continue law to this day: the disseisee cannot dispose, or devise; the descent takes away his entry. *Per* Lord *Mansfield*, in 1 *Burr.* 112. [*Goodright* v. *Forrester*, 1 *Taunt.* 578. But he may release or confirm.]

this shall not enure to extinguish the rent, but by way of grant, of which the heir of the lessee for life may take advantage, if he do not, by granting away the rent, purchasing the reversion of the manor, or making a feoffment of the manor, and thereby committing a forfeiture, or by some such like means, prejudice himself; for by these means the rent will be extinct and determined. [This is another difference between a grant and a release: a release would have extinguished the charge for the benefit of the persons in remainder, reversion, &c.; but as the grant was to a particular tenant, and his estate in the land, and in the rent, were not co-extensive, there was a suspension only, and not an extinguishment of the estate in the rent. But when the reversion is purchased, the rent may be extinguished; so when a feoffment is made, the feoffment is a conclusion of the right to demand the rent.] If a disseisor grant a rent to the disseisee, and he by his deed doth grant it over to another; or the disseisor make a lease for life, or gift in tail, the remainder to the disseisee, and the disseisee doth grant over this remainder, and the tenant attorn; these grants of the disseisee shall be taken for a grant and a confirmation also, *ne res pereat*; [so that a wrong-doer is protected, rather than a grant to a stranger shall be defeated.] If there be lord and tenant of white acre and two other acres, and the lord grant, by deed to his tenant, that he will not distrain his tenant in white acre for his service; this grant shall not enure to determine the seigniory in any part, but as a covenant, so that if he do distrain in white acre, the tenant may have an action of covenant. [Thus a covenant not to sue one of two obligors, will not be a release; while a covenant never to sue a sole obligor, may be pleaded as a release, to avoid circuity of action; 8 *Term Rep.* 168, *Dean* v. *Newhall*. And in some cases, the same instrument which, in certain circumstances, would operate as a release, shall be construed merely as a covenant.] If a man have a wood of two hundred acres, and he grant it to another for life or years, and that he shall cut therein four or five acres every year; in this case, albeit the wood be granted, and the grant shall enure to pass it, yet the grantee can * cut no more but [than] four or five acres by the year,

Co. super Lit. 301.

Perk. Sect. 69.

Mich. 37 & 38 Eliz. B. R. Cain.

*P. 86.

[The rule is, *modus et conventio vincunt legem.*] And yet the grantor, as this case is, cannot himself cut any of the wood during the time; as in case where a man doth grant to another, that he shall cut every year four or five acres in such a wood: for in this case the grantor may notwithstanding cut as much as he will, [leaving sufficient wood for the grantee to satisfy the terms of the grant. In one case there is a grant of the wood, and this grant excludes the grantor, notwithstanding a restraint or regulation is placed on the grantee in the mode of cutting. In the other case the grantee hath merely a privilege or right of cutting, without any specific right in the other parts of the wood.] And here note, that in all the cases before, according to the construction that the law makes of the deed, so must the party, that is to use it, set it forth and plead it; as when it shall enure as a lease, then it must be pleaded as a lease, &c. See more in *release, numb.* 9. *surrender, numb.* 7. *confirmation, numb.* 7.

14. How a deed of grant shall be construed & taken in all the parts & branches thereof.

In the construction of deeds it must be observed, that there are some general rules that are applicable to all the parts of all kinds of deeds, and some that are applicable only to some kind of deeds, and to some part of the deed only. In the construction therefore of all parts of all kinds of deeds, these rules are universally observed:

General rules.

1. That the construction be favourable, and as near to the minds and apparent intents of the parties, as possible it may be, and law will permit: for *benigne sunt faciendæ interpretationes chartarum propter simplicitatem laicorum. Et verba intentioni non è contra, debent inservire.* As, if there be lord and tenant, and the tenant grant the tenements to one man for term of his life, the remainder to another in fee, and the lord grant the services to the tenant for life [for an estate] in fee; in this case, howbeit a grant may enure by way of release, and a release to the tenant for life shall enure to him in remainder, and is [be] an extinguishment; yet, because this is contrary to the intent, it shall be taken for a suspension only of the services during the life of the tenant for life, and the services shall go afterwards to his heir. [In short the deed operates as a grant and not as a release; and in consequence of the party being tenant for life of

Co. super Lit. 313. Lit. Sect. 563. Plow. 160. 154. [Cro. Car. 400.]

the land and of the services at the same time, the right to the services is suspended during the estate for life; had the assurance been made by words proper to a release, the deed should have enured as such, and of consequence the rent would have been extinguished. The rule is only when the intent is to pass the land one way or another, there it may be good either way. *Per* C. J. *Willes*, in 2 *Wils.* 78. By the word intent is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but an intent that the land shall pass at all events in one way or another. *Ibid.*] But if the intent of the parties be apparently against law, then the construction shall not apply the deed to their intent, [for the intent cannot change the law;] as if one give land to another and his heirs for twenty years, in this case the executor, and not the heir, shall have this land after the death of him to whom it is given, [for a chattel, except in particular instances, as muniments of title, a horn by which the estate is held in point of tenure, &c. &c. cannot, by the rules of law, be transmitted from the ancestor to the heir. Chattels devolve from the owner to his executor or administrator, *i. e.* his personal representative. In this case, as the time for which the land is to be held is expressly declared, it shall mark the continuance of the estate, and the words and his heirs being words of surplusage, which cannot have any application, shall be rejected. In the other instance, the express limitation of the party controls what, in its absence, would have been the construction of law. The words, *and his heirs*, standing substantively, would have passed the fee; but the party having declared that he intended to pass only an estate for years, the construction which will accomplish the intent shall prevail. But see a distinction in *Baldwin's case*, 2 *Rep.* 23 b.] So if one by deed intending to give land to another and his heirs, give the land to him, to have and to hold to him, or to him and his assigns, for ever, [it is otherwise in a will, *Essay on Estates, chap. Fee,*] without these words "and his heirs," this is but an estate for life at the most, [for in deeds the inheritance cannot pass without a limitation to the heirs, &c. in express terms, or by words of reference to those terms.

Doct. & Stud. 39. Lit. cap. 1.

1 *Est. & Distinctions*, 442. A different rule prevails in wills.]

2. That the construction be reasonable and according to an indifferent and equal [*viz.* reasonable] understanding: and therefore if I grant to another, common in all my manor, this shall be expounded to extend to commonable places only, and not in my gardens, orchards, &c. And if I grant to one estovers out of my manor, he may not by this cut down my fruit trees. And if one grant me (a barrister) a fee *pro consilio*; this shall be taken for counsel in law only. And so in case of a physician [for advice in medicine only.] And if one grant to me to dig in all his * lands for tin, I may not by this grant dig under his house. And if one grant me common for all my beasts, this shall be taken for all my commonable beasts, and not for goats, and the like, [as geese, &c. which are not commonable beasts.] And if one grant me all his trees in his manor, by this I shall not have his apple trees (78). And if one lease to me his house and land, to the end that I may make profit thereof in the best manner, by this grant I may not prostrate the house or make waste.

Plow. 161. 16 H. 8. 10. Dyer, 15. Fitz. Barre. 237. Bro. Don. 14. 17 E. 3. 7. 46 E. 3. 17.

*P. 87.

3. That too much regard be not had to the native and proper definition, significations, and acceptance of words, and sentences, to pervert the simple intentions of the parties: for [*qui hæret in literâ hæret in cortice: i. e.* the lawyer who forms his opinion on the mere words without the context, goes only skin-deep into the argument: thus] a manor may pass by the name of a messuage, or a knight's fee, if it be used so to be called: *& sic è converso*, a messuage by the name of a manor: a remainder may be granted by the name of a reversion; a reversion by the name of a remainder: for the law is not nice in grants, and therefore it doth oftentimes transpose words contrary to their order, to bring them to the intention of the parties (79), [but lands in possession will not pass by the grant of a remainder or reversion, for this

Plow. 154. 170. 134. Dyer, 46. Co. super Lit. 223. 146. 217. Co. 9. 48. 10. 1, 8.

(78) See accordingly *Hob.* 304.

(79) "For the words are not the principal things in a deed, but the intent and design of the grantor." And the words are to be construed in a manner most agreeable to the meaning of the grantor; and words which are merely insensible, are to be rejected. 3 *Atk.* 136, per Lord Chief Justice *Willes*, who there lays down some general rules for the construction of deeds.

would be a construction against the words, and to pass the possession contrary to the intention :] and it is a rule of law, *mala grammatica non vitiat chartam*, neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative when the apparent intent is contrary. And it is another rule of law, *falsa orthographia non vitiat concessionem.*

Plow. 160, 161. 4. That the construction be made upon the entire deed, [*viz.* on the context,] and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein. *Ex antecedentibus & consequentibus est optima interpretatio:* for *Turpis est pars quæ cum suo toto non convenit. Maledicta expositio quæ corrumpit textum.* If a man make a feoffment of all his land in *D.* with common *in omnibus terris suis*, this common shall be intended in the lands granted in *D.* only, and not elsewhere, for it must be understood *secundum subjectam materiam.* [*Query* in this case, for as all the lands in *D.* are granted, the grant of common would not, by this construction, be of any avail.]

Lit. Sect. 283. Finche's Ley. 60. Plow. 160. 154. 5. That the construction be such as the whole deed and every part of it may take effect, and as much effect as may be to that purpose for which it is made (80); so as [*read* that] when the deed cannot take effect according to the letter, it be construed so as it may take some effect or other: *Verba debent intelligi cum effectu. Et benigne faciendæ sunt interpretationes, ut res magis valeat quam pereat.* [The maxim, *cum quod ago non valet ut ago valeat quantum valere potest*, is applicable to the second branch of this rule. This is the origin of the doctrine of *cy pres* in wills and to conditions, and trusts executory at least, even in deeds: the doctrine was borrowed by equity from the common law learning on conditions; and the principle of that doctrine in wills is, that when there is a general, and also a particular intention, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. *Per Buller*, 2 *Term Rep.* 254; 3 *Atk.* 136;

(80) This is a rule both in law and equity, per Ld. Ch. *Parker*, 1 *Pr. Wms.* 457.

Roe v. *Tranmer, Willes,* 682.] And therefore if an annuity be granted *pro consilio impendendo,* or a feoffment made *ad erudiendum filium,* or *ad solvendum* 10*s.* these shall be construed conditional grants without any words of condition; for otherwise the party will be without remedy. [This seems to be the rule of the civil law, *causa data non secuta.*]

Co. super Lit. 185. Finch of the Law, 6. [Cro. Car. 400.]

6. That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party: *Verba chartarum fortius accipiuntur contra proferentem: & quælibet concessio fortissime contra donatorem interpretanda est* (81). [The object of this rule seems to have been to prevent any injury from the use of ambiguous terms, and to punish the party whose meaning they express, by turning the ambiguity against him.]

*P. 88. * And therefore if one seised of land in fee grant it to another, and say not for what time, this shall be taken an estate for [his own] life. But this is to be understood with this limitation, that no wrong be thereby done, for it is a maxim in law, *quod legis constructio, non facit injuriam,* [and also that the construction be most beneficial to the grantee.]

Forfeiture. And therefore if tenant for life [or in tail] grant the land he doth hold for life [or in tail] to another, and doth not say for what time, this shall be taken an estate for his own life, [the life of the grantor,] and not the life of the grantee, for then it would [in some cases] be a forfeiture; [for the law, in its genuine construction, prefers a less estate by right, to a larger estate by wrong. Also, where no forfeiture would be incurred, the like construction would be made, because this is the construction most beneficial for the grantee.] So if one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple, or for life; by this grant shall pass no more but the lands he hath in fee simple. [See *Doe* d. *Davies* v. *Williams,* 1 *H. Black.* 25; where, in

(81) This rule must be understood with a restriction; for a distinction should be made between an indenture, and a deed poll: the latter is executed by the grantor alone, and the words are his only, and shall therefore be taken most strongly against him; but in an indenture executed by both parties, they are to be considered as the words of them both. *Plow.* 134. This rule, from its strictness and rigour, is the last to be resorted to; and is never to be relied on but where all other rules of exposition fail. *Bac. Elm. reg.* 3.

ejectment for three acres of land, called portway, the case was, that *I. W.* and others, being seised of lands in fee, called Clock Mills, and possessed of other lands held for a long term of years, and which from the year 1740 to the time of the conveyance, had been occupied with and reputed part of the Clock Mill estate, by indentures of lease and release conveyed all that messuage, mill and lands, called Clock Mills, in the possession of, &c. and all lands and meadows to the messuage and mill belonging, or used, occupied and enjoyed, or deemed, taken or accepted, as part thereof, to *T. D.* &c.; and it was held by all the justices of the C. B. that the lands held for the term of years passed by this deed. And it was agreed, that this being a case arising on a deed, was to be distinguished from those of a like nature which have arisen on wills, where the words lands, tenements, and hereditaments, have been held generally to pass only the freehold lands. *Rose* v. *Bartlett, Cro. Car.* 292. *Day* v. *Trigg*, 1 *P. W.* 286. *Davies* v. *Gibbs*, 3 *P. W.* 26. *Knotsford* v. *Gardner*, 2 *Atk.* 450. *Pistol* d. *Randal* v. *Riccardson*, B. R. 24 Geo. 3. In the last-mentioned case, a devise of all and every his several lands, messuages, tenements, and hereditaments, whatsoever and wheresoever, whereof he was seised or interested in, or entitled to, was held to pass only the freehold lands of the devisor. In the case of *Doe* v. *Williams*, the court seem to have proceeded in some measure on the intent to be collected from the clause, including lands, &c. accepted part of the estate.] So if a man have a house, wherewith there hath been copyhold land, and other land, usually occupied; and he let this house, and all his land thereunto belonging; in this case, and by this demise, the copyhold land doth not pass; for in both these cases, [provided as to the leasehold lands livery were made,] then there would be a forfeiture. [With this qualification the rule seems perfectly correct: for general words shall never be so construed as to create a forfeiture, and therefore in a recent case, copyhold lands were not considered as comprised in a fine; since, if comprised under general words, there would have been a forfeiture.] But otherwise [*viz.* unless there would be a forfeiture,] by these words [but the conclusion

Co. super Lit. 112.

is too general] all the land in both cases would pass.

7. That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reason to the contrary; and therefore herein a deed doth differ from a will; for if there be two repugnant clauses in a will, the first shall be rejected, and the latter received (82). 4 El. the Bishop of Ely's case.

8. That that which is generally spoken, be genenally understood, [*generaliter dicta, generaliter interpretanda,*] unless it be qualified by some special subsequent words, as it may be: for if one be seised of a manor wherein there is a park, and he grant the manor with the custody of the park; by this [grant] the park will not pass; [for if the park passed, there would not be any existing right to grant the custody of it. By the grant of the custody of the park, there is a necessary implication from the context, that the grantor is to retain the park.] Co. super Lit. 49.

9. That if the words may have a double intendment, and the one standeth with law, and the other is against law, that it be taken in that sense which is agreeable to law: and therefore if tenant in tail make a lease of land to *B.* for term of life, and do not mention for whose life it shall be; this shall be taken for the life of the lessor, and not for the life of the lessee, [as it will be, if such a lease be made by tenant in fee simple, for this construction is most beneficial to the grantee. *Essay on Estates, ch. Life.* Besides, the law prefers a less estate by right, to a larger estate by wrong.] 9 Ed. 4. 4.

10. That things doubtfully set down, be applied to him to whom they do properly belong: as if *I. S.* make a feoffment to one of his own name, and there is a covenant in the deed that *I. S.* shall deliver the deeds, this shall be taken of *I. S.* the feoffor, and not *I. S.* the feoffee. [So if there be words of grant, and the grantee be not named in the clause of grant, the law will supply the omission. *Spyve* v. *Topham*, 3 *East*, 115.] Co. 9. 48.

(82) Which is owing to the different natures of the two instruments for the first deed and the last will are most available in law, *Hard.* 94, 1 *Vern.* 30; but different opinions having been formed of the operation of repugnant clauses in a will, those opinions are considered and the authorities relating to them collected, by the Editor of the 13th edition of *Co. Lit.* in note 1, 112 b, and in the margin of the last edition of *Plow.* 541. See further how *deeds* are to be expounded, where there appears to be a repugnancy in the words of them, in *Bac. Abr. Deeds* (I).

11. That such a construction be made of abbreviations, as the deed may not lose its force: as if one grant *tot' ill' Maner' de D. & C.* if it be but one manor, the words shall be taken for *totum illud manerium*; if two manors, then it shall be taken for *tota illa maneria*. And here note, that most of all these rules run through all the cases of exposition hereafter following (83).

Fit. Grant. 41. Plo. 317. Co. 5. 12. 22 Ass. Pl. 61. Perk. Sect. 110.

[A twelfth rule is, that the same act may, in an instant of time, be available to several purposes: as, 1st. An assent to a legacy, and a grant of a term, *Owen*, 56. 2d. Attornment and surrender. 3d. Grant, and a re-grant, 2 *Barn. & Ald.* 739; *Lord Mountjoy's case*, 4 *Leon.* 147.

In the celebrated judgment of Chief Justice *Willes*, in the case of *Parkhurst* v. *Smith* (*Willes Rep.* 332,) Lord Chief Justice *Willes* observed, "It is a known maxim in law, that *benigne faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat.* There is another, that *verba intentioni et non e contra debent inserviri.* It is said in our books, that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants; and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties; for neither false Latin nor false English will make a deed void, if the intent of the parties doth plainly appear. He added, he had collected these rules and maxims from *Littleton*, *Plowden*, *Hobart*, *Finch*, persons of the greatest authority. But they are themselves so full of justice and good

(83) Further as to rules for the construction of deeds and wills, see *Plow.* 160; *Lilly's Prac. Conv.* 152; *Finch's Law*, 58. The rules of property, rules of evidence, and rules of interpretation are, or ought to be, in courts both of law and equity, exactly the same; both ought to adopt the best, or must cease to be courts of justice. 3 *Bl. Com.* 434.—A court of equity is as much bound by *positive rules* and *general maxims* concerning property, as a court of law is, *per* Ld. *Mansfield* in 2 *Burr.* 1108, where the rules of construction are fully discussed.—The construction does not vary with the court. It is the different subject matter of the limitation, which occasions the alteration in the construction of it, and will occasion the same difference of construction even in the very same court. See *Fearne* on *Cont. Remainders*, 3d edit. 93. In the construction of *ancient grants and deeds*, there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by, *per* Ld. *Hardwicke*, 3 *Atk.* 577.

sense, that they do not want any authority to support them, and that he did not know that they were ever yet controverted.

And *Comyns*, in his Digest, gives the rules in these terms, under the title *Parols*:—

"Ambiguous words shall be expounded as near to the intent as may be.

"The *general* words in the premises of a deed or grant, may be *corrected*, *restrained*, and *explained* by the *habendum*, or an exception, *Hob.* 169; or by a *condition* annexed, *Hob.* 169; or by the *context or* RECITAL of the deed; or by synonymous expressions or clauses.

"*Relative words* generally are referred to *the next antecedent*, when the intent upon the whole deed does not appear to the contrary.

"Where *the intent* appears otherwise, the *reference* shall be to SUPPORT the intent.

"The *general* construction of words ought to be for *supporting the intention* of the parties.

"So the construction of a deed shall be with regard *to a recital.*

"But a *recital* does not confine subsequent words, by which the intent appears MORE LARGE.

"Words shall be *transposed*, to support the intent of the parties."

"Construction shall be made of words, *if it can*, to support that *which seems* to be the intent of the parties."

And he has added Examples, in illustration of the several rules.

In *Black. Comm.* vol. 2, p. 379, the learned commentator has collected and illustrated the Rules of Interpretation of Deeds and Wills, in these terms:—

"1. That the construction be *favourable*, and as near the minds and *apparent intents* of the parties, as THE RULES OF LAW will admit. [a] For the maxims of law are, that '*verba intentioni debent inserviri*;' and '*benigne interpretamur chartas propter simplicitatem laicorum.*' And, therefore, the construction must also be *reasonable*, and agreeable to common understanding [b].

[a] And. 60.

[b] 1 Bulst. 175. Hob. 304.

"2. That [c] *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*:' but that, where the *intention* is clear, too MINUTE A STRESS be not laid on the STRICT AND PRECISE signification of *words*; *nam qui hæret in literâ, hæret in cortice.* Therefore, by a grant of a re-

[c] 2 Saund. 157.

[d] Hob. 27. mainder, a reversion may well pass, and *e converso.*[d] And another maxim of law is, that *mala gramma tica non vitiat chartam*; neither false English nor [e] 10 Rep. 133. Co. Lit. 223. 1 Show. 334. bad Latin will destroy a deed.[e] Which, perhaps, a classical critic may think to be no unnecessary caution.

"3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. '*Nam ex antecedentibus et consequentibus* [f] 1 Bulstr. 101. *fit optima interpretatio.*' And,[f] therefore, that every part of it, be (if possible) made to take effect; and no WORD, but what may operate in [g] P. Wms. 457. some shape or other.[g] '*Nam verba* DEBENT INTELLIGI CUM EFFECTU *ut res* MAGIS VALEAT [h] Plow. 156. QUAM PEREAT.'[h]

"4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. '*Verba fortius accipiuntur contra proferentem.* For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed poll; for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, but the other party hath given his consent to every one of them. But in a deed poll, executed only by the grantor, they are the words of the grantor only, [i] Plow. 134. and shall be taken most strongly against him.[i] However, this being a rule of some strictness and rigour, is the last *to be resorted to, and is never to be relied on,* but *where all* OTHER RULES OF EX- [k] Bacon's Elem. c. 3. POSITION *fail.*[k]

"5. That, if the words will bear TWO SENSES, one agreeable to, and another AGAINST LAW, that sense be preferred which is most agreeable [l] Co. Lit. 42. thereto." [l]As, if tenant in tail lets a lease for life generally, it shall be construed for his own life only, for that stands with the law, and not for the life of the lessee, which is beyond his power to grant.

"6. That, in a deed, if there be two clauses so TOTALLY REPUGNANT to each other, that they

cannot stand together, the first shall be received, and the latter rejected: [m] wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand. [n] Which is owing to the different natures of the two instruments; for the first deed, and the last will, are always most available in law. Yet, in both cases, we should rather attempt to reconcile them. [o]

[m] Hardr. 94.

[n] Co. Lit. 112.

[o] Cro. Eliz. 420. 1 Vern. 30.

"7. That a *devise* be most favourably expounded, to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal and proper phrases."

And therefore, many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments.

Thus, a fee may be conveyed without words of inheritance; and an estate tail without words of procreation. By a will, also, an estate may pass by mere implication, without any express words to direct its course. As, where *A.* devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; [p] for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take it, nobody else can.

[p] 1 Ventr. 376.

So also, where a devise is of black acre to *A.*, and of white acre to *B.* in tail, and if they both die without issue, then to *C.* in fee: here *A.* and *B.* have *cross remainders* by implication; and, on the failure of either's issue, the other or his issue shall take the whole; and *C.*'s remainder over shall be postponed till the issue of both shall fail. [q] But, to avoid confusion, no cross-remainders [*read* in general] are allowed between more than two devisees; [r] and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly probable) and not merely *possible* implications. [s] And herein there is *no distinction between the rules of law and equity*; for the will, being considered in both *courts in the* LIGHT OF A LIMITATION TO USES, [t] is construed IN EACH with EQUAL FAVOUR and benignity, and expounded rather on its own PARTICULAR CIRCUMSTANCES, than by any GENERAL RULES of positive law. And it is observable, that all the rules, except the sixth and seventh rules, are equally applicable to deeds and wills. The seventh

[q] Freem. 484.

[r] Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

[s] Vaugh. 262.

[t] Fitz. 236. 11 Mod. 153.

rule is peculiar to wills; and the sixth rule is a rule of law, rather than of interpretation.

To avoid mistaken conclusions, these rules of exposition must be carefully distinguished from rules of law.

While rules of law regulate the rights of parties, rules of construction are only guides to discover the intention or to fix the meaning of ambiguous language. The law has decided that general restraints on alienation should be void, and that conditions, which are repugnant to the estate, or contrary to the policy of the law, should be rejected. It has also regulated the order of succession by heirs, and has determined that personal property should be transmitted to executors, administrators, &c. And thus, the law has prescribed rules against perpetuities; and it has introduced into our system of tenures, various other rules too numerous to be recounted in a note.

Now, the first inquiry, on reading a deed or will, is, What was the intention of the grantor or testator? And the second inquiry may, from circumstances of difficulty, be, Is this intention clear or ambiguous? If it be ambiguous, then the intention must be collected from the context, and from the occasion of using the language; *Ex visceribus causæ.*

If the intention be clear, then, on the point of intention, no further inquiry will be necessary. But the next inquiry will be, whether this intention be consistent with the rules of law, *i. e.* whether the policy of the law will allow the intention to prevail in the courts of justice? If the intention be consistent, in the whole or in part, with the rules of law, then the intention (so far as it is consistent with the rules of law) must have effect. On the other hand, in those instances in which the intention aims at the accomplishment of an object, contrary to the rules of law, effect will be denied to this intention, so far as it contravenes the policy of the law. The rule of law, and not the intention, shall govern the title.

On this subject, and on these points, the most eminent judges have exercised their talents; and nine-tenth parts of the litigation of property is aimed at one or the other of two objects; 1st. To ascertain the intention when the language is ambiguous, or raises a doubt on the intention. 2d. To ascertain whether that intention, when ascertained, is capable of effect, consistently with the rules of law.

The importance and utility of the subject will induce the editor, in some future work (should his life and health allow of it) to collect and arrange the more prominent and leading authorities by which the judgment must be guided.

To a person who would read a deed or will, or any other instrument, with effect, a knowledge of these rules of interpretation, as contrasted with the rules of law, is of indispensable necessity. It is as essential as is the knowledge of the alphabet, and of the rules of grammar to those persons who would become proficients in any language.

This note will be closed by subjoining the learned comments which Lord Chief Justice *Willes* added, (*Willes's Rep.* p. 327,) to his detail of the rules as he collected them. He observed,—"On the foundation of these rules, whenever it is necessary to give an opinion upon the *doubtful* words of a deed, the first thing we ought to inquire into is, what was the intention of the parties? If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of the deed, as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit, that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law; nor can we put words in a deed which are not there (83[a]); nor put a construction on the words of a deed which are directly contrary to the plain sense of them. But when the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the judges, (and this is that *astutia* which is so much commended by Lord *Hobart*, p. 277, in the case of the Earl of *Clanrickard*,) to endeavour to find out such a meaning in the words as may best answer the intent of the parties."

*P. 89.

‡ *The exposition of the several parts of the deeds of grant. And how the words & sentences therein shall be taken.*

1. *In the premises, and what doth pass by the grant of a thing.*

*‡ Touching things granted, these rules are first to be known.

1. When any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also; and shall pass *inclusive*, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such

(83[a]) [Sometimes words are supplied in effect by construction.]

like words. *Cuicunque aliquid conceditur, conceditur etiam & id sine quo res ipsa non esse potuit.* As by the grant of conusance of pleas, is granted the ordinary process to bring causes to judgment. By the grant of a ground, is granted a way to it; [*i. e.* all usual ways; and unless there be an usual way, then a way of necessity will pass. *Shep. Abr.* 4 part, 200. *B. N. P.* 74. *F. N. B.* 183. *Com. Dig. Chimin, D.* 2. 8 *Term Rep.* 50. *Latch*, 153.] (84). By the grant of trees is granted withal [unless the right of cutting be restrained, and it may be restrained, so as to preserve them for ornament, &c.] power to cut them down and take them away (85). By the grant of mines, is granted the power to dig them: and by the grant of fish in a man's pond, is granted power to come upon the banks and fish for them (86).

Co. super Lit. 152. Lit. Sect. 172. 229. Co. 4. 86. 87. 8 H. 7. 4. Bro. Grant. 86. 144. 43 Ed. 3. 22. Co. 10. 64. Co. super Lit. 307.

2. The incident, accessary, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words *cum pertinentiis*, but not *è converso*; for the principal doth not pass by the grant of the incident, &c. *Accessorium non ducit, sed sequitur, suum principale.* And therefore by the grant of a reversion without naming the rent, a reversion after an estate tail, for life, or [for] years, and the rent reserved upon the estate, will pass, so as the tenant attorn to the grant, [attornment is no longer necessary;] but by the grant of the rent the reversion will not pass. So by the grant of a manor, the Court Baron thereunto belonging will pass; by the grant of a house, or ground, the ways [and other conveniences, as garden, &c.] thereunto belonging do pass; by the grant of arable land, the common appendant thereunto will pass; by the grant of mills, the waters, flood-gates, and the like that are of necessary use to the mills do pass; [also a stone belonging to the mill, though separated from the mill to be new worked;] by the grant of a house, the estovers appendant thereunto will pass; by the grant of a manor, the advowsons appendant, and

(84) By operation of law; as if a man grants a piece of ground in the middle of his, he at the same time impliedly grants a way to come at it, and the grantee may cross his land for that purpose without trespass; and if the grantee is obstructed, he has a remedy by action of assize of nuisance, or on the case. F. N. B. 183.

(85) And you may come with carts over my land to carry them away. 11 *Co.* 52. a.

(86) And he may justify doing so; but he cannot justify the digging a trench to let the water out to take the fish, for he may take them by nets, and other devices; but if there were no other means to take them, he might dig a trench. *Finch's Law*, 63.

villains regardant thereunto, pass, [but they may be severed by exception;] by the grant of a fair, the Court of Piepowders will pass; by the grant of homage, or rent, the fealty will pass; and by the grant of escuage, homage and fealty will pass. But divers things, that by continual enjoyment with other things are only appendant to others, as warrens, leets, waifes, estrays, and the like, these will not pass by the grant of those other things; and therefore if one have a warren in his land, and grant the land, by this the warren doth not pass. [The warren is a distinct thing from the land. So by a grant of the land, the tithes will not pass; but the tithes may pass by the words hereditaments, held or occupied with the land.] And yet if in these cases, he grant the land *cum pertinentiis*, or with all the profits, privileges, &c. thereunto belonging; by this grant perhaps these things may pass; [and as to the things which may pass by the word appurtenances, see *Moor*, 682, and by the words commodities, emoluments, and advantages; see *Hob.* 303.] And here know, that a reversion may be parcel of, or appendant to, a thing in possession, and pass by the grant of it; but a possession cannot be parcel of, or appendant to, a thing in reversion. And therefore if one make a lease for life of a manor, excepting twenty acres of it, and after grant the reversion of the manor; by this grant the twenty acres will not pass. [See *Vin. Abr. Manor.* But if he has granted the two acres for life, the reversion of these twenty acres would have passed by the grant of the manor.] So if one be disseised of an acre, parcel of a manor, or of common appendant to the manor, [how can there be any actual disseisin of a common appendant?] and before an entry or recontinuance of * the acre, or common, he grant the manor to a stranger; by this the acre of land, or common, will not pass, [for he had merely a right of entry as to this acre, and a right of entry cannot be aliened, 6 *Co.* 68. But the grantee of a manor, &c. shall have all the profits of the manor, as lands escheated, &c.; and on this ground, if a man devise a manor, and subsequent to the date of his will, but prior to his death, some of the tenements held of the manor escheat, they become parcel of the manor, and

38 H. 6. 31. 5 Co. 11. 47. 50. Plow. 103. Bro. Grant. 60. 129. Co. i. 7. 28.

*P. 90.

will pass to the devisee inclusively; for the title by escheat is a title under a former ownership, and different from a title to lands purchased subsequent to the date of a will; for such after-purchased lands will not pass without a republication of the will;] but otherwise it is in case where a lease for years only is made of, a parcel of the manor. And if a lease be made for life, of twenty acres, parcel of a manor, and after the manor itself is granted; by this [lease] the reversion of the twenty acres is granted, and will pass also.

[1 Leon, 26. 27.] And if a man make a feoffment in fee of an acre of land, parcel of a manor, and after repurchase it, and then grant the manor; this acre will not pass by this grant, for it is not united by the new purchase. [For lands once severed from a manor cannot become parcel of the manor by any subsequent act; but though they are not parcel in law, yet they may be parcel in reputation, and as such pass by proper words; see *Vin. Abr. Manor.*] But it is otherwise of trees; for if a man make a lease for life of a manor or other land, excepting the trees, and after grant the reversion of the manor or land, to another, hereby the trees do pass. And if a man make a feoffment in fee of a manor, excepting the trees, and after the feoffee buy the trees, in this case the trees are united again, so that if the feoffee sell the manor, the trees shall pass with it. [The same rule applies to mines, &c.] If I lease an acre of land, to which an advowson is appendant, for term of life, reserving the advowson, and after do grant the reversion of that acre, with the appurtenances, hereby the advowson doth not pass (87), [for during the continuance of the estate for life, the appendancy was suspended; but if the lease for life had determined prior to the grant, then the advowson would have been appendant, and passed.] But if I grant the advowson for term of life, reserving the acre, and after grant the acre, with the advowson, *cum pertinentiis*, by this [grant] the advowson doth pass (88), on the same ground as the difference between a grant of a manor for life, reserving

(87) When an advowson shall *be appendant*, or *in gross*, see in *Com. Dig. Advowson* (B). and further what shall be deemed to pass as appendant, appurtenant or incident, in *Bac. Abr. Grants.* (I. 4).

(88) As to the grant of an advowson *after avoidance*, see the cases of *Walker* v. *Hammersley*, 3 *Lev.* 115. The case of the Bishop of *Lincoln* v. *Wolfenstan*, 3 *Burr.* 1510,

an acre, and the grant of an acre for life, reserving the manor. In one case there is a severance of the accessary for a time; in the other case, the reversion remains parcel of the principal; and as to words by which an advowson will not pass, see *Hob.* 303.] If land be appendant to an office, there, by grant of the office with the appurtenances, the land will pass without livery of seisin. [Thus the parson, vicar, &c. will have glebe lands without any livery of seisin.] And if an office be appendant to land, there, by the grant of the one, [*viz.* land,] the other will pass; [but, in this case, there must be livery, if the land be held in possession.] 3. That which is parcel or of the essence of a thing, [and is still belonging to the same,] albeit at the time of the grant it be actually severed from it, doth pass by the grant of the thing itself. And therefore by the grant of a mill, the millstone doth pass, albeit at the time of the grant it be actually severed from the mill. [But if the thing has ceased to belong to the principal, as an old discarded millstone, it will not pass inclusively.] So by the grant of a house, the doors, windows, locks and keys, do pass as parcel of it, albeit at the time of the grant they be actually severed from the house. 4. By the grant of the land or ground itself, all that is *supra*, as houses, trees and the like, is granted, for *cujus est solum, ejus est usque ad cœlum*; also all that is *infra*, as mines, earth, clay, quarries, and the like (89). [But the right to the mines, quarries, &c. may be severed, either wholly or partially, from the soil. One person may have the soil, and another the mine or quarry; and the right to a mine or quarry, it is apprehended, is a profit apprendre in alieno solo; *Doe* v. *Wood*, 2 *Barn. & Ald.* 724; and yet ejectment lies for a mine.] And by the grant of a house, the ground whereon it doth stand

14 H. 8. 25. Co. 11. 50. [14 Vin. Abr. 319. pl. 6.]

14 H. 8. 1. Co. super Lit. 4. [2 Black. Com. c. 2.]

where the court held, "That a *grant* of a next presentation, or of an advowson, made *after* the church was actually fallen vacant, was a void grant. And the case of *Barret & Reynell* v. *Gbubb & Rolle*, *Hil.* 16 Geo. 3, in C. B. where *D. Grey*, Chief Justice, lays it down as certain, "That an advowson appendant may be lawfully purchased with the manor to which it is appendant, during a vacancy of the benefice; and adds, there is no reason why an advowson in gross should not. He then proceeds, "*That a bonâ fide* purchase of an advowson is good at whatsoever time it is made; and a corrupt purchase, whenever it is made, is bad. That the grant of a presentation during vacancy is void, but that as to the advowson, the case in *Burr.* must be a mistake of the reporter.

(89) Land being *Nomen generalissimum*; whereas by the name of a messuage, castle, or the like, nothing will pass but what falls with the utmost propriety under the term made use *Lit.* 4. a. [too general.]

doth pass. 5. When any matter of interest or profit is granted, the grant shall be taken largely: but when any matter of ease or pleasure only, is granted, as a walk or the like, the grant shall be taken strictly. 6. When a man doth grant all his lands, or all his goods, by this grant doth pass, not only what he is sole seised or possessed of, but also what he is jointly seised or possessed of, with another (90), [as far as respects his share; for *generaliter dicta generaliter interpretanda. Qui omne dicit nihil excipit.*] And so *e converso.* If two men join together and grant all their lands, or all their goods, hereby do pass, not only all they have jointly and together, but all those they have sole and apart. 7. Some words in * deeds are large, and have a general extent, and some have a proper and particular application; the former sort may contain the latter; as *dedi*, or *concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender; and it is in the election of the party to whom the deed is made, to use it to which of these purposes he will. And hence it is, that if a lord, by the words of *dedi & concessi*, grant to his tenant that doth hold of him, his rent; or one that hath a rent-charge out of land, doth grant it to the tenant of the land; in these cases the rent is extinguished, albeit it be by way of grant; [and it may be used either, first as a grant, and then as an extinguishment by operation of law; or as a release, and consequently as an extinguishment by the party.] But a release, surrender, confirmation, &c. cannot amount to a grant, &c. nor a surrender to a confirmation or a release, &c. because these be proper and peculiar manner of conveyances, and are destinated to a special end. [On a late occasion (1795) it was discussed, and very attentively considered in practice, whether an instrument, importing to be a surrender, but incapable of effect in that mode, could operate as a covenant to stand seised to uses. There was a great difference of opinion among eminent men. Though they could not agree, yet the more prevailing opining seems to have been, that the instru-

Plow. 289. 19 H. 6. 4. [Wingate Max. 376.]

Co. super Lit. 301. Lit. Sect. 543. 544.

*P. 91.

(90) Where a man grants *all his goods and chattels*, not only those pass wherein he is jointly possessed with another, as an obligation wherein he is joint obligee; but those also which he is possessed of in right of another, as a term of years, which he has in right of his wife, or goods which he has as executor. *Roll. Abr.* 58, *Grants* (X). 1 *Leon.* 263.

ment might operate as a covenant to stand seised, and so it was ruled at *nisi prius* by Lord *Kenyon*, and the point is now considered as clear; and this general proposition of the text seems to be no longer tenable. Thus, a deed with words of release, may be pleaded as a grant, or as a covenant to stand seised to uses. *Roe* v. *Tranmer*, *Willes Rep.* 682; 2 *Wils.* 75; *Shove* v. *Pincke*, 5 *T. Rep.* 124.]

The terms, whereby things are granted, expounded.

Amongst words whereby things do pass, some are collective, compound or general, comprehending many things, as hereditaments, lands, tenements, honors, isles, villages, and the like, including lands of several sorts and qualities. And some words are simple or particular, as meadow, pasture, wood, moor, and the like.

Co. super Lit. 5. 6. Co. 4. 88.

Hereditament.

The word "hereditament" is of as large extent as any word; for whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixt, is an hereditament. [An annuity in fee, not being a rent-charge, is an hereditament, but not a tenement; neither is a condition a tenement, but it is an hereditament. 3 *Rep.* 2; 2 *Black. Com.* 17; *Salk.* 239. A mere personal thing, as an annuity, may be an hereditament, though held for a chattel interest, or an interest merely of freehold, when that interest is carved out of a larger estate, which is of inheritance.] By the grant, therefore, of all hereditaments, do pass honors, isles, castles, seigniories, manors (91), messuages, lands, meadows, pastures, woods, moors, marishes, [*i. e.* marshes,] furses, heaths, reversions, commons, rents, vicarages, advowsons in gross, and the like things, which the grantor hath in fee simple at the time of the grant, whether he hath it by purchase or descent (92). [But though an estate for years be not an hereditament, it may be an estate in an hereditament, and therefore the subject may pass. As if a man, having a term for years, assign or demise all his lands, tenements and hereditaments, why should not all the subjects pass?]

Co. super Lit. 6. 16. Perk. Sect. 114, 115. 11 H. 6. 22. [1 Prest. on Estates 12.]

Tenement.

And the word "tenement" is of large extent also, [for the extent of the word tenement, see 2 *Black.*

Bro. Grant. 143. Co. super Lit. 6. Perk. Sect. 114.

(91) There is no question but a manor may pass by the word hereditament, per Lord *Hardwicke*, in *Norris & Le Neve.* 3 *Atk.* 82.

(92) Therefore an heir loom, though neither land nor tenement, but a mere movable, yet being inheritable, is comprized under the general word hereditament; and a *condition*, the benefit of which may descend to a man from his ancestor, is also an hereditament. 3 Co. 2. [2 *Black. Com.* 17.]

Com. 16, 59; *Vin. Abr. Title Grant*; 1 *Prest. on Est.* p. 8,] and it seems doth comprehend as much as the former. [It doth not comprehend a personal annuity in fee; and an annuity for life is neither a tenement or hereditament; and an office for life is a tenement, and not an hereditament.] And therefore, by the grant of all tenements, will pass as much as by the grant of all hereditaments (93). [This proposition is too general.]

Co. super Lit. 4. Co. 4. 891. Perk. Sect. 114. The word "land" strictly doth signify nothing but arable land; but in a larger sense, it doth comprehend any ground, soil or earth whatsoever. And therefore by the grant of all lands, do pass arable lands, meadows, pastures, woods, moors, waters, marishes [*i. e.* marshes,] furzes, heath, and such like, and the castles, houses and buildings thereupon, but not rents, [being distinct from and independent of the land. But a fine levied of the land may extinguish a rent issuing out of the land; but a recovery suffered of the land would not bar an estate tail in the rent, not being a rent service,] advowsons, and such like things. [And in *Ewer* v. *Hayden*, it was argued that by the grant of *Blackacre*, a house built thereon shall pass; *Cro. Eliz.* 476.] Land.

Co. 11. 47. 50. 10. 107. Also by grant of any land in possession, [generally it must be understood, and not so as to make the possession a description of the property,] the reversion thereof will pass. And yet by the grant of a reversion of land, the land in possession will not pass. [So if the reversion be granted, and the nature of the reversion is erroneously described, so that there is not any such reversion, the grant is void.]

Edw. case, Mich. 9. Jac. Curia. 9 H. 7. 25. Bro. Grant. 87. 11 H. 6. 22. But here it must be observed, that in cases of grants, and gifts of all hereditaments, tenements or lands, consideration is had of the estate of the grantor; for if a man be seised of some lands in fee, and have other lands for life, or years only, and all these are lying within one parish, and he grant all his lands, tenements or hereditaments in this parish, to another in fee simple, fee tail, or for life,* and give livery of seisin in the lands whereof he is seised in fee, in the name of all the rest, by this doth pass no more but his lands whereof he is seised in fee; for otherwise it would be a forfeiture for those [other] lands. But if the livery of seisin be made in any Note. *P. 92. Forfeiture.

(93) This description of the word tenement does not agree with Lord *Coke* in 1 *Inst.* 6, a, where he says tenement is a large word to pass land, &c.; but hereditament is the largest.

part of the lands he hath for life or years, then that part wherein the livery is made will pass, and no more. [*Query.*] And if the conveyance be by bargain and sale, and deed inrolled, then the lands whereof he is seised in fee simple and for life, shall pass, and not the land he hath for a term of years. And yet, if in this case the grant be for years, then all the lands will pass, for then there will be no forfeiture in the case. [As the assurance is made by bargain and sale, there does not appear any objection to the leaseholds being comprised on the ground of forfeiture, since a bargain and sale will not operate as a forfeiture.] Howbeit it is said in *Bro. Done* 41, *pro. lege*, that if a man give or grant all his lands and tenements in *B.* by this, leases for years do not pass, and that these words do intend franktenements at the least (94). [It must be understood, that the terms of description were general, and in an instrument and mode of assurance, which was proper for conveying freehold lands, and then *primâ facie* general words will be confined to freehold lands. By context or circumstances leaseholds may be comprehended. *Rose* v. *Bartlett, Cro. Car.* 292. 2 *P. W.* 456. *Day* v. *Trigg*, 1 *P. W.* 286. *Knotsford* v. *Gardener*, 2 *Atk.* 450, are the leading authorities. This case only proves that lands specifically described will pass, though they are leasehold, and notwithstanding they would not have passed if the words had been general.]

Forfeiture.

Co. super Lit. 5. [14 Vin. 308. King v. Levett, 1 Bulstr. 197.]

These words *honor, isle*, and *commote*, are compound words, and of large extent. And therefore, by the grant of them, may pass one or more seigniories, manors, and divers other lands. Also a castle may contain one or more manors. And therefore by the grant of a castle, may pass one

Honor. Isle. Commote. Castle.

(94) *A.* possessed of lands for a term of 999 years, did for valuable consideration, by lease and release, *grant, bargain, sell and demise, to trustees* and their heirs, to the *use of himself and his wife for their lives, and the life of the survivor of them*, remainder to the *heirs of the wife*, and covenanted *that he was seised in fee*, the wife died without issue, having made a writing *in the nature of a will*, and devised the premises to *B.* and his heirs. Lord Chancellor was of opinion, that though the settlement could not operate as a lease and release, yet *A.* being in possession, and the word "granted" being in the release, it took effect as *a grant or assignment of his whole interest at common law:* and though it would not go to the heirs of the wife, yet it should go *to her administrator*, it being clearly the husband's intention to divest himself of *all his interest in the estate. Marshal* v. *Frank. Gilb. Eq. Rep.* 143. *Prec. in Chan.* 480. S. C.

or more manors. And so sometimes *è converso* a castle may pass by the grant of a manor. [On these cases the rule is, that the words of description must be understood in the sense in which the parties used them. As to the castle, the difference is, 1st. When the castle is the principal, and the land the accessory; or when the lands are known by the general denomination of the castle, then the terms describe all the land inclusively. 2dly. When there is a castle on a manor, and the castle is merely an appendage to the manor, being a building standing on part of the soil thereof, the grant of the manor includes the castle. 3dly. When a person has a castle as a distinct thing, and grants the castle; or when the terms of the deed are clearly confined to the building called the castle, and the ground attached to it, in these cases that building, and this ground alone will pass. In short, the effect of the instrument must be collected from the intention of the parties.] But by a castle most commonly is signified no more but [*read* than] the house or building, and the parcel of ground inclosed wherein it doth stand (95).

Plow. 169.

Co. super Lit. 5. Plow. 168.

This word "village or town" is of large extent also. And by the grant of it, a manor, land, meadow, and pasture, and divers such like things, may pass.

Town or village.

Co. super Lit. 5. 5a. Perk. Sect. 116. Co. 5. 11. Plow. 168. Dyer, 233. 14 H. 8. 1. 9 Jac. B. R. Dyer, 30. 8 H. 7. 4.

This word "manor" is a word of large extent, and may comprehend many things. And therefore by the grant of a manor, without the words of *cum pertinentiis*, do pass demesnes, rents, and services, lands, meadows, pastures, woods, commons, advowsons appendant, villains regardant, courts baron, and perquisites thereof, that are in truth at the time of the grant parcel of the manor.

Manor.

[a Bainton's case, M. 9. [Sir Moyle Finch's case, 6 Co. 63. contra.]

[a] But nothing that in truth is not parcel of the manor, albeit it be so reputed, will pass by the grant of the manor; and therefore if one have a manor, and after purchase the lawday (96), or a warren to it, and then he grant away the manor, hereby the lawday, or the warren, will not pass. And yet if by union time out of mind, [or for a short period,]

(95) See accordingly 2 *Inst.* 31, and further as to a castle, in *Mad. Baron. Anglic.* 17.

(96) *Lawe-day, alias dicitur de visu franci plegii; vulgo leta: alias de curia comitatus, juxta stat. An.* 1 Edw. 4, ca. 2. Spel. Gloss. This law-day or lage-day was properly any day of open court, and commonly used for the more solemn courts of a county or hundred. Cow. *Interp.*

they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* these things may pass. [b] By the grant of a manor, also divers towns [the lands in divers towns] may pass. An honor also may pass by this name. And so also may a castle, or a hundred. And one manor also, that is parcel of another manor, may pass by the grant of that manor, whereof it is parcel, [*viz.* the seigniory of the inferior manor; for if the superior and inferior manor come into the tenancy of the same person, the inferior manor will be extinguished in the superior manor; and the tenants of the inferior manor, will become tenants of the superior manor. 1 *Leon.* 27, 28.]

[b] Co. super Lit. 5. 26. Ass. Plo. 54. 2 E. 3. 36.

The word "knights-fee" is a compound word also, and may comprehend many things. And therefore by the grant of this [a knight's fee] may pass land, meadow, and pasture, as parcel of it. And sometimes * by this, doth pass so much land as to make a knight's fee. And some say it doth contain eight hides of land (97). And it seems also that a manor may pass by this name, [*viz.* a knight's fee,] if it be usually called so.

Co. super Lit. 5. Plo. 168. 17 E. 3.

*P. 93.

Grange.

The word "grange" is a compound word also, and by the grant of a grange will pass a house, or edifice, not only where corn is stored up, like as in barns, but necessary places for husbandry also, as stables for hay, and horses, and stables and sties for other cattle, and a curtilage, and the close wherein it standeth, at the least. And where land, meadow, and pasture, &c. belonging to such houses, are called all together by the name of a grange, there perhaps by this word the whole may pass.

Co. super Lit. 5. Plow. 167.

Farm.

The word "farm or ferm" called in Latin *firma*, is also a compound word, and doth comprehend many things. And therefore by the grant of a ferm, will pass a messuage and much land, meadow, pasture, wood, &c. thereunto belonging, or therewith used: for this word doth properly signify a capital, or principal messuage, and a great quantity of demesnes thereunto appertaining. Also by the grant of all farms, or all ferms, it seems leases for years do pass. [By the word farm is understood any such quantity of land, in all its varieties, and to any extent, as are occupied by one tenant. In

Co. super Lit. 5. Plow. 195.

Bro. Grants 151

(97) In different ages a knight's fee was estimated at several values, 2 *Inst.* 596. further *Cow. Interp. voc. Knights' fee.* *Co. Lit.* 69, a, and *Mad. Baron, Angl.* 31, 183. S

general, the reputation of what is reputed and understood to be comprehended by the given description, will lead to the true construction.]

Co. super Lit. 5. The word "oxgang" is a collective word also, for by the grant of *unam bovatam terræ*, or of an oxgang of land, may pass land, meadow, and pasture, and it doth properly [*viz.* did originally] intend as much as an ox can till. [Or rather, the parcels of land, which are in reputation of this quantity, and have been passed from person to person by this description.] And *jugum terræ*, or half a plow-land, is as much as two oxen can till, and by the grant of half a plow-land, may pass meadow, and pasture.

Oxgang of land.

Half a plow land.

Co. super Lit. 5. Plow. 167. The words "plow-land," and a "hide of land" are *synonyma*, and are collective words also. And therefore by the grant of *carucatam* or *hidam terræ*, or of a plow-land, or of a hide of land, may pass 100 acres of land, meadow and pasture, and the houses thereupon, [being lands known by this description;] but it doth properly intend as much land as one plow can till in a year.

A plow-land, or a hide of land.

Co. super Lit. 5. This word "a yard-land" is also collective, and doth comprehend many things, but it is not certain, [*viz.* definite;] for in some countries it doth contain twenty acres, and in some countries twenty-four acres, and in some countries thirty acres; by the grant therefore of *virgatam terræ*, or a yard land, will pass that quantity of land, meadow and pasture, that is called by this name. And so by the grant of half a yard, or a quarter of a yard land (98). [Therefore all grants of this sort must be explained by the local denomination, or reputation in the country in which the lands lie. At this day, reputation of what has been described in each particular instance by this term, is the only means by which the knowledge of the contents or quantity can be ascertained.]

A yard of land. Half a yard of land.

Co. super Lit. 6. Plow. 167. The word "fold-course" is also compound; for by the grant of a fold-course, lands and tenements may pass, *et sic de similibus*. [Properly a fold-course is a right of folding sheep.] And finally by the grant of any such compound thing as before, for the most part there doth pass thereby so much as in common reputation, [*viz.* by local evidence,

Fold-course.

(98) There are no certain number of acres contained in a hide or plough-land, or yard-land, or an oxgang of land. *Co. Lit.* 69, a. 2 *Inst.* 596.

or the title deeds,] is accounted part of that thing, and is usually called by the name (99).

Parsonage, rectory, vicarage.

*P. 94.

By the grant of a rectory or parsonage will pass the house, the glebe, the tithes, and offerings belonging to it. And by the grant * of a vicarage will pass as much as doth belong unto it, as the vicarage-house, &c. [A lease for years of a rectory is good without deed, because it contains glebe lands. The same law of a parsonage, 19 Hen. 8, c. 12. 1 *Ld. Raym.* 193. Therefore the rule only is, that incorporeal hereditaments in gross may not pass without deed. A rectory lies in livery, and the tithes will pass inclusively.] 8 H. 7. 1. Bro. Grant, 89.

Messuage. Curtilage.

By the grant of a messuage, or a messuage with the appurtenances, doth pass no more than the dwelling-house, barn, dove-house, and buildings adjoining, orchard, garden, and curtilage; *i. e.* a little garden, yard, field, or piece of void ground, lying near and belonging to the messuage, and houses adjoining to the dwelling-house, and the close upon which the dwelling-house is built, at the most, [*viz.* whatever is annexed to and enjoyed with the house, for its more convenient occupation.] And so much also may pass by the grant of a house. [See *Keilw.* 57, and 1 *Inst.* 5, 6, *ad contra*; see also *Mod.* 24; *Dal.* 26; 14 *Vin. Abr.* 318, D. pl. 1; *Ibid.* E. 4. So that the quantity of an acre of ground, or thereabouts, in orchard, garden, and out-let, [or any other quantity connected with and open to, or communicating with the house, and curtilage, or pleasure grounds to the house,] may pass by either of these names; but more than this will not pass by the grant that is made in either of these words, albeit more have been occupied with it, and albeit more be intended to be passed by the grant, [this is a reference to the presumable intention of the parties, not to any intention to be collected from the deed.] And therefore if there be a messuage or dwelling-house, and divers acres of land thereunto belonging, called all together by the name of hedges, [and the lands are distinct from the house, Plow. 85. 15. 171. 178. 569. Lit. Bro. Sect. 31. 185. Co. super Lit. 5. Co. 10. 65. Kelw. 57. 27 H. 6. 2.

(99) As to the dimensions of land in England, see the books referred to in note 11, to *Co. Lit.* 5, a, 13th edit.; and if the reader is desirous to investigate the etymologies of the several words, by which things will pass in conveyances, he will find the proper books pointed out, in note 3 to *Co. Lit.* 6, a, 13th edit.

viz. a farm distinguished from a paddock,] and a grant is made by these words, of all that messuage with the appurtenances, commonly called by the name hedges; by this grant nothing shall pass but the messuage, garden and curtilage. [a] And yet if a manor or farm be commonly called by the name of a messuage, there, by the grant of a messuage, the whole manor or farm may pass. [b] And by the grant of a messuage or house, and all the lands thereunto appertaining, will pass all the land usually occupied therewith. [c] Also by the name of a messuage, a chapel, or an hospital, may be granted. A house will pass by deed by the name of land. 2 *And.* 123; 14 *Vin. Abr.* 319, E. pl. 2; *Mod.* 359. The house includes the curtilage. 2 *Bulstr.* 113; 14 *Vin. Abr.* 319, pl. 4. It is said, an upper chamber in a house lies in grant only, and not in livery. It is also said that such chamber is no frank-tenement. The first of these opinions is questionable, and the second is, beyond all doubt, erroneous. 10 *Vin. Abr.* 202, A. 2, pl. 4; 14 *Vin.* 320, F. pl. 2.]

[a] See before.

[b] Lit. Bro. Sect. 185. 160. Bro. Leases, 55. Plow. 170.

[c] 13 Ass. pl. 2. Co. super Lit. 4.

By the grant of a cottage, doth pass a little dwelling-house that hath no land belonging to it, [and may extend to a curtilage, and implies a court and backside. 2 *Lord Raym.* 1015; 6 *Mod.* 114; 4 *Vin. Abr.* 582. It may also comprise a garden.] Cottage.

By the grant of all a man's arable land, [generally] there doth pass no more but that kind of land; and by the grant of all a man's meadow ground, or all a man's meadows, doth pass no more but that kind of ground. And by the grant of all a man's pasture, doth pass no more but the land or ground itself employed to the feeding of beasts, and also such pastures and feedings as he hath in another man's soil. Arable land, meadow, pasture.

14 H. 8. 1. Perk. Sect. 116. Co. 5. 11. Br. Done, 14. [1 Inst. 4. 6. Bro. Grants, 167. Co. Jac. 487. 524. 2 Roll. Ab. 455. U. pl. 1. 3.]

If a man have divers acres of pieces of wood, and grant to another *omnes boscos suos*, or all his woods, or all his woods growing in such a place, [but *query* in this case, as the word growing seems explanatory of the grant;] by this grant doth pass all the high-wood and underwood, and not only the wood growing upon the land or soil, but the land or soil itself wherein it doth grow. [The observation arising from all these cases is, that the context of the instrument must lead to the sense and intention of the parties, and that intention must prevail; and Wood trees.

when the intention expressed by the words of the instrument is doubtful, the words of the instrument must be interpreted in their largest and most extensive signification.] But in this case, if the grantor have in the same place divers pieces of wood, and divers closes, wherein there are divers trees growing in the hedges; it seems, in this case, these trees in the hedges shall not pass by this grant in these words; especially if the case be so, that the cutting of them will be a waste. And yet if the grantor have no pieces or groves of wood in the place, nor trees but what are growing in the hedges and grounds; in this case, it seems all the trees, except the apple trees, do pass, but not his hedges and hedge rows. And in * case where the trees only do pass; as where the grant is of all a man's trees, there shall pass no more of the soil but so much as shall serve for the nutriment of the trees; and the owner of the soil shall have the grass growing thereupon also; [and one man may by grant or gift have an inheritance in trees growing on another man's soil.] If a man grant to another all his saleable underwoods within his manor, which have been usually sold by the owners of the manor, with free entry, egress and regress, for selling, making and carrying the same away at all times convenient; in this case it seems the soil doth not pass but the wood only. And yet if those words with free entry, &c. be omitted, *contra*.

*P. 95.

Co. 5. 11. 11. 50.

Curia Hill. 16 Jac. B. R. Pinchcomb's case.

If one demise, grant, and to term [*read* farm] let, a farm, with all manner of timber-wood, underwood, and hedge rows, except the great oaks in such a close, [an exception which gives to the lessor a right to cut the oaks down during the term,] to have and to hold the farm for twenty-one years; in this case, albeit there be the word grant, and that the trees be not named again in the *habendum*, yet the other trees do not pass by this grant, otherwise than in other leases; [*viz.* with the right to shade, mast, estovers, &c.] and if the lessee cut any timber to sell, it is waste in him.

Dyer, 374. Co. 11. 48.

Toft.

A toft is [the site of a decayed house, *viz.*] a place where a messuage hath stood, and by this name in a grant such a thing will pass. [A croft is a little close, or pightle, adjoining to a house, used either for pasture or arable, as the owner

pleases. In many places such close is called a ham.]

Co. super Lit. 4 b.

Bruera is a heath, or heathy ground. *Frassetum* is a wood, or piece of ground that is woody. *Alnetum* is a wood of elders, [should be alders,] or place where elders [alders] grow. *Salicetum*, a wood of willows, or place where willows grow. *Selda*, a wood of sallows, willows, or withies, or place where such things grow. *Filicetum* is a braky ground, or place, where such things as fern grow. *Fraxinetum*, a wood of ashes, or place where ashes grow. *Lupulicetum*, a hopyard, or place where hops do grow. *Arundinetum*, a place where reeds grow. *Roncaria*, or *runcaria*, a place full of briars or brambles. *Juncaria*, or *joncaria*, or *jampna*, (which are all one,) a place where rushes do grow. *Ruscaria*, a place where kneeholm, or butchers pricks, or broom, doth grow. *Mariscus*, a fen, or marsh ground. *Mora*, [moor, *viz.*] a more barren and unprofitable ground than a marsh. And by grant of these, and such like things, or of twenty acres of such ground, [generically,] these particular kinds only, or so many acres thereof, do pass. *Vacaria*, is a dairy-house. *Porcaria*, a swine-sty. *Bercaria*, a tanhouse: and by these names these things will pass. By the name of *stagnum* a pool, or *gurges* a gulf, the water, land, and fish in the water, will pass.

Bruera. Frassetum. Alnetum. Salicetum. Selda. Filicetum. Fraxinetum. Lupulicetum. Arundinetum. Roncaria. Juncaria. Ruscaria. Mariscus. Mora.

Vacaria. Porcaria. Stagnum. Gurges.

Co. super Lit. 5.

Co. idem.

By the grant of *stadium*, *ferlingus*, or *quarentena terræ*, doth pass a furlong or furrow long, which anciently was the eighth part of a mile. By the name of *selio*, or *porca terræ*, doth pass a ridge of land, which is sometimes longer, and sometimes shorter. By the grant of an acre [substantively] of land, doth pass so much as is an acre by measure in that country, by the ordinary account and measure of the country. By the grant of a rood of land, doth pass ten perches, * [*read* forty perches,] the fourth part of an acre. And by the grant of six foot in length, and two foot in breadth, so much only doth pass. And by these, and such like names, land may be granted. [The owner of an advowson may grant the advowson, or next presentation, not being an existing avoidance, or several presentations; but he cannot grant the glebe lands, or the tithes, as a distinct property. In these he has not any estate or interest. They are

Stadium. Ferlingus. Quarentena terræ. Selio terræ.

Acre of land.

Rood of land.

*P. 96.

inseparably annexed to the advowson, and will belong to the incumbent for the time being of the church.]

Mines. By the grant of *mineras*, or *fodinas plumbi*, &c. or mines of lead, &c. the land itself will pass, if livery of seisin be made thereof; [for livery of seisin necessarily operates to pass the land, and explains the sense and meaning of the parties;] but otherwise it seems not, and then the grantee hath by the grant a power to dig only, granted unto him. [*Doe* v. *Wood*, 2 *Barn. & Ald.* 724. Co. super Lit. 6 Co. 5. 11.

A mine may be a corporeal hereditament; for instance, if a mine be open, and granted, the grant is of a corporeal hereditament.

In regard to mines not open at the date of the grant, this distinction, (a distinction grounded on principle,) though no decision is found on the point, may be taken.

1. The grantee has an incorporeal, and not a corporeal hereditament. *Doe* v. *Wood*, 2 *Barn. & Ald.* 724. An interest which would pass by grant, without livery of seisin; and for such incorporeal hereditament, the grantee, his heirs or assigns, could not (unless he had possession of the land) maintain ejectment; for it would be singular, that that which is an incorporeal hereditament in the first instance, should become a corporeal hereditament in the result. Besides, all the right of soil, subject to the easement or privilege of mining, remains to the grantor, his heirs and assigns. Thus an ejectment will not lie for a piscary. *Cro. Jac.* 146; nor *quodum rivulo sive aquæ cursu. Yelv.* 143; nor for pannage, 1 *Lev.* 212.

It has been decided, that an ejectment will lie for a mine. *Commin* v. *Kyneto*, *Cro. Jac.* 150. *Noy* 120. *Andrews* v. *Whittingham*, *Carthew* 277. But whether the mine was claimed as resulting from a right or easement of mining, or from a right of soil, does not distinctly appear. It seems to have been for a mine, held under a right of mining. Trespass also will lie against those who enter wrongfully into possession of a mine, held under a right or easement of mining. (*Barker & al.* v. *Birkbeck & another*, *Burr.* 1550. And see *Wilson* v. *Mackreth*, *Burr.* 1825. *Hoe* v. *Taylor*, *Moor* 457.) And hence it may be inferred, though not necessarily, that a person who is in possession of a mine

may maintain ejectment against any wrong-doer who enters into the mine, claiming the mine. See *Selwyn's N. P.* 727. The ancient remedy against the owner of the soil, or even a stranger, seems to have been by a writ of *quod permittat*; and it would be difficult, even at this day, for the lessee of a right of mining to maintain ejectment against the owner of the soil. *Doe* v. *Wood*, 2 *Barn. & Ald.* 724. And if he could not maintain that action against the owner of the soil, it is difficult to understand how he could maintain it against a grantee in possession, under a grant by the owner of the soil.

The case will be illustrated by considering the state of the title to houses, &c. built on the soil of the lord, in consequence of the grant of the right of mining, and of building houses, &c. Of the houses the grantee has mere possession; he has not any right in the soil; he has not any term of years in the land; or, as a consequence, in the houses built on the land. He has only an interest or easement in *alieno solo*. The house is his, for the purpose of possession; and while he occupies it, he is in the nature of a tenant at will. He cannot predicate of himself, as being a lessee for years of the house, or of the land on which the house is erected. His possession will vary, or may vary, from one parcel of land to another, as new mines shall be opened, and the convenience of building cottages, &c. may require the erection of other cottages, &c. These notes are added on account of the general utility of the subject. Also, there may be a licence of mining, as distinguished from a lease of a mine. *Doe* v. *Wood*, 2 *Barn. & Ald.* 724. Grants of rights of mining, ought to express whether the right is or is not to be exclusive of the owner.]

Perk. Sect. 111. If one grant to me to dig a trench in his ground, from such a place to such a place, to convey water by a lead pipe, or otherwise; hereby also *inclusive* is granted a liberty at any time after to dig, to amend it as occasion shall be. [The maxim is, *qui aliquis concedit*, &c.] Trench.

Co. super Lit. 4. If one grant to me to dig turfs in his land or soil, and to carry them away at my will and pleasure; by this is not granted the land itself, the Turfs.

houses or trees thereupon, or mines therein. [This is merely a profit to be taken in *alieno solo*, although part of the soil may be removed.]

Common. If one grant to another, common for all his beasts in his land; hereby is not granted common for goats, pigs, and such like beasts and cattle that are not commonable. But if the grant be of common for all manner of beasts, *contra*; [for the stipulation, that the common shall be for all manner of beasts, excludes the construction of law, which would restrain the grant to commonable beasts.] And if one grant to another, common without number in his land, the grantor is not hereby excluded to common there with the grantee. Co. super. Lit. 4. Perk. Sect. 108. 109.

And if one grant to me common of pasture for ten kine in his lands in *Dale*; by this grant I shall have common in his commonable grounds and lands only, and not in any other lands.— And if a man grant common of pasture to me, for my beasts *ubicunque averia sua ierint*, and he occupy one hundred acres of land with his beasts, and after he keep no beasts; yet by this grant I may keep my beasts in those 100 acres. But if he grant to me common of pasture for my beasts wheresoever his cattle shall go, [without identifying any lands,] &c. by this grant I shall have no common but when the grantor doth use his common with his cattle, &c. [The distinction is reconciled by rendering the word *ubicunque* as whensoever, instead of wheresoever, and then the grantor cannot defeat his grant, by omitting to keep cattle.]

Estovers. By the grant of estovers, will pass, houseboote, hayboote, and plowboote. But if a man grant to me estovers out of his manor, I may not by this grant cut down any of the fruit trees within his manor (100). [For the grant is to be construed reasonably.] Perk. Sect. 116.

Way. If land be granted [or excepted] to me; hereby also implicitly [by implication of law] is a way thereunto granted [or excepted] to me also. [a] So that if one have twenty acres of land, and grant me one acre in the midst of it, hereby *inclusive* there is granted to me a way to it. [The rules are 14 H. 8. 1. [a] Clar. case, Trin. 5 Jac. B. R.

(100) For the nature and different kinds of estovers, see *Co. Lit.* 41, b.; the same estovers that tenant for life may have, tenant for years shall have.

applicable only to ways of necessity. In all other cases the usual and accustomed ways pass as easements, &c.] [b] And yet if a man have two closes, and he use to go over one of them for his ease, to the other close, by a new way, and after he grant the further close *cum pertinentiis*; by this grant the new way doth not pass.

[b] Per Williams & Yelverton, Justices, Mich. 3 Jac.

Co. super Lit. 5. Rice & Wiseman's case. Mich. 9 Jac.

Forest, park, chase, warren.

If a man have a forest, park, chase, vivary, or warren in his own ground, and he grant this forest, park, chase, vivary or warren; [generally without any qualification or context,] hereby not only the privilege, but the land itself doth pass. But if the ground be another's, [then for want of title to the land;] or if it be his own [land] and the grant * be only of the game, [right of sporting, &c.] in these cases, the land, or soil itself, will not pass.

*P. 97.

Co. super Lit. 4.

Fishing.

If a man be seised of a river, and by his deed doth grant *separalem piscariam*, or *aquam suam* in the same, and maketh livery *secundum formam chartæ*; by this grant doth pass only a liberty to fish within the water, and not the soil, nor the water itself: and therefore the grantor may take water still; and if it be dry, he may take the soil also. [As livery of seisin is made, it seems the better opinion that the soil will pass by a grant of *separalem piscariam*; 1 *Inst.* 122 b.] And if one grant all his fish in his pond; by this is granted a power to come and fish for them; [for *qui aliquid concedit, &c.*] but the grantee may not hereby dig a trench and let out the water to take the fish, albeit they may not be otherwise taken (1). [The excess is in digging the trench. This is the act which cannot be justified.]

Fitz. Barre, 237.

Co. super Lit. 4. Dyer, 285. Trin. 5 Jac. B. R. accord.

Vesture or herbage of land.

If one be seised of twenty acres of land, and he grant to another and his heirs the vesture, or the herbage of it, and maketh livery of seisin in it *secundum formam chartæ*; by this grant do pass the corn, grass, underwood, sweepage, and the like; and for these things the grantee may have an action of trespass for any wrong done to him in them. But hereby the land itself, the houses, and great trees thereupon, and mines therein, do not pass. And if one grant the herbage, or vesture of a wood; hereby is granted the grass and under-

(1) See before, in page 86.

wood only, and not the timber of great trees.

Profits of lands. But if a man, so seised of twenty acres of land, grant to another the profits of this land, to have and to hold to him, and his heirs, and maketh livery *secundum formam chartæ*; hereby the vesture, herbage, trees, mines, and all whatsoever parcels of that land, do pass.

Deeds. If one grant to another all his deeds, or all his muniments; hereby will pass all his charters, feoffments, leases, releases, confirmations, letters of attorney, and the like. [In short, all deeds, &c. material to the evidence or defence of the title.] 35 H. 6. 37.

Goods. If one give or grant to another *omnia bona*, or all his goods; by this [these terms] do pass all his moveable and immoveable, personal and real goods, as horses, and other beasts; plate, jewels, and household stuff; bows, weapons, and such like; and his money, and his corn growing on the ground; also all the obligations and bills that are made to him, and in his own name, do pass by this [in equity] but not [at law] the debts due by such obligations and bills (2). And some say that leases and terms of years of houses, lands, rents, commons, &c. rents charge for years, wardship of tenants in capite, and by knights service, and the interests that a man hath by statute staple, statute merchant, or elegit, do pass by this grant; but of this, others doubt (3). And if a man give or grant to another *omnia catalla sua*, or all his chattels; hereby doth pass as much as by the grant of all his goods, and by this [grant] without question leases for years, &c. do pass. [On the effect of Co. super Lit. 118. 39 H. 6. 35. Dyer, 59. Perk. Sect. 115. 12 H. 8. 4. Bro. Grant. 96. 51. Done, 39. 47. Dyer, 5. Co. 8. 33.

Chattels.

(2) If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, *viz.* the parchment and wax to another, who may cancel and use the same at his pleasure, *Co. Lit.* 232, b. Money due on bond, is a *chose in action*; so called, because, though the *property* in a debt vests at the time of forfeiture mentioned in the obligation, yet there is no *possession* till recovered by a due course of law. A *chose in action* strictly is not assignable at law. *Co. Lit.* 214, 266, a. And after an assignment of a bond, if an action is brought on it, it must be brought in the name of the obligee; and for this reason, the power of attorney, and covenant, that the assignor (the obligee) will not release, in case an action is brought, are inserted in the assignment of the bond. But though a *chose in action* cannot be assigned to a common person, yet it may to the king, 1 *Pr. Wms.* 252. The king may, by his prerogative, assign a *chose in action* to *A.* and it will be a good assignment; but if *A.* assigns it over to any other person, that assignment will be void, *Cro. Jac.* 180. A court of equity, however, will protect an assignment of a *chose in action*, 3 *Pr. Wms.* 200.

(3) Leases for years do not pass by a *grant* of *omnia bona*; but otherwise in a will, the civil law being the guide; by two judges against one, *Cro. Eliz.* 386. *Portman* v. *Willis* [But see *Co. Lit.* 118 b. *Vin. Abr. Grants*, W.]

the words goods and chattels to pass choses in action; and on the operation of these words in a statute to give a right to things of this sort, see *Ryall* v. *Rolle*, 1 *Atk.* 164.] But by neither of the grants do pass those goods or chattels which the grantor hath by delivery [bailment] in keeping for another, or the like; [for they are the chattels, &c. of another, not of himself.] Neither doth any estate of inheritance or freehold, or the charters concerning any freehold, pass under * these words. [a] Neither doth any thing in action, as debts or the like, nor [things of pleasure, &c. as] hawks, hounds, poppinjays, or the like, pass by this grant. [b] And yet if an executor grant *omnia bona & catalla sua*; hereby the goods and chattels he hath as executor, as well as his other goods and chattels, will pass. And if one grant all his leases for years which he hath by any conveyances; hereby the leases for years which he hath as executor, as well as other leases for years, will pass.

[a] Per Ch. Just. B. R. 21 Jac.

*P. 98.

[b] Adjudged 3 Jac. Kelw. 64 10. Co. 4. 1. Per Fleming, Just. 7 Jac. B. R.

Dyer, 50.

If one grant to another all his utensils; hereby will pass all his household stuff, but not his plate, jewels, or any such like thing, [and still less articles of his trade.]

Utensils.

Co. super Lit. 345. Lit. Sect. 613. Plow. 161. Co. 1. 153.

If a man be seised of land in fee simple, or for life, and [*read*, or] have an estate in it for years, by statute merchant, staple, elegit, or the like; and he grant all his estate, or all his right, or all his title, or all his interest of and in the land; by this grant, all his estate, and as much as he is able to grant, doth pass. [When tenant in fee or tenant in tail grants all his estate, the fee will not pass unless there be a limitation to the heirs of the grantee.] And if tenant for life of land, the remainder to the [*read*, a] stranger in tail, the remainder to the right heirs of the tenant for life, do grant by these words; hereby [provided the word heirs be in the grant] both his estates [for life and in fee] do pass. And if a tenant in tail grant all his estate in the land; hereby there doth pass as much as he can grant; [*viz.* for his life; and if the limitation be to the grantee and his heirs, and no discontinuance be effected, then a fee determinable on the failure of his issue, will pass; but unless there be a fine, the estate would be defeasible by the issue; *Machell and Clarke*, 2 *Lord Raym.* 778.] And all these words also do carry and pass reversions, as well as

Grant of all a man's estate, right, &c.

possessions. And if a man have a term of years of land, and he grant his term; hereby doth pass the term of years, and all his estate and interest of the land. [So of a lease for lives; 2 *Abstr.* p. 2.]

Note. And note, that by all these names these things may be granted; and that for such things as are grantable without deed, when they pass by a verbal grant in any of these words, the words shall have the same exposition as they have in deeds. Fitz. Brief, 581.

If one grant all his goods in such a place, [with or without the words] *si quæ fuerint*; by this grant nothing doth pass but the goods that are in such a [*viz.* that] place at the time of the grant; and not any other goods that shall be there afterwards. H. 6.

If two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all their goods they have in common, and likewise all the goods they have in severalty. [And therefore the grant should be restrained when it is the intention to confine it to particular goods; and there should be either a schedule, and a reference to it, or the goods should be described, as those which they have jointly, &c.] Bro. Done, 10.

If two tenants in common, or others severally seised of land, join in the grant of a rent of twenty shillings, or a horse, out of the land whereof they are so seised; by this grant the grantee shall have two twenty shillings, or two horses (4). [The case is perfectly right as to grants as distinguished from a reservation of the rent, and the rents are several, on account of the several seisins; for each tenant in common has a distinct seisin. There cannot, on such a grant, be a moiety of a rent payable by one tenant, and a moiety of the rent payable by the other tenant. But when there are two tenants in common, and they reserve a rent, each will have a moiety or other share of the rent, proportionable to his aliquot part.] Plow. 171. 140. Co. 10. 106.

If a man grant a rent of ten pounds to me, to have and to hold during my life and my wife's life, and after the death of my wife, a rent of three pounds to me for my life; in this case, if my wife die, I shall have both the rents; [for there are several rents, and the determination of one rent is Bro. Grant, 64.

(4) But if they reserve twenty shillings upon a lease, they shall have only one twenty shillings. *Finch's Law*, 63. According to the maxim of law, that every man's grant shall be taken, by construction of law, most forcibly against himself. *Co. Lit.* 183, a.

independent of the commencement of the other rent.] But if there be any words of restraint or determination of the first rent, it may be otherwise.

Adjudg. M. 20 Jac. B. R. Bertons. Brown.

* If one be seised of a garden plot in the parish of *Sale*, and grant it to *B.* for ten years, which being expired, he doth grant his garden plot to *C.* for twenty-one years, and *C.* doth build a house upon part of it, and leaveth the other part in a garden plot still, and after the twenty-one years ended, the lessor doth grant to *D. totam illam peciam fundi sive gardin' plott' nuper in tenura de* B. *& nunc de* C. lying in the parish of *Sale*, by this grant, the house newly built, and the plot of garden doth pass. [*Supra*, fo. 90, and see *Marsh* v. *Smith*, 1 *Leon.* 26; *Palm.* 319.] *P. 99.

Bro. Grant, 53. 88. Done, 26.

If one grant his manor of *Dale*, in *Dale*, which in truth doth extend into *Dale* and *Sale*; in this case no part of the manor that doth lie in *Sale* shall pass; [for the words "in *Dale*" are restrictive.] So if one grant all his tenements in *Dale*; hereby none of the tenements in *Sale* will pass. So if the manor lie within the parishes of *A. B.* and *C.*, and the grant is of the manor of *Dale*, lying within the parishes of *A.* and *B.*; by this grant no part of the manor lying in *C.* will pass. But if one seised of the manors of *A.* and *B.* in the county of *C.* grant thus, *totum illud manerium de* A. *&* B. *cum pertin' in com'* C. or *totum illud manerium de* A. *cum* B. *in com'* C. by these grants, in case of a common person, both the manors will pass. [So if he grant the manor of *Sale*, all the demesnes in *Dale* and *Sale*, which are parcel of the manor, will pass.]

Co. 1. 46.

Bro. Grant.

If one grant all his lands in *Dale*, which he had of the gift of *I. S.*; by this grant [thus restricted] nothing will pass but that which he had of the gift of *I. S.* [*infra*, 246.] But if one grant all his lands in *Dale*, called *Hodges*; [being a full description and certainty in itself,] which he had of the gift of *I. S.*; by this grant all that which is called *Hodges* shall pass, albeit the grantor had it not of the gift of *I. S.* [for *falsa demonstratio non nocet.*]

Dockrate's case, Pasch. 12 Jac.

If one grant all his lands in the occupation of *I. S.*; by this grant doth pass not only such lands as *I. S.* doth occupy by right, but also such lands as he doth occupy by wrong, and not only the

lands whereof he hath some estate, but also such lands as [*omit* as] whereof he hath the pasturage only.

If one grant all his lands in *B.* and elsewhere in the county of *S.*, in the tenure of *I. S.*, by this grant, nothing doth pass but that which is in the tenure of *I. S.*; [for the words in the tenure of *I. S.* are restrictive. 2 Jac. Br.

Where, upon an assurance, a man is to have one of two things, nothing passes till election which he will have; *Moor*, 682. Probably, a lease of one thing in particular amounts to an election; but, as from a lease of both, nothing can be inferred; the lease shall be void for both; *Moor*, 682. The election must be made in the lifetime of the grantor and grantee; 1 *Inst.* 145 a, and note, *Plow.* 66.]

If one grant his manor of S. *nec non* [also] *omnes mariscos suos de* S. *ac omnia terra, tenementa, &c. in* S. *& alibi dict' maner' spectan'*; by this grant the marsh doth pass, though it be no part of the manor, [on account of the specific denomination; since otherwise the words would be without meaning, as there were not any other marshes.] Adjudged Seignior Wentworth's case. Co. 1. 46.

If one grant all his demesne lands of his manor of *Dale, &c.* it seems by this [grant] the customary land parcel of the manor, held by copy, doth pass; [for the copyhold tenements are parcel of the demesnes.]

If one be seised of tithes which did belong to an abbey, part of which were gathered by the almoner, and part not, and he grant *omnes & omnimodas decimas granorum, &c. infra dominium prædict' & precinct' ejusdem, in dict' comit'; ac omnes alias decimas, proficua & commoditates &c. infra dominium predict' & dict' monaster' &c. spectan' & quæ nuper per eleemozinar' ejusdem monasterii collect' fuer'*; by this grant shall pass, all the tithes, as well those that were * collected by the almoner, as those which were not, and those words *quæ per eleemozinar, &c.* shall refer only to the last, and not to both sentences. [This conclusion seems doubtful; for if the clause is to be construed as containing two distinct sentences and descriptions, the latter sentence is of no effect, as the tithes described in the second sentence are comprised in the former sentence, and *mala est interpretatio quæ corrumpit textum.*] Adjudged, Hil. 2 Jac. B. R. Baker's case.

*P. 100.

Dyer, 80. If one grant all his lands in *D.* containing ten acres, whereas in truth his lands there do contain twenty acres; by this grant the whole twenty acres will pass; [because the words containing ten acres are only an addition to the description, and not part of the essence of the description. The grant is in substance of all his lands.]

Dyer, 70. If one grant the site of an abbey, *& omnia* [*omnes*] *terras prat' pasturas & subscript' cum pertinen' dict' monaster' pertinen' &c. viz.* such a thing, and such a thing, &c. by this grant, the grantee shall have all the lands belonging to the monastery, and *viz.* shall relate to *subscript'* only, and not to *omnia.* [This proposition must be adopted with great caution. The context must govern the construction. In general, the enumeration or specification would be restrictive.] See more in Grant, *infra, numb.* 4, and in Testament, at *numb.* 8, and in Fine, at *numb.* 3.

Co. 10. 106. 14 H. 8. 1. 11. 5a. The exception is always taken most in favour of the feoffee, lessee, &c. and against the feoffor, lessor. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same [or the like] words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them if he desire to sell them; and he, or the vendee, may cut them, and take them away. And by such an exception, the lessor will have the boughs, fruit, herons, and hawks, that breed in them, &c.

In the exception, and how that shall be taken:
1. In the thing excepted.

Perk. Sect. 646. Fitz. Assis. 316. If a man be seised of a fishing from such a place to such a place, and hath a mill upon the water, and he grant *totam partem suam piscariæ de* D. *quatenus terræ suæ se extendunt, salvo tamen stagno molendini*: this exception doth not take away the fishing of the grantee in the mill pond, but it shall have relation only to the pool to repair [supply water to] the mill.

Hil. 16 Jac. B.R. per Judges. If a man seised of a manor make a lease of it, excepting all the saleable underwoods, now growing, or which hereafter shall grow on the premises, which have been usually sold by the owners of the manor, with free entry, egress, and regress, for the felling, making, and carrying away of the same, at

times convenient; in this case, the soil is not excepted by reason of the subsequent words; [for if the soil were to have passed, there was not any occasion to reserve a power of entry, &c.]

If one be seised of a manor, and make a lease of it *cum pertinen' una cum columbar' ac reddit' tenentium, decimis garbarum, finibus, heriot' perquisit' cur' & aliis omnibus proficuis, (advocac' ecclesiæ & wrecc' except',)* in this [case] the exception doth begin at *advocac' ecclesiæ*, and doth except that also which followeth, and no more. [A lease of the manor *habendum* the manor, except one acre, is a good exception; for the manor, which was given by express name, passes, and the acre excepted was not comprised in the premises, otherwise than by implication; *Moor*, 26.] Dyer, 58.

1. *In the time.* If one grant lands in fee, excepting the trees or any other thing, to the grantor, without saying "and to his heirs," [*omit* without, &c. and *read* for his life;] by this exception the thing excepted is severed only for the life of the grantor, and then [after his death] it shall pass with the rest of the things granted. But if the thing be excepted indefinitely, without saying "for the life of the grantor, &c." nor how long, this shall be taken to be an exception during the estate. [Can there be such an exception in a grant passing an estate of freehold?] Dyer, 264.

*P. 101. In the *habendum* or limitation of the estate, and how that shall be taken.

*The *habendum*, as all other parts of a deed, for the most part, shall be taken most strongly against the grantor, and most in advantage of the grantee; yet so as withal it shall be construed as near the intent of the parties as may be, as in all the cases following doth appear. [The rule is, that when the intent of the parties is clearly expressed, the intent shall govern the construction. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* But when the import of words is doubtful, and they are applicable equally in one sense and in another, in this case the construction most in favour of the grantee shall be made.

Fee simple. If land be given, or granted, to one, *habendum*, or to have and to hold, to him and his heirs, so long as he pay 20*l.* yearly to *I. S.* and his heirs, or so long as such a tree doth stand, or the like; this is a kind of fee simple, [*omit* simple,] but it is limited and qualified, and determinable upon this Plow. 557.

contingent. And yet this may become a pure fee simple; for if land be granted to one and his heirs, until *I. S.* pay 100*l.* and *I. S.* die before he pay it, in this case the estate is become a pure fee simple. [1 *Prest. Estates*, p. 400. Sometimes, however, the Court of Chancery will consider the limitation to be merely a security for money, and will order a re-conveyance on payment of the money. In the instance proposed, of a grant to a man and his heirs, so long as a tree shall stand, the estate cannot become a fee simple without a release of the *possibility* of *reverter*; but in the former instance, the estate may eventually become simple and absolute, without any act of the party, merely from the impossibility of payment.]

Co. super Lit. 8, 9. Lit. 1. 27 H. 8. 5. Perk. Sect. 239, 240, 241. 39 H. 6. 38. Plow. 28. Bro. Estates, 4. 11 H. 7. 12. Co. super Lit. 15.

If lands be given or granted to a man, to have and to hold to him and his heirs, this is a fee simple, pure, absolute and perpetual, and this is made by these words "his heirs;" for it is a general rule that these words "his heirs" only, make an estate in fee simple in all feoffments and grants. But this rule hath many exceptions; for if feoffment of land be made to *I. S. & heredibus*, without the word "*suis*," this is a fee simple, [for the law will imply *his*;] and yet, if the grant be to *I. S.* and *I. D. & heredibus*, without this word "*suis*," *contra*; for this is only an estate for their lives, [for the uncertainty whose heirs are to take; 2 *Prest. Estates*, p. 10.] And if *lands* be given to a bishop, parson, or the like, to have and to *hold to him and his successors*, this *is a fee simple.* And if lands be given to a mayor and commonalty, or other corporation aggregate, generally, without the word successors, or any other word; or if lands be given to such a corporation for their lives, [the life of the corporation, as distinguished from the lives of individuals, or of the individual members,] this is a fee simple, [on account of the perpetual existence of the corporate body.] But if land be given to a parson, or the like, to have and to hold to him, without saying how long, or to have and to hold for life, by this [grant] he hath no more but [*read* than] an estate for life (5) [a] And if lands be given to the king generally, without any other word,

[a] Co. 6. 97. super Lit. 9.

(5) See accordingly this distinction between a corporation aggregate, and a corporation sole, in respect of the estate they respectively take, by a grant in which the word successors is omitted, clearly explained, in *Co. Lit.* 94, b.

[but *quatenus* king; this is a fee simple; for as the gift is to the king in his politic capacity, it is a fee, because the king never dies.] [b] So if one grant *Deo & ecclesiæ de D.*, it is said this is a fee simple in the parson of *D.* [See this point explained in *Prest. Estates, ch. Fee.*] So also of a grant *ecclesiæ de D. per Thirne Just.* So if a grant had been to the monks of such a house, it had been a fee simple in the house. And in like manner it is in other cases; [c] as if one recite that *B.* hath enfeoffed him of white acre, to have and to hold to him and his heirs, and then he saith further, that as fully as *B.* hath given white acre to him and his heirs, he doth grant the same to *C.*; by this [grant] *C.* the grantee hath the fee simple of this acre, [on the principle that *verba relata hoc maxime operantur per Referentiam, ut in esse videntur*; and see 2 *Prest. Estates*, p. 2.] And if one grant two acres to *A.* and *B.* to have and to hold, the one to *A.* and his heirs, and the other to *B. in forma predicta*, by this [grant] *B.* hath a fee simple in this other acre; for an estate in fee simple, fee tail or for life, may be made by such words of reference. [But if lands had been limited to *A.* for life, remainder to *B.* in tail, remainder to *C.* in fee, the words of reference would be void for uncertainty; but it is otherwise if the words had been *in eadem forma*, since these words refer to the immediate antecedent; 1 *Inst.* 20 b.] Also if a rent be granted between parceners, [in fee, and not in tail,] for to make an equality of partition, and it be granted generally, and without any words of heirs, yet this is a fee simple (6.) So where lands are given in *frankalmoigne* (7.) And so * also it is in the cases of a release of right, a fine, and a recovery; [1 *Prest. Estates*, p. 400.]

[b] 15 Ed. 4. 13. 9 H. 7. 11. 12 H. 8.

[c] Co. super Lit. 9. Ass. Pl. 2. Plow. 130. 14 H. 4. 36.

*P. 102.

If one [by deed] give or grant land to another, to have and to hold to him and his heirs males, or to him and his heirs females, in both these cases there is [for want of words of procreation; *Prest. on Estates, ch. Tail*, and *Abraham* v. *Twigg*, *Cro. Eliz.* 478; *Idle* v. *Cook*, 1 *P. W.* 70.] a fee simple made; but otherwise it is when these words are in a will, for then it is but an estate in tail

27 H. 8. 27. Lit. Sect. 31. Co. 11. 46.

(6) Because the grantor hath a fee simple, in consideration whereof he granted the rent; *ipsæ etenim leges cupiunt ut jure regantur.* *Co. Lit.* 10, a. *Plow.* 134, b.

(7) For the doctrine of *Frankalmoigne*, see *Co. Lit.* 93, b. The statute of 12 *Car.* 2, c. 24, does not in the least vary the tenure in *Frankalmoigne*, but expressly saves it.

only (8), [and the court will supply the words of procreation.]

23 H. 6. 5. If one grant land to one, to have and to hold to him and his right heirs, by this [grant] he hath a fee simple. And so it shall be taken, if it be by fine.

Co. super Lit. 22. Co. 1. 95. 66. So if one grant land to *I. S.* for life, the remainder to the heirs, or to the right heirs of *I. S.*, this is a fee simple, [on the ground of the rule in *Shelley's case*, 1 *Co.* p. 93; *Fearne Conting. Rem.* p. 192; and 1 *Prest. Est.* p. 453;] so if one make a feoffment in fee to the use of himself for life, and after his death to the use of his heirs, this is a fee simple, [and the fee will be descendible as the old reversion; 1 *Prest. Estates*, p. 18.]

If one grant land to *I. S.* to have and to hold to him and the heirs of *I. S.* this is a fee simple, and all one with a grant to *I. S.* and his heirs.

20 H. 6. 35. Co. super Lit. 217. If one grant land to another, to have and to hold to him for twenty years, and that after the twenty years, the grantee shall have it to him and his heirs by 10*l.* rent, and give livery of seisin; by this the grantee shall have the fee simple. [On this point there is a difference to be taken, whether the grantee shall have the inheritance immediately, or shall wait the expiration of the twenty years. The cases are collected in *Co. Lit.* 207. The result of them seems to be that the fee shall pass immediately, or at a future day, according to the nature of the assurance. If, consistently with the assurance, the fee may remain in the grantor, it shall remain in him till the years are elapsed or the contingency arises; but if livery be made, then the freehold must necessarily pass. Since it is the necessary operation of livery of seisin, to carry the freehold at least; and immediately, by its operation, to avoid the objection of abeyance, 1 *Prest. Estates*, p. 289, 422.]

Co. 1. 91. Dyer, 156. Co. super Lit. 22. If one grant land to the wife of *I. S.* to have and to hold to her for life, and after to *I. S.* in tail, and after to the right heirs of *I. S.* by this [grant] *I. S.* hath a fee simple, [expectant on his estate tail.] And if one grant land to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.*; by this [grant] *A.* hath a fee simple, expectant on two estates for life.]

Ben. Estates, 86. If land be granted to a man and his wife, to

(8) For the operation of words in a will, as to what estate passes by them, whether in fee, in tail, or for life, see fully in the chapter on Testaments.

have and to hold to them, and the heirs issuing of them, it seems this is a fee simple, and not a fee tail. [According to the later authorities, this would be an estate tail. *Prest. Est. ch. Tail.*]

If land be granted to one and his heirs, by the premises of a deed, to have and to hold to him for life, by this [grant] he hath a fee simple, [since otherwise the word heirs would be nugatory, on account of the repugnancy, since the estate for life must necessarily exclude his heirs; *sed query* at this day. But if the *habendum* were for the life of another person, or for the lives of the grantee and another person, then the *habendum* is consistent with the grant, and explains it, since the word heirs may have effect.]

Co 2. 21. 24. super Lit. 21. 21 H. 6. 7.

So if by the premises of a deed, land be granted to one and the heirs of his body, to have and to hold to him and his heirs, by this [gift] he hath an estate tail, and a fee simple expectant. *Thurman* v. *Cooper*, *Poph.* 138; *Cro. Jac.* 476; 2 *Prest. Convey.* 441.] And *vice versa*. [Not so; for if the grant be to him and his heirs, *habendum* to him and the heirs of his body, the *habendum* would be restrictive, and one estate only, and that in tail, would pass. This proposition does not state the converse case, namely, a gift to *A.* and his heirs, *habendum* to him and the heirs of his body.] If by the premises of the deed, the grant be to him and the heirs of his body, by this also he hath an estate tail, and a fee simple expectant (9.) [This paragraph should be omitted.]

Fee tail.

If lands be given or granted to a man, to have and to hold to him, and to the (or his) heirs of his body, or the (or his) heirs males of his body, or the (or his) heirs females of his body, by this [gift] the grantee hath an estate tail. So if lands be given to a man, to have and to hold to him and the heirs males, or to him and the heirs females of his body begotten; in both these cases it is an estate tail (10.)

Terms of Law, tit. Tail. Lit. tit. Fee, toto. & in Co. super Lit. 26.

(9) But according to 8 *Co.* 154, b. the words *heirs of the body*, in the *habendum*, qualify the word *heirs* in the *premises*, and create an estate tail, without any fee expectant. See also *Mo.* 26.—*contra Cro. Jac.* 476, and 2 *Roll Rep.* 23. See more amply, as to what words make an estate in fee simple, in *Vin. Abr. Estate*, (R.) (L.) *Com. Dig. Estates*, (A. 2.) *Bac. Abr. Estate in Fee Simple*, (B.)

(10) It is a constant rule, that in the creation of an estate in tail, it must appear of what body the persons to inherit must issue, and it is the essence of the estate. 1 *Pr. Wms.* 72. *Co. Lit.* 27, b. For the origin and nature of estates tail, what things may be entailed, the different species of estates tail, the words necessary to create them, the incidents and inconveniencies attending them, and the introduction and progress of fines and recoveries, in to bar them, see 2 *Bl. Com.* 110. *Co. Lit.* 9, 19. And *Wright's Ten.* 186.

Lit. Idem. Co. 1. 140. Co. super Lit. 20. Co. 7. 41.

If lands be given to a man and his wife, to have and to hold to them and the heirs males, or to them and the heirs females, of their two bodies begotten, by this [gift] they both have an estate tail, [as tenants by intireties.] And if lands be given to them, and the heirs males, or heirs females, of the body of the husband begotten on the wife, by this [gift] he [alone] hath an estate tail, and * his wife an estate for life only. And if lands be given to *A.* to have and to hold to him and his heirs on the body of *B.* begotten, by this [gift] *A.* [alone] hath an estate tail, and *B.* hath nothing (11), [on account of the words which appropriate the heirs to the body of the husband.] So if lands be given to a man and his wife, to have and to hold unto them, and the heirs which he shall beget on her body, by this [gift] they have an estate tail in them both, [because both are donees, and the words of limitation to the heirs equally apply to the heirs of one as well as of the other.] If lands be given to a man and his wife, and the heirs of the body of the husband; by this [gift] the husband hath an estate in general tail, and the wife but an estate for life. If lands be given to him, to have and to hold to him, and his heirs he shall beget on the body of his wife, by this [gift] he hath an estate tail, and she no estate at all.

*P. 103.

Lit. Sect. 17.

If one give his land to his daughter, or cousin, in frank-marriage, by this [gift] they have each of them an estate tail without any word of "heirs, or heirs of body," &c. (12.) [And the words *in libero maritagio*, or in free marriage, were of the essence of this gift; and these words are so appropriate to this purpose, that they cannot be supplied by any circumlocution. This mode of gift is obsolete. No instance of such a gift occurs in modern titles.]

---

(11) And on the death of *B.* without issue, in the lifetime of *A.*, *A.* becomes tenant in tail after possibility of issue extinct. For the nature of this estate, and its privileges, see Co. *Lit.* 27, b.

(12) The daughter or cousin takes only an estate in special tail. This gift may be either before, or after marriage. The words in *frank-marriage*, according to the rules of law, create an estate of inheritance in special tail; but these four requisites must be incident to the gift, or else those words will create but an estate for life. 1st. It must be given for consideration of marriage. 2dly. The woman or man, that is the cause of the gift, must be of the blood of the donor. 3dly. If the gift be made of such a thing as lieth in tenure, the donees must hold of the donor at the time of the estate in frank-marriage made. 4thly. The donees shall hold freely of the donor, till the fourth degree be past. Co. *Lit.* 21, b. See further as to the doctrine of frank-marriage in *Fleta*, *lib.* 3, *cap.* 11. *Com. Dig. Estates*, (B. 6.)

If one give lands to *B.* and his heirs, to have and to hold to *B.* and his heirs, if *B.* have heirs of his body, and if he die without heirs of his body, that it shall revert to the donor; by this [form of gift] *B.* hath an estate tail, [that the limitation over may have effect, and that the several clauses of gift may be consistent and effectual, agreeable to the intention.] So if one give lands to *B.* and his heirs, if he have issue of his body, by this [gift] he hath an estate tail (13.) [No case warrants this proposition, unless there be a limitation over on failure of issue of the body; see *Prest. on Est. ch. Tail.*] So if lands be given to *B.* to have and to hold to him and his heirs, provided that if he die without heir of his body, the land shall revert, [for on the context the gift is to *B.* and the heirs of his body.] So if lands be given to *A. & B. uxori ejus, & hered' eorum, & aliishered' ipsius A. si dict' hered' de dict' A. & B. exeunt', obierunt sine herede de se, &c.*; by this [gift] they have an estate tail, [since, by the context, the gift is explained to be to them and the heirs of their bodies.] And so in all such like cases, where, after a limitation of a fee simple, [*viz.* a gift to a man and his heirs, thus, *prima facie*, importing a fee simple,] these, or such like words are added, *viz.* that if he die without heirs of his body, the land shall revert; for in all these cases the *habendum* is construed to be a limitation, or declaration, what heirs are meant before (14.) [All these cases are instances in which the rule of exposition, that the construction be made on the entire deed, &c. (*supra*, 84,) hath its proper application and effect.]

Co. super Lit. 21. Co. 7. 41. 5 H. 5. 6.

If lands be given to *A.* and *B.* (a young man and maid unmarried,) [and who may lawfully intermarry,] to have and to hold to them, and the heirs of their two bodies, by this [gift] each of them hath an estate tail; and if they marry, their heirs may inherit it. [They have an estate in special tail, and they are joint-tenants in tail, and each may alien a moiety in fee simple. The fine with proclamations of one, would bar the heirs of both.

Co. super Lit. 26. Plow. 135.

(13) The word *issue* in a will, may be a word of limitation; but, in a deed, it is always a word of purchase. 2 *Atk.* 582. [*Yates* v. *Fettiplace*, *Com. Rep.* 742.]

(14) Nor does such construction, or explanation of the *habendum*, retract the gift in the premises, because the word *heirs* has still its operation, and by such construction becomes more conformable to the will and intention of the donor. See *Bac. Abr. Estates* in " (B.) [1 *Pow. Wood*, p. 199. 125.]

By common recovery, one of them cannot bar the intail in more than one moiety.]

Co. super Lit. 7. Co. 8. 87. Ass. pl. 47. 5 Ass. 14. If lands be given to the son, to have and to hold to him, and his heirs of the body of his father; by this [gift] the son hath a fee simple, [because the gift is in effect to him and his heirs.] But if the words be, to have and to hold to him and the heirs of the body of the father engendered, by this [form of gift it is an estate tail in a deed, as it is in a will. [See 1 *Prest. on Est.* 287. By this gift the son takes an estate for life, and the limitation to the heirs of the body will give the intail to the persons who answer that description; so that this son may or may not take the estate tail in the first instance. If he take the estate tail, he is a purchaser under the gift to the heirs of the body, as a separate and distinct gift. In the former instance the gift is to the heirs of the son of the body of his father, and this is the reason that a fee, and not an estate tail, passes; 1 *Prest. on Est.* 287.] And if the father be dead, the law is so also; [but if the father be living, no estate tail will arise to the son till the father's death, because *nemo hæres est viventis*;] but it seems the son shall have by this [gift] only an estate for life, except he be issue in tail to his father *per formam doni*. So if there be grandfather, father and son, and the father dieth, and lands be given to the son, to have and to hold to him, and the heirs of the body of the grandfather, this is an estate tail in the son; [*viz.* a gift to the son for life, with remainder to the heirs of the body of his grandfather; and the son may take the estate tail if the description of heir be fulfilled in his person:] but neither the father, [in the first case,] nor the grandfather, [in the second case,] have either of them any estate in these cases. If lands be given to *I. S.* and the heirs of the body of his wife (being dead) begotten, by this [gift] *I. S.* hath an estate tail; [*read* the heirs of the body of the wife have an estate tail as purchasers. But if the gift had been to *I. S.* and his heirs of the body of his deceased wife begotten, the husband would have had an estate in special tail, if there had been issue; and if no issue had existed, he would have been tenant in tail after possibility of issue extinct.]

wm.

12 H. 4. 1.

* If one grant lands to *I. S.* to have and to hold to him, and the heirs of his body issuing, the re-

*P. 104.

Co. super Lit. 385.

mainder to *I. D.* and his heirs *in forma predicta*; by this [those gifts] *I. S.* and *I. D.* after him, have each of them an estate tail (15.) [But if the gift had been to *A.* for life, remainder to *D.* in tail, remainder to *C.* in form aforesaid, the limitation to *C.* would have been void for uncertainty; otherwise if the gift had been in *eadem forma*, because the words same, &c. refer to the immediate antecedent. *Co. Lit.* 20 b.]

If one grant lands to *A.* to have and to hold to him for life, the remainder to the first son of *A.* and the heirs males of the body of that first son; by this, [gift] the first son hath an estate in tail, and *A.* his father but an estate for life only. But if lands be granted to *A.* for life, the remainder to the heirs of the body of *A.*; by this [gift] *A.* hath an estate tail in him, [under the rule in *Shelley's case.*] And if lands be given to a man and his wife, to have and to hold to them, and one heir of their bodies lawfully begotten, and to one heir of the body of that heir; by this [gift] there is an estate tail made, yet so as it shall last only during the lives of those two heirs. [See *Prest. Est. ch. Fee and Tail.* But it is an inheritance, and a recovery would bar the remainders. *Note*, the gift is not only to the heir in the first degree, but to the heir in the second degree. This circumstance distinguishes this case from *White* v. *Collins*, *Com. Rep.* 289. 1 *Prest. Est.* 363.] Co. 2. 91. super Lit. 22. 39 Ass. Plow. 20.

If one grant lands to another, to have and to hold to him and to his heirs, on the body of such a woman lawfully begotten; by this gift he hath an estate tail, for begotten shall be intended by the donee on that woman. Co. super Lit. 26.

If there be husband and wife, and they have issue a son and daughter, and lands are given to the wife, to have and to hold to her and the heirs of her late husband, on her body begotten, [so that the husband being dead, the issue, heirs of his body, have a present capacity to take *by the name of heirs*;] by this [gift] the wife hath an estate for life, and the son an estate in tail, [as purchaser,] and if he die without issue, it shall go to his daughter, *per formam doni*, [as one of the heirs of intail; 1 *Prest. Est.* 287.] Co. super Lit. 26. [Southcote v. Stowell, 2 Mod. 207.]

(15) If the remainder had been to *J. D. in forma predicta*, without the word *heirs* being inserted, this limitation would vest a good estate tail in *J. D.* *Co. Lit.* 20, b.

Co. super Lit. 20.

If lands be granted to the husband of *A.* and wife of *B.*, [being a husband and wife who may lawfully intermarry,] to have and to hold to them and the heirs of their two bodies; by this [gift] they have each of them an estate in tail in them, [they are joint tenants in tail;] for there is a possibility that one husband and [one] wife may die, and then the other husband and wife may intermarry. [*Prest. Est. ch. Tail.*]

[Chudleigh's case, 1 Rep. 120.]

19 H. 4. 3. Dyer, 274.

If there be father and son, and lands are given to the father, to have and to hold to him and the heirs of the body of his son; by this [gift] the son hath an estate tail, but the father, as it seems, but an estate for life. [Under such a gift the son cannot take any estate. The gift is not to him, but to *the heirs of his body*; and no one can take, by the rules of the common law, except in the event of the death of the son in the lifetime of the father, or *eo instante* that the father dies; since otherwise the remainder would fail for want of the support of a particular estate.]

Lit. Sect. 352.

If lands be given to the mother for life, the remainder to her son and the heirs of the body of his father on her begotten, (the father being dead,) by this [gift] the son hath an estate tail, [if he be the heir of the body of his father; for such a gift passes to the son, by his proper name, only an estate for his life. Under the limitation to the heirs of the body of his father, he may, primarily or subsequently, and precisely in the same manner as he would have done under an estate tail, executed in his father, take an estate tail.]

19 H. 4.

If lands be granted to *I. S.* to have and to hold to him and the heirs he shall happen to have of his wife; by this [gift] he hath but an estate tail, and no fee simple, and his wife hath no estate at all. [In this example there is not any express mention of the body from which the issue, inheritable to the intail, are to proceed; but as there is a restriction importing words of procreation, the language of the gift is sufficient. It is impossible, in any reasonable interpretation of the terms of the gift, that *A.* as a person specially named, should have any heirs of his wife, except those which proceed from their bodies as husband and wife.]

Co. super Lit. 20.

If lands be granted to *I. S.* and the heirs that the said *I. S.* shall lawfully beget of his first wife,

and he hath no wife at the time of the grant; by this [gift] he hath an estate tail, [to him and the heirs of his body by his first wife; so that on failure of the issue of the first wife, he will become tenant in tail after possibility of issue extinct.]

If *A.* have issue by *B.* his wife, *C.* a son, and *D.* a daughter, and *A.* die, and lands are granted [given by will] to *B. to have and to hold to her* and to the heirs of *A.* her late husband on her body begotten (16); in this case, and by this deed, *C.* hath an estate tail, [taken by way of purchase, as heir of the body,] and the woman hath only * an estate for life; and if *C.* die without issue, *D.* his sister shall have the land *per formam doni*, [as heir inheritable under this intail.] But if one grant lands [by deed] to *A.* late wife of *I. S.* to have and to hold to the said *A.* and the heirs of *I. S.* on the body of the said *A.* begotten; in this case the son and heir shall take no estate by the grant (17). [The only reason that can be objected to an estate tail vesting in the heir of *I. S.* is, that he is named in the *habendum* to take immediately and jointly with *A.*, and this he cannot do, because he is not a party to the deed.] And the same construction shall be upon the same words in his will. [In a will the gift to the heir would unquestionably be good.]

Co. super Lit. 26. [Mandeville's case, 1 Inst. Hodgkinson v. Wood, Cro. Car. 17. Southcote v. Stowell, 2 Mod. 207. 1 Prest. Est. p. 451.]

*P. 105.

Will.

If lands be granted to the husband and wife, to have and to hold to them, and the heirs of the body of the survivor of them; by this [gift] the survivor shall have an estate tail after the death of the other, [taking that estate by way of contingent remainder.]

Co. super Lit. 26.

If lands be granted to *I. S.* to have and to hold to him *& heredibus de carne sua*, or *heredibus de se*, [the law implying *exeuntibus*,] or *heredibus quos sibi contigerit*, in all these cases *I. S.* hath an estate tail and no more. [See *Prest. on Estates, chap. Tail.*]

Co. super Lit. 20.

If lands be granted to husband and wife, to have and to hold to them, and the heirs of the body of the husband, the remainder to the husband and wife, and the heirs of their two bodies begotten, this

Co. super Lit. 28. [Badger v. Loyd, Salk. 232.]

(16) It is presumed the words printed *in italics*, in this case, should be omitted, to make it consistent with *Mandeville's case*, put by *Ld. Coke*, in 1 *Inst*, 26, b. and to distinguish it from the next case in the text above.

(17) Because he was named after the *habendum*, *Co. Lit.* 26, b. See note 4, thereto, in the 13th edition, where one named after the *habendum* shall take.

remainder is void, and therefore by this [gift] the husband hath an estate in tail, and the wife a joint estate for life with her husband, and no more. [This case is not referrible to the doctrine of estates tail in particular, but the case is governed by a rule of law applying to all estates generally. The estate limited to the husband and wife and the heirs of the body of the husband, necessarily includes the whole period of time comprised in the gift to the husband and wife in special tail; as there must be heirs of the body of the husband as long as there are heirs of the bodies of both husband and wife; and the gift in special tail is void in its creation, on the presumption that it would never have effect, and therefore it would be to no purpose to execute it into estate. Had the subsequent gift been of an estate that might subsist in any person, or at any period of time, after the determination of the former estate, the second gift would have been good. So the gift would be good, if one estate tail had been created by one deed, and the second estate tail had been of the reversion; for a gift of a reversion, as passing the services, is in itself a benefit. 3 *Prest. Convey.* p. 247; 1 *Prest. on Estates*, p. 227.]

Co. 1. 140. If lands be granted to *I. S.* and his heirs of the body of *Jane* a *Noke* begotten; by this [gift] *I. S.* hath an estate tail, and no more, [*viz.* in special tail. See *Page* and *Hayward*, 2 *Salk.* 570; and *Essay on Estates, chap. Tail*; and no issue, except those who proceed from *Jane Noke*, can inherit.]

Co. super Lit. 20. If lands be granted to *I. S. & heredibus de corpore procreatis*; by this [gift] the heirs that shall be begotten afterwards shall take. And if lands be granted to *I. S. & heredibus de corpore procreandis*; by this [gift] the heirs of his body before begotten shall take *per formam doni* as well as those [heirs] that shall be begotten afterwards, [for the words *procreatis* and *procreandis* are, in words of succession, and sometimes even in words of gift, of the same import. *Essay on Estates, chap. Tail*; and *James* v. *Hallett*, 1 *M. & Sel.* 124.]

Co. super Lit. 146. If one grant to *I. S.* that if he and the heirs of his body be not yearly paid 40 *l.* that he or they shall distrain in the lands of the grantor; by this [gift] the grantee hath an estate in tail in the rent: and if he grant to *I. S.* that if he and his heirs be not

paid, &c. that he or they shall, &c. he hath a fee simple in the rent (18).

If one give or grant land to another, to have and to hold to him for life, or to him and his assigns, and say not how long, nor for what time, and the grantor make livery of seisin according to the deed; by this [gift] the grantee hath an estate for his own life (19). But if no livery of seisin be made, no estate at all, but an estate at will, doth pass by this deed. [This observation assumes the grantor to have the freehold with possession in right thereof, so that livery of seisin is essential to the operation of the assurance; for in case he has a reversion or remainder, this reversion or remainder may pass by grant. So the freehold in possession may pass by bargain and sale *inrolled*, or covenant to stand seised to uses.] And if he that doth grant the land, be but a lessee for years of the land, and he make no livery of seisin upon the grant; by this [grant] his term of years, and that estate [only] which he hath, is granted. [The books differ on this point, some holding the grantee to be merely tenant at will. *Griffin's case*, 2 *Leo.* 78. But it seems to be fully settled that he will have all the term. 3 *Prest. Abst.* p. 116.] But if he make livery of seisin upon the grant, then an estate for the life of the grantee will pass, [by wrong or disseisin,] and it is a forfeiture of the estate of lessee for years; of which [forfeiture] he in reversion [or remainder] may take present advantage. [And as a freehold passes, the grantee cannot claim the term; and the feoffor has, while the estate for life continues, or while the disseisin may continue by enlargement, a reversion in fee by wrong. But the disseisin may cease with the estates, being particular estates, which owe their effect to it.] And if one grant to another, common in his land when he doth put in his own beasts; or estovers in his manor when he cometh there, and say no more, by this [grant] it seems the grantee hath an estate for life.

Lit. Sect. 283. 285. Co. 8. 85. 96. 2. 24. Finche's law, 60. Co. super Lit. 9. Dyer, 307. Co. 7. 23.

Forfeiture.

17 Ass. pl. 17.

(18) See further what words make an estate tail, *Com. Dig. Estates*, (B. 3.) *Vin. Abr. Estate*, (R.) *Bac. Abr. Estate in Tail*, (B.)

(19) If the grantor hath authority to make such a grant; an estate for a man's own life being more beneficial, and of a higher nature, than for any other life, *Co. Lit.* 42; but if tenant in tail [or for his own life] makes such a grant generally, with livery, the grantee shall have the land but during the life of the tenant in tail, [or tenant for his own life,] for that is the greatest estate he can lawfully make, [and is the construction most beneficial for the grantee; but if the king grant lands, or rent, and limits no estate, the grantee does not take any estate of freehold. *Roll. Abr. Estate*, (O.) Or any estate whatever.]

Co. 5. 112. super Lit. 8.

* If one grant land to *I. S.* to have and to hold to him, or his heirs, in the disjunctive; this [grant] is but an estate for life, and no more. [In a will the fee would pass. 2 *Prest. on Estates*, p. 11.] So if one grant lands to *I. S.* to have and to hold to him, and his heir, in the singular number; by this [grant] *I. S.* hath only an estate for life, and no fee simple. [An estate tail may be created by a grant to the heir in the singular number, used collectively, as heir for the time being, and not when used as a designation of one heir; as in *White* v. *Collins*, *Com. Rep.* 289. So in a will the fee may pass by a devise to a man and his *heir*. 2 *Prest. on Estates*, 28.] *P. 106.

Co. 1. 87. 130. Plow. 539.

If one bargain and sell land to another for money, and limit no time, and express no estate; by this [assurance] the bargainee shall have only an estate for life. But otherwise it was before the Statute of Uses, for then it had been a fee simple, [by reason of the consideration. So now a man, who contracts for the purchase of land, contracts, impliedly, for the inheritance.]

Co. 1. 66.

If lands be granted to *I. S.* for life, and after to the next heir male of *I. S.* and the heirs males of the body of such next heir male; by this [gift] *I. S.* hath but an estate for life. But if it be to the next heirs males of *I. S.* it is an intail. [The first example is from *Archer's case*, 1 *Rep.* 66 b. The ground of the determination is, that the first heir male is to take by purchase; because the inheritance is engrafted on the gift to him. 1 *Prest. on Est.* p. 349.]

20 H. 6. 33.

If one grant land to *I. S.* to have and to hold to him in fee simple, or in fee tail, without saying "to him and his heirs, or to him and his heirs males, or the like," this is but an estate for life, and no more. [It is otherwise in a *will*, and it is apprehended in a *declaration of trust*.] So if one [by deed or fine] grant land to *I. S.* to have and to hold to him and his seed, or to him and his issues generally, without more words; by this [grant] is made only an estate for life. But in the construction of a will the law is otherwise, in most of these cases (20). [It is apprehended in all of them.]

Co. super Lit. 8. 20.

Will.

(20) See *post*, in the chapter on Testaments.—Difference of construction does not only arise on different instruments: for in the very same case, and in the very same court, the same limitation has received two different constructions, when applied to a legal, and to a trust estate. See *Fearne on Cont. Rem.* 3d edition, 96.

If lands be granted to two *& heredibus* without this word "*suis*," by this [gift] they have an estate for their lives and no longer, [for want of words of appropriation, and consequently for want of certainty in whom the fee shall vest. In a will the word *suis* would be implied.] 20 H. 8. 35.

If one grant lands to *I. S.* to have and to hold to him and his heirs for his [the grantor's] own life, or for the life of *I. D.*; by this [grant] *I. S.* hath an estate for life and no more. [But if a grant be made to a man and his heirs, *habendum* to him for his own life, the *habendum* would, it is said, be repugnant to the grant, and the grantee would have the inheritance. *Sed query*, and see 1 *Pow. Wood*, 199. But if the *habendum* had been for the life of another person, it would have been consistent with the grant, and retained in construction; so as to confine the duration of interest to the period of the life.] Co. 5. 11a. 1. 140.

If one [by deed, for a like gift in a will passes the fee simple. 2 *Prest. Est.* p. 74,] grant lands to *A.* and *B. habendum sibi & suis*, omitting all other words; or [in a deed or will] to have and to hold to them and their assigns; by this they have an estate for life only. So if lands be granted to any natural person, to have and to hold to him and his successors; by this [gift] he hath only an estate for his life. [In a will this limitation passes the inheritance.] Co. 4. 29. super Lit. 1. 8.

If one grant his lands to *I. S.* to pay his debts, to have and to hold to him generally, without limiting any estate; in this case *I. S.* hath an estate for life only. [In a will these words pass the inheritance. 2 *Prest. on Estates*, p. 74.] Co. 8. 96.

If lands be granted to *A.* and *B.* to have and to hold to them for their lives, to the use of *C.* for his life; by this [grant] *C.* hath an estate for his life if *A.* and *B.* live so long, [because an estate arising from an use cannot be larger than the estate conveyed to serve the use; and *C.* cannot have a larger estate than is limited to himself, and that estate is for his life. But if a grant be made to a man and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for lives, this *habendum* and declaration of use, are one entire limitation at the common law, and the grantee hath merely an estate for the lives. The effect would have been different if a remainder had been limited to the use of another person, for then the grantee would Dyer, 186.

have taken the fee to supply a seisin to the uses; and he would have had an estate for the lives under the Statute of Uses. *Jenkins* and *Young*, *Cro. Car.* 230; 1 *Prest. Est.* 180; and 3 *Prest. Abst.* p. 52.]

Lit. sect. 613. Co. 1. 63. super Lit. 345. Plow. 562. 162. Co. super Lit. 24.

If a tenant in tail grant *totum statum suum*; by this [grant] the grantee hath an estate for the life of the grantor, and no longer. [But a grant by tenant in tail to another and his heirs passes a determinable fee. *Machel and Clarke*, 2 *Lord Raym.* 778.] And if a lessee for life grant all his estate, hereby his estate for life doth pass, for this is as much as he can lawfully grant, [and the law prefers, in its construction, an estate by right to an estate by wrong. 3 *Prest. Abstr.* p. 51.]

If a man have a son and a daughter, and die, and lands be granted to the daughter and the heirs females of the body of the father; it seems by this [gift] she hath only an estate for life; [for the son is the general heir of the father, and therefore the daughter does not answer the description of *heir*. But if the son should die without issue in the life-time of his sister, or of any of her descendants, being females and heirs, so that a daughter, &c. become the general heir of the father, she may take an estate tail as purchaser. So also, if the son should die, leaving a daughter or daughters, &c. such daughter or daughters, &c. may take an estate in tail female, as purchasers. *Counden* v. *Clerk*, *Hob.* 29. And after an estate in tail female has once vested, the succession would be from female to female, as heirs in tail, notwithstanding a male may be the general heir. In a course of descent to such estate in tail female, no female, being a descendant from a male, could take, as heir in tail. *Preston on Estates, ch. Tail.*]

[Harg. Co. Lit. p. 24. b.]

Co. super Lit. 42. 234, 235.

If one grant land to another, to have and to hold to her while she shall live sole; or during her widowhood; or so long as she shall * behave herself well; or so long as she shall dwell in such a house; or so long as she pay 10*l.* yearly; or so long as the coverture between her and her husband shall continue; or if one grant lands to a man, to have and to hold unto him until he shall be promoted to a benefice, or the like: in all these [and the like] cases, if livery of seisin be made according to the deed; or if the grant be of such a

*P. 107.

thing whereof no livery is requisite, the grantee hath an estate for his life, and no more, and that determinable also. [These are denominated estates for life, with collateral determinations. *Prest. on Estates, ch. Life*; *Ib.* 1 vol. *ch. Fee*, p. 442. 480.]

If one grant lands to *I. S.* to have and to hold to him for life, and doth not say for whose life; this regularly shall be taken for the life of *I. S.* the lessee, and not for the life of the lessor. But if the lessor himself have but an estate for life in the lands granted, then the lease shall be construed to be, and to endure during that life only, by which the lessor did hold; [this construction is partly] to prevent a forfeiture. [And it is apprehended, even though no forfeiture would be incurred; since it is for the interest of the grantee to have this construction of the grant. *Prest. Estates, ch. Life.*] And if he that doth make the lease, be tenant in tail of the land, this [grant] shall be taken to be a lease for the life of the lessor. And if a tenant for life of land make a lease for years of it, and then grant his reversion by the name of a reversion, to another, to have and to hold to him and his heirs [generally;] by this [grant] he [the grantee] hath only an estate for the life of the grantor, and no more. So, if tenant in tail of land, grant it to one for years, and after grant his reversion to another, to have and to hold to him, and his heirs; this shall be construed to be an estate for the life of the tenant in tail, and no longer; and the attornment of the tenants in these cases will not alter the case. [This conclusion is over-ruled by the determination in *Machell & Clarke*, 2 *Lord Raym.* 778; and it is now settled contrary to the opinion of *Lit.* § 612, that the grant, &c. of a tenant in tail to one and his heirs, will pass a fee determinable on failure of issue inheritable to the estate tail, and defeasible by the issue in tail, unless they are barred by a fine with proclamations, &c.] And so it is in case of a release also, [operating in enlargement of estate;] as if tenant in tail doth release to *B.* (being lessee for years of the land) all his right to the land, this [release] shall be taken to enure but for the life of the tenant in tail and no longer. [This is true for want of words of limitation to the heirs; but if the heirs had been named, the release would have passed a base or determinable fee. 1 *Preston on*

Co. super Lit. 183. 42. Plow. 161. F. N. B. 168.

Estates, p. 400; 1 *Abstr.* p. 127; 2 *Prest. Convey.* p. 349]: as if a man retain a servant, and say not how long; this shall be taken for a year (21). *Constructio legis non facit injuriam*, [is the general rule applicable to these cases. Another rule, also applicable, adopts the construction most beneficial to the grantee.]

Co. super Lit. 147. Co. 8. 85. If one grant to *I. S.* that if he be not paid yearly for his life 40*s.* he shall distrain in the land of the grantor for it; by this [grant] *I. S.* hath [a rent and] an estate for life in the rent. And if a man by his deed grant a rent of 10*l.* issuing out of all his land, quarterly, at the usual feasts, this [in the absence of a limitation of time] is an estate for life of the grantee. [If the grantor had a term of years or for life, the rent would, by construction of law, be for a corresponding or equal term. *Butt's case*, 7 *Rep.* 23; 2 *Prest. Abstr.* p. 23.]

Co. 6. 9. 11. 3. If one grant lands to *I. S.* and *I. D.* to have and to hold to them during their lives, omitting these words [and the longest liver of them] by this notwithstanding they [the lessees] shall [except in the instances already noticed] hold it during the life of the longest liver of them; [and if one of them make a lease for years, that lease may continue, notwithstanding his death. But if he sever the joint-tenancy, he becomes merely tenant for his own life. *Prest. on Estates, ch. Life*; 2 *Prest. Abstr.* p. 63; 3 *Prest. Convey*, p. 407, 445. They are joint-tenants, and take an estate for their lives, and the life of the survivor, to give effect to the consequences of law, in regard to joint-tenancy; but from the moment the joint-tenancy ceases by alienation, the right of taking any benefit from the joint-tenancy will no longer exist; and then, by construction of law, the estate of each grantee is to continue merely for the life of that grantee.] And if lands be granted to *A.* to have and to hold to him during the lives of *B. C.* and *D.* without any more words; by this [grant] *A.* hath an estate during all their lives, and during the life of the longest liver of them. † And if lands be granted to *A.* to have and to hold to him during his life, and during the lives of *B.* and *C.*; by this [grant] he hath a lease for his own life, and the lives of *B.* and *C.*, and the longest liver of them. But if a lease be made to

† 38 Eliz. B. R. in the case of Ross & Adwick.

(21) For that retainer is according to law. See 13th edition, *Co. Lit.* 4 2,

I. S. of land, to have and to hold to him during
*P. 108. the time * that *A.* and *B.* shall be justices of peace, or during the time that *A.* and *B.* shall be of the *Inner Temple*, or the like; in these cases the failure of one doth determine the estate. [For these are leases with collateral determinations. The construction on this limitation requires that each of the persons should continue a justice, &c. *Prest. on Estates, ch. Life*; 2 *Abstr.* 18; 2 *Preston Convey.* p. 183.] * And if a lease be made to *B.* only, to have and to hold to him and *C.* for their lives, [though the life of the longest liver of them be added;] by this [lease] *B.* hath an estate for his own life only, and no more, and *C.* hath nothing at all (22). [For as the grant is void as against *C.*, since he is not a party to the deed, his life shall not form a part of the limitation of the estate; for, in construction of law, the limitation for the life of the longest liver, &c. is expressed, and *expressio eorum quæ tacite insunt nihil operatur*; *Eustace's case*, 3 *Salk.* 204. This subject is fully examined in *Essay on Estates, ch. Life*; and is under discussion in *Doe* v. *Wilson, Mich. Term* 1820. But if the lease had been to *A.*, *habendum* to *A.* and *B.* successively as they are named, *B.* might have taken by way of remainder, and been tenant for his life.] And here, by the way, let it be observed in these and such like cases, where lands are granted to one man, to have and to hold to him "or to him and his assigns, or to him, his executors, administrators and assigns;" [it is doubtful whether executors or administrators could have been, though heirs may be, special occupants; 3 *Prest. Abstr.* p. 175;] during the life, or during the lives of others; and in most cases where a man is tenant *pur auter vie, i. e.* for the life, or lives, of another, or others, if the tenant *pur auter vie* in possession die, his estate shall not go to his heirs, executors or administrators, unless they can first get into possession after his death; but he that can first get into the possession of the land after the death of the tenant *pur auter vie*, shall have it for his life, and after his death, then he that can first get into the possession again, &c. [See *Hargrave's* note on *Co. Lit.* p. 41 b; *Essay on Estates, ch.*

* Adjudged B. R. 8 Eliz. Hobart & Wisemore's case.

Occupant.

Co. super Lit. 41. 239. 388. Plow. 556. 28 Dyer, 328. 321. 264. Co. 10. 98.

(22) See further as to what words make an estate for life, in *Vin. Abr. Estate*, (N. a.) *Bac. Abr. Estate for Life*, (A.)

Life.] And therefore if the land were let by the tenant *pur auter vie* at the time of his death to any under-tenant for years, or for one year, or at will, and this under-tenant be in possession at the time of the death of the tenant *pur auter vie*, this under-tenant shall [by the common law] have it for his life, if the life or lives by which it is held so long live; for the rule in this case is *occupanti conceditur. Et capiat qui capere potest.* And this estate [or rather title] is called an occupancy, and he that hath it an occupant (23). To prevent which mischief, the lessee must take care when he takes his lease, to have it made to him and his heirs during the life or lives of him or them by whom it is held; for in this case after his death his heir and none other shall have it; or if this be neglected, then he must take care to grant over his estate by act executed (for by his last will he may not devise it) [*Blake* v. *Blake*, 3 *Cox*, *Pr. Wms.* 10. n. 1.] to some friend and his heirs in trust for him; or he may grant it over to another, and take a regrant of it to himself and his heirs; or he may make a lease for years of the lands to some friends in trust, and by this means he may have the fruit of it during the term (24).

(23) If he who claims to be occupant does not take actual possession, he shall not be occupant, 1 *Sid.* 347. *Vaugh.* 188.

(24) By the statute 29 Car. 2, c. 3, tenant *pur autre vie* may devise his estate by will, attested by three witnesses; and if he does not devise the estate, it is chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent. In case there be no special occupant thereof, it shall go to the grantee's executors or administrators, and shall be assets in their hands. See 2 *Salk.* 464. 2 *Vern.* 719. And by the stat. 14 Geo. 2, c. 20, s. 9, reciting the stat. 29 Car. 2, c. 3, and that doubts had arisen where no devise had been made of such estates, *(pur autre vie,)* to whom the surplus of such estates, after the debts of such deceased owners thereof, are fully satisfied, shall belong; it is enacted, "That such estates *pur autre vie, in case there be no special occupant thereof*, of which no devise shall have been made, according to the said act, for prevention of frauds and perjuries; or so much thereof as shall not have been so devised, shall go, be applied, and distributed, in the same manner, *as the personal estate* of the testator, or intestate."] These two statutes have abolished the title of *general* or *common* occupancy (a); but *special* occupancy by the heir at law, where the original grant is to a man and *his heirs* during the life of *cestuique vie*, still continues. And where the executors take, either by being named in the grant, as where the grant is to a man, his executors and administrators, during the natural lives of *A. B.* and *C.*, or as devisees, in both those cases do not the executors take as special occupants? The statute turns the estate *pur autre vie* into personalty, for some special purposes, but doth not alter the *nature of the estate.* This is obvious by the statute requiring *three* witnesses. See further as to the general doctrine of occupancy, and of what things it may be. If a man has an estate *pur autre vie* in gavelkind, or in Borough-English lands, the heirs, after the death of their father, according to their respective customs; in one all the sons, in the latter the younger son, shall be the special occupant. *Rob. on Gavelkind*, 97.

(a) [Except as to copyholds, rents, &c.]

[This interest, though limited to the heirs, is now devisable, 29 *Car.* 2. c. 3, and in default of a disposition by will is real assets; and the will must be attested by three witnesses. A grant was to three and their heirs, *habendum* to their heirs for ever. To the use of the three for ever, without any limitation to their heirs; and the court inclined to the opinion, that an estate for life only was *limited. Dyer*, 169; *sed query*; and see *Viner's Abridgment, Grant*, p. 155. A feoffment to *A.* and his heirs, *habendum* to him and his heirs. To the use of *A.* for life. And the fee passed by the feoffment, though the use was only for life; *Cro. Eliz.* 131; *Viner, ib.* But a grant to *A.* and his wife, *habendum* to them; to the use of them and the heirs of their bodies is only an estate tail. *Jenkins & Young, Cro. Car.* 230; 1 *Prest. on Estates*, 180.] [Ripley v. Waterworth, 7 Ves.]

For years. When such a lease shall begin, and how long it shall continue.

When no time is set down for the beginning of an estate, then it shall begin presently; otherwise, [*i. e.* if any time be fixed] it shall begin at the time expressed, if it may stand with law. If a lease for years be made, bearing date the 26 day of May, to have and to hold for twenty-one years from the date, or [*omit* from the date or] from the day of the date; in these cases the lease shall begin [generally speaking] on the 27th day of May (25); Co. super Lit. 46. Co. 51. 2. 5. Dyer, 286. 307.

2 *Bl. Com.* 8, 258, and 400. The notes to the 13th edition, *Co. Lit.* 41, b. *Com. Dig. Estates*, (F.) 2 *Ld. Raym.* 1000. 6 *Mod.* 66. *Bac. Abr. Estate for Life*, (B.) *Ibid, Heir and Ancestor*, (I.) As to estates *pur autre vie*, see *Fearne*, 233, 235. Limited in Tail, *ibid*, 385, 390. Limited for Life, 391, 394. Estates *pur autre vie*, not being *estates of inheritance*, are not strictly intailable, but they may be so settled as to answer *the purposes of an intail*, and be rendered unalienable for almost as long time as if they were intailable in the strict sense of the word: for they may be devised or limited in strict settlement by way of *remainder*, like estates of inheritance; and such persons as have interests in them, *in the nature of estates tail*, may bar their issue, and all remainders over, by *alienation* of the estate *pur autre vie*, as those who are, strictly speaking, *tenants in tail*, may do by fine and recovery; but then the *having of issue* is not an essential preliminary to the power of alienation, in the case of an estate *pur autre vie* limited to one, and the heirs of his body, as it is in the case of a *conditional fee*, from which the mode of barring by alienation was evidently borrowed. *Harg. note* 5 *to Co. Lit.* 20, a. who cites as to the intail of estates *pur autre vie*, 2 *Vern.* 184, 225. 3 *P. Wms.* 262. 1 *Atk.* 524. 2 *Atk.* 259. 376. 3 *Atk.* 464. & 2 *Ves.* 681. *Vin. Abr. Occupant, and Estate*, (R. a. 3.) *Eq. Ca. Abr. Estate*, (B.) 1 *Atk.* 524. 3 *Atk.* 708.

(25) In the case of *Pugh* v. *Duke of Leeds*, solemnly determined in B. R. Michaelmas term 1777. Lease for twenty-one years, made to commence *from the day of the date*, held to be a good lease in possession, and the same as if it had been to hold *from the date*. The following cases were mentioned in that decision: *Dyer*, 218. *Moor*, 4. 5 *Co. Clayton's case*. 5 *Co. Barwick's case*. *Llewellin's case*. 4 *Bulst.* 177. 1 *Roll. Rep.* 387. 3 *Bulst.* 204. *Co. Lit.* 46, b. 166, b. *Aleyne*, 77. 6 *Wil. & M. Questions on a Prebendal Lease*. 11 *Wm.* 3, *Sir Robert Hoare's case*. 2 *Ld. Raym.* 1141. *Thomson & Vandike*, in B. R. Michaelmas 1736, *cor. Ld. Hardwicke*. And the case of the *Attorney General* v. *Countess of Portland*, in the Exchequer, *cor. Sir Thomas Parker*. See *post*, 523, (of the old

[though a limitation from the day of the date shall be exclusive or inclusive of the day of the date, as will best effectuate the intention. *Pugh* v. *Duke of Leeds*, *Cowp.* p. 714.] But if the words be, to have and to hold from [the date, or] henceforth, or from the making hereof, in these cases the lease shall begin on the day in which it is delivered. And if it be to begin *a die confectionis*, then it shall begin the next day after the delivery, [unless the grant would be void in that exposition of it.] And if it be, to have and to hold for twenty-one years, without mentioning when it shall begin, it shall begin from the * delivery, if there be no former lease in being; and if there be, then it shall begin from the time of the ending of that lease. [This is a mistake. The lease will begin from the execution, and operate as an immediate grant of the *reversion* expectant on the former term; and the several terms will be concurrent. *Grumbrell* v. *Roper*, 3 *Barn. & Ald.* 711.] If the deed have a date which is void or impossible, as the 30th of February or 40th of March, and the term be limited to begin from the date, then it shall begin from the delivery. So if a man by his deed recite a lease which is not, or which is void, or misrecite a lease that is in *esse* in [a] point material, [so that in truth there is not any such lease admissible in evidence, as that which is recited,] and then say, to have and to hold from the end of the former lease; this lease shall begin, in course of time, at the time of the delivery of the deed. [So that if there be no existing lease, it will give an immediate right to the possession; and if there be a former lease, it will give an immediate right to the reversion.]

*P. 109.

Co. L. 154. Plow. 198.

If one make a lease of land to *A.* for twenty years, and then grant it [the land] to *B.* to

editions,) and the note thereto from 1 *Burr.* 282. See further on this point, *Vin. Abr. Estate*, (Z. a.) *Time*, (A.) *Com. Dig. Estates*, (G. 8.) 1 *Wils. Rep.* pt. 2, p. 165. *Bac. Abr. Leases*, (E.) rule 2; and notes to *Co. Lit.* 46, b. The case of *Pugh* v. *Duke of Leeds*, cited in the note, has, since the first edition of this book in folio, been reported in *Cowper*, p. 714. In that case, where one had a power reserved in his marriage-settlement to lease for twenty-one years *in possession*, but *not in reversion*, granted a lease to his only daughter for twenty-one years, to commence *from the day of the date*, adjudged a good lease; the word "*from*" may mean either *inclusive* or *exclusive*, according to the context and subject matter; and the court construed it so, as to effectuate the deeds of parties, and not to destroy them. In the case of *The King* v. *Gamlingay*, *Kenyon*, C. J. speaking of *Pugh* v. *Duke of Leeds*, says, "it must be remembered, that though *I believe* that case was rightly decided, the contrary determination had before been made by all the judges; and *Ashhurst*, J. says, the case of *Pugh* v. *Duke of Leeds* was properly decided. *Durn. & East*, 3 vol. 515. [Sir *W. Grant*, *Lester* v. *Garland*, 15 *Ves.* 248, adopted the same principle.]

have and to hold to him from the end of the first term, &c. in this case this second lease shall begin, as soon as the first lease, by what means soever, shall end; [*query*, if not overruled by *Plowden* v. *Cartwright*, *Burr.* p. 282. And this is a *reversionary* lease, and not a lease of the reversion. It passes an *interesse termini*, and not a term or immediate estate.] But if the words of the second lease be, to have and to hold to him from the end of the twenty years, in this case the second lease shall not begin until the twenty years be expired. And if one make a lease of white acre to *A.* for ten years, and of black acre to *B.* for twenty years, and then, reciting both the leases, doth make a lease to *C.* to begin after the former leases; this [lease] shall be taken respectively, [*reddendo singula singulis*; *Windham's case*, 5 *Co.* 8 a;] and shall begin, for white acre after the end of the ten years, and for black acre after the end of twenty years. And if one makes a lease to two for sixty years, provided that if the lessees shall die within the term, that then presently after the decease of the last of them longest living, the lessor shall re-enter, and one of them die; and after the lessor doth make a lease to another, *habendum*, *&c. cum post sive per mortem sursum redd' vel forisfacturam* of the last surviving lessee *acciderit vacare* for forty years; in this case, this second lease shall begin after the death of the lessee surviving, re-entry of the lessor, or the effluxion of time of the first lease, which [ever] of them shall first happen, and the lessee cannot, at his election, make it to begin at any other time. Co. 6. 36.

If a man make a lease for thirty years, and four years after make another lease to another man, in these words: *Noveritis*, *&c. me* A. *de* B. (*predictis* 30 *annis finitis*) *dedisse & concessisse* B. *de* C. *&c. Habendum à die confectionis presentium et termino predicto finito, usque ad finem* 31 *annorum*; by this [lease] the second term shall begin at the end of the thirty years; [for the words *a die confectionis* are restrained by the words *et termino predicto finito*; and these words mark the more remote of two times, *viz.* the day of the execution of the deed, and the end of the term, as the period of commencement.] And if one make a lease to *A.* for twenty years, and after make a lease to *B.* to have and to hold Dyer, 261. Craddock's case, Pasc. 7. Jac. Co. B.

to him, from the end of the first term, for twenty years, to be accounted from the date of the last deed; in this case the second lease shall begin at the end of the first lease, and these words "to be accounted, &c." shall be rejected. [This is questionable, at least; for one part of the limitation may refer to the commencement in interest, and another part refer to the computation of the term. See *Prest. on Est. ch. Years.*]

Dyer, 112. If one make a lease of land to *A.* for ten years, and after by indenture grant it to *B.* to have and to hold to him, from Michaelmas next for ten years, and after [wards, before Michaelmas,] the first lessee doth purchase the reversion, by which his term is drowned; in this case, the second lease shall begin presently when Michaelmas is come. [If the purchase be not made before Michaelmas, the first term will not merge; for after that period, the reversionary term becomes an estate; leaving a new reversion in the lessor; and will prevent a merger of the prior estate for years from taking place. While the second lease remains an *interesse termini*, the former lease may be surrendered to the lessor of the second term, or may be merged in the reversion; 3 *Prest. on Convey.* p. 207; but after the term granted by the second lease commences in interest, a surrender may not be made to any other person than the tenant of the second term, while that term subsists; for the second lessee hath the immediate reversion. Under the circumstances, his term becomes an estate, and commences in interest and computation from Michaelmas, whether the first term be merged or not.]

Mich. 13 Jac. B. R. * If two joint-tenants be, and one of them grant the land to *I. S.* to have and to hold to him for twenty years, if the lessor and his companion so long live; by this the lease shall continue no longer than they both live together, and when either of them is dead the lease is determined (26.) [This is considered to be a lease with a collateral determination, and the term will, on sound grammatical interpretation, cease as soon as it shall happen that one of the lives is not in being.] * And if

*P. 110.

* Co. 5. 9.

(26) Joint-tenants and tenants in common may, according to the interests they have, join or sever in making leases; and such leases shall bind, whether made to commence in *præsenti* or *futuro*. *Bac. Abr. Joint-tenants*, &c. which cites *Co. Lit.* 168. *Bro. tit. Grants*, 154. *Roll. Abr.* 848.

one grant his land to *I. S.* to have and to hold to him, his executors, &c. for the term of one hundred years, if *A. B.* and *C.* live so long, and leave out these words " or either of them ;" in this case, if either of them die, the lease is determined, because the three persons do not all so long live. But if the words be, to have and to hold for one hundred years, if *A. B.* or *C.* (omitting " or either of them,") shall live so long, *contra* ; for the word " or " will be read in its grammatical sense and as a disjunctive ; being most beneficial for the grantee.]

[b] If a lease be made of land to the husband and wife, to have and to hold to them for twenty-one years, if the husband and wife, or any child between them, shall so long live ; this is a good lease, and shall continue for all their lives, and for the life of the longest liver of them, albeit the first words be in the copulative, [for the subsequent words disjoin and sever the contingency.]

[b] Pasch. 30 Eliz. C. B.

If one possessed of land for a term of years, grant the same to another, to have and to hold to him, his executors and administrators, or to him and his assigns, or to him, without any more words ; or if a man that is possessed of a term grant his lease to another, and doth not say for what time ; it seems in these cases, the whole term is granted, albeit no livery of seisin be made. And in the first case, if livery of seisin be made, then it seems there doth pass an estate for the life of the grantee, [by disseisin,] and therefore that this is a forfeiture of the estate of the lessee for years, whereof he in the reversion may take advantage presently. And if a lessee for years of land grant a rent out of the land generally, without any limitations, this shall be construed to enure for a grant of the rent so long as the estate of the grantor doth continue. But if he grant a rent by express words, for the life of the grantee, by this the grantee shall [under a legal exposition of the grant from the circumstances and estate of the grantor,] have it for all the term, if he live so long. [2 *Prest. Abstr.* p. 2. These points furnish the following observations : 1st, That a grant *indefinitely* is a grant for life, where the grantor hath an estate in fee, because no time for the duration of the interest of the lessee is limited, and it cannot be a larger estate, for want of words of inheritance. So a grant of rent by a tenant for

Dyer, 307. 67. Plow. 520. 524, 525. 423, 424. Co. 7. 23.

[10 Vin. Abr. Estate, Q. a. pl. 4. Q. a. 2. pl. 3. cites Cro. Eliz. 183. St. Aubyn's case.]

years, without words of limitation, designating the time for which the interest is to continue, is a grant during so many years as the grantor hath in the land; because an estate for any number of years is, in consideration of law, less than an estate for life; and such grant would pass an estate for life, if the grantor had a sufficient estate to support it for that period; and therefore, as the grant cannot pass an estate for life, and the precise agreement of the parties does not appear, the grantee shall have the rent as long as he may; that is, to the end of the term.]

Co. super Lit. 218. If one grant lands to *I. S.* to have and to hold to him for life, reserving for the first seven years a rose, and if he will hold the land over [beyond seven years,] that he shall pay a rent in money, and no livery of seisin is made, [and the lands do not lie in grant;] by this it seems, in certain [*omit* in certain] is made a lease for seven years, until the condition be performed, and then also it seems it is a lease for no longer time. And so perhaps it will be, if livery of seisin be made. [If livery of seisin be made, an estate of freehold must pass, and it is not easy to comprehend how any implication would raise a term of years from this grant, for *expressum facit cessare tacitum.*]

Co. super Lit. 42. Plow. 273. If one grant a rent of 5*l. per annum* unto *I. S.* to have and to hold to him, &c. until he shall receive 20*l.* in this case he shall have a lease for four years of this rent. But if lands be granted to *I. S.* to have and to hold, &c. until he shall receive 20*l.* out of the profits of it; in this case, if livery of seisin be made, [or the grantor has a reversion, &c. so that the grant may operate without livery,] the grantee hath an estate determinable upon the levying of the money; and if no livery be made, [and the lands do not lie in grant,] he hath [at law] no estate at all, but at will.

Co. super Lit. 218. If one make a lease for life, and say that if the lessee within one * year pay not 20*s.* that he shall have but a term for two years; by this [lease] if he doth not pay the money he hath only a lease for two years, albeit livery of seisin be made upon it. [The effect of livery is in such case determined by the default, and the estate of freehold ceases by a limitation or *quasi* condition annexed thereto; and on the determination of that estate, the estate for *P. 111.

years takes effect, commencing in estate by force of the original contract. 1 *Inst.* 222 b; 1 *Prest. on Estates*, p. 234.]

If one make a lease to *I. S.* to have and to hold to him, his executors, &c. for ten years if *I. D.* shall live so long, and *I. D.* is dead at the time when the lease is made; in this case *I. S.* hath an absolute lease for ten years, [because the collateral determination refers to an event which cannot happen. But if the lease were made determinable on the deaths of *A.* and *B.*, and *A.* was living and *B.* was dead, then the term would be determinable on the death of *A.*] Co. 9. 63. 60.

If one grant lands to *I. S.* to have and to hold to him, his executors, &c. for three years, and so from three years to three years during the life of *I. S.*; or from three years to three years during the life of the lessee; by this [lease] it seems *I. S.* hath a lease for six years and no more. [*Prest. on Estates, chap. Years.*] And if one grant lands to *I. S.* to hold for three years, and after the end of those three years for three other years, and after the end of those three years for three other years, during the life of the lessor; by this [lease] it seems *I. S.* hath a lease for nine years and no more. [*Prest. on Estates, chap. Years.*] And yet if in these and such like cases, where a lease is made from so many years to so many, for the life of any person, livery of seisin be made upon this deed, *secundum formam chartæ*; this [lease] perhaps may be an estate for life. [When livery is made the lessee will have an estate for life. So also is the law, when the lease is of things lying in grant, and is made by *deed. Prest. on Estates, chap. Life. Years.*] Plow. 273. Co. super Lit. 45.

If lands be granted, to have and to hold from Lady-day, *pro termino unius anni & sic de uno anno in unum annum quamdiu ambabus partibus placuerit*; by this [lease] the grantee hath a lease for three years only in certain, and afterwards a lease at will. [*Prest. on Estates, chap. Years.*] And if lands be granted to have and to hold from the Nativity of Christ next, *pro termino unius anni, & si in fine dict' unius anni ambæ partes placerent quod eadem presens dimissio foret renovata tunc habend' premissa* to the lessee, &c. *ab & post dictum festum Nativitatis Domini usque terminum trium* 14 H. 8. 10. Co. 6. 35. 10. 106.

annorum extunc prox' sequen'; by this [lease] the grantee hath a lease in certain but for one year only, and if the parties agree again, a lease for three years.

Co. 6. 35. 21 H. 7. 38. If one make a lease to *I. S.* to have and to hold to him for years, and say not how many years; by this the lessee hath a lease for two years and no more.

Co. 3. 19. If one grant his land to *I. S.* to have and to hold to him until *I. D.* shall come to twenty-one years of age; in this case if *I. D.* die before that time the lease is ended. [This, in wills and grants, is only a chattel interest; for it cannot by its limitation endure beyond the period at which *I. D.* shall attain the appointed age; and that age, if it happen at all, must happen in the course of years, without any reference to the life or death of *I. D.* However, if livery be made, the lessee would, by force of the livery, have an estate for life, that is, a determinable freehold.]

Co. 1. 44. 7 H. 4. 42. [Lit. Sect. 427. infra.] If a man, possessed of a term of years of land, doth grant the land to another and his heirs, this by construction will amount to a good grant of his interest (27), [and that interest will of necessity be transmissible to his personal representatives. The like conclusion applies to a grant by deed, or gift by will from a tenant for years to another and his heirs, or heirs of his body. But this objection applies only to words of limitation, regulating the right and order of succession; for the general heir, or heir of the body, or a special heir of the body, may, under proper words, in a deed or will, take a term of years as a purchaser.]

Dyer 263. If lands be granted to husband and wife, and to *I. S.* to have and to hold to them, and to the heirs of the husband and *I. S.*; by this [grant] the wife hath only an estate for life, in a moiety with her husband, and the husband and *I. S.* have the fee simple in joint-tenancy, to them and their heirs. [The husband and wife, as between themselves, are tenants by intireties for their lives, and have one moiety in point of ownership; and as to their companion, they are joint-tenants. As against the wife the joint-tenancy may be severed by the stranger, but not by the husband; nor can the husband make any alienation to the prejudice of his wife.

(27) See *ante*, 89.

They will be joint-tenants during their lives, but each of them hath the power of docking the intail as to one moiety; and barring the remainder over, expectant on the intail for that moiety, by suffering a common recovery; and either of them, by levying a fine with proclamations of the parcels as an intirety, though he cannot discontinue the moiety of the other, may, before or after marriage, preclude the issue of one and the other of all title under this gift.]

If lands be granted to *A.* and *B.* to have and to hold to *A.* for life, the remainder to *B.* in fee; by this [grant] *A.* shall have the whole for his life, and *B.* the fee simple afterwards (31). [This point is law, though the contrary is stated in p. 114. So if the grant had been to *A.* for life, remainder to *A.* and *B.* in fee, they would have taken the fee as joint-tenants without merger of the estate of *A.* in any part; but if a tenant in remainder, expectant on an estate for life in *A.* had granted to *A.* and *B.* in fee, there would have been a merger for *A.*'s moiety. *Wiscot's case*, 2 *Rep.* p. 60; and 3 *Prest. Convey.* p. 24.] Dyer 126. 56. [2 Co. 55. 3 Cro. 25. 89. Co. Lit. 183. b.]

When the *habendum* shall be said to be repugnant & void; and when not, but shall control, divide, or expound the premises.

*P. 113.

As touching this matter, these differences are to be taken; between things that are granted, and between the estates: when the things that are granted are such as lie in grant, and take effect by the delivery of the deed only, without any ceremony; or take * effect by the same ceremony; and when not, but another ceremony is required to the perfection of the grant and estate: and when there is an express estate made by the deed in the premises thereof; and when but an implied estate only: as for examples, if one grant land, rent, common, or any such like thing, to one and his heirs, by the premises of the deed, to have and to hold to him for life, or to have and to hold to him and to his assigns, without more words; in this case the *habendum* is repugnant and void, and by this [gift] the grantee shall have an estate in fee simple, if livery of seisin, and [or] attornment, as the case doth require, be duly made, for otherwise no estate at all, but at will, will pass. So if a man grant a rent, or any such like thing Co. 2. 23. 8. 56. Perk. Sect. 181. 14 H. 8. 14. Co. super Lit. 183. [a. 190. b.]

(31) See further in *Bac. Abr. Joint-tenants*, (D.) *Com. Dig. Estates*, (K. 1.) *Vin. Ab. Joint-tenants*, (P.)

that lieth in grant, to one and his heirs, to have and to hold to him for years; this is a void *habendum*, and the grantee shall have the fee simple. [But if by the *habendum* the rent, &c. had been limited to the grantee and his heirs during the life of the grantor, or the life or lives of any other person or persons, the grant would have passed only an estate for the life or lives of the person or persons named in the limitation of the estate.] But if a man grant land to another, and his heirs, to have and to hold to him for a certain number of years; in this case, whether he make livery of seisin or not, it is a good *habendum*; and by this [grant] the grantee shall have an estate for so many years, and no more; [because the deed operates for years before livery is made; and livery afterwards made, shall not defeat the operation of the deed, but shall be repugnant and void. The report of *Baldwin's case*, 2 *Rep.* 23, explains the law, and assigns this very reason, and it is the only book in which the reason is stated. In his note on the *habendum*, which is in other respects highly valuable, Mr. *Powell* hath not adverted to this distinction.] So if one grant land, rent, common, or any such like thing, to one in the premises of the deed, without limitation of estate, (which in judgment of law is an implied estate for life,) to have and to hold to him for a certain number of years, or at will; this *habendum* is good, and shall stand with the premises, and qualify it, [or rather explain it;] and by this [gift] the grantee shall have but a lease for years, or at will, as the *habendum* is. And if one grant land by the premises of a deed to one, and his heirs of his body, to have and to hold to him and his heirs: this *habendum* shall stand, and this shall be taken an estate-tail, and a fee simple expectant. So, *vice versa*, if land be granted to one and his heirs, to have and to hold to him, and his heirs of his body; this shall be construed an estate tail, and a fee simple expectant, and so both shall stand together (32). [The current of authorities is, that the *habendum* shall, in the latter case, qualify or explain the premises, so as to restrain the grant in the premises to the heirs described in the *habendum*; consequently, an estate tail only, and not two estates, are granted.]

Co. 8. 154. 21 H. 6. 7. Co. super Lit. 20. Dyer 126. and per curiam in Thruxton's case, Pasc. 16 Jac. B. R. 21 H. 6. 7. Co. super Lit. 21.

(32) See before in page 98.

If lands be given to *B.* and his heirs, to have and to hold to *B.* and his heirs, and if he die without heirs of his body, that it shall revert to the donor, it seems [clear] this [gift] is [from the context and qualification of] a fee tail only, and no fee simple expectant. *Voluntas donatoris in charta doni sui manifestè expressa, observanda est.* [So a feoffment was made to the use of *B.* and his heirs, and for want of issue of him, to the right heirs of the feoffor, *per Holt*, C. J. This is but one entire sentence of limitation, the intent whereof is very plain, and the rule of law is only that an estate of inheritance cannot pass without words of inheritance; but there is no rule of law that words of inheritance may not be qualified or abridged by subsequent words; therefore in this case *B.* hath an estate in tail only, though the limitation be by deed, it being in one sentence: for though the first words of the sentence, *viz.* "to his son and his heirs," make a fee simple, yet the subsequent words; "and for want of such issue of him," make an estate tail, by qualifying or abridging the first words, and in creating estates tail, *voluntas donatoris observanda est.* *Lee* v. *Brace*, 3 *Salk.* 337. 1 *Ld. Raym.* 101, S. C. *Carth.* 343, S. C. The books do not agree in stating the terms introducing the limitation over. *Prest. on Estates, ch. Tail.*] [Canon's case, 3 Leon. 5.]

If a lease for years be made of land, and then the lessor, by the premises of the deed, granteth the land to another, to have and to hold the reversion of the land to him, &c. for life; this *habendum* shall stand. So if by the premises of the deed, the reversion be granted, to have and to hold the land itself, this is good, and both shall stand together; but nothing is granted in either case but the reversion. Co. 10. 107, 108.

If the next advowson of a church be granted to three, to have and to hold to them, and either of them, jointly, and severally; this is joint, and the *habendum* [or rather the language which adverts to a several tenancy] is void; [for the same persons cannot have one and the same estate as joint-tenants, and as tenants in common.] †And yet if one grant land to two by * the premises of the deed, to have and to hold to one of them for life, the remainder to the other for life; this is not repugnant, but shall stand together, and make the estates Dyer 304. Co. 5. 7. 19.

*P. 114. † Co. 2. 55. super Lit. 183 Dyer 106.

several, and in remainder one after another, [p. 113.] So if a lease be made to two, to have and to hold the one moiety to the one, and the other moiety to the other; [or which is the same thing in effect, to hold to them as tenants in common, in equal, or any other shares;] by this they have several estates. *Expressum facit semper cessare tacitum.*

Dyer 272. Plow. 520. [1 Salk. 346. Vin. Abr. Grant, K. a.]

If a man have a lease for years of land, and he reciting this [lease, and] by the premises of the deed doth grant all his estate in the land, to have and to hold the land or the term after his death, or for part of the time only; in this case the *habendum* is void, and the whole estate doth pass immediately by the premises (23.) [An underlease would be good; *Earl of Derby* v. *Taylor*, 1 *East*, 502; 2 *Prest. Convey.* p. 166; and therefore if the termor grants the land he holds for years, for a term of years, to commence after his death, this is a good grant; *Show. Parl. Cas.* 199. So if he make an underlease to commence from a future day; and the technicality annexed to the word term and estate by ancient authorities (*Chedington's case*, 1 *Rep.* p. 153,) has been disregarded in modern decisions; *Plowden* v. *Cartwright*, 1 *Burr.* p. 282; *infra*, p. 109. A grant by a termor for years, of the land, for the residue of the term after his death, seems, in former times at least, to have been deemed repugnant, on the ground that the law presumed that the life would continue longer than the term. Besides, it has been questioned whether even a termor could grant his estate or the land for the residue of his term, to hold from a future day or on an event; thus reserving a particular estate. It seems such future grant is good. See *infra*.]

Dyer 256.

If a tenant for life surrender a moiety of his land, and the lessor grant it all to a stranger, to have and to hold, the one moiety for life, and the other moiety for forty years after the death of the tenant for life; this *habendum* shall stand and enure according to the grant, [and the law will appropriate the language to the different moieties, *reddendo singula, singulis.*]

Curia pas. 7 Jac. Co. B.

If a man seised of land in fee make a lease for life of it to one, and after grant the reversion of it

(23) See accordingly, 1 *Salk.* 346. *Skinn.* 528.

to another, to have and to hold the reversion and the tenements aforesaid *cum post mortem, forisfact', &c. vacare acciderit*; in this case the *habendum* and premises may stand together (24.) It is usual in the *habendum* of a deed, to set down to what use the party, to whom the deed is made, shall have the thing granted. But touching this, and the matters that do concern uses, see *Use, infra*, at large. And see also more, for the *exposition of deeds*, in *Testaments, numb.* 8; *Grant, numb.* 4; *Leases, cap.* 14, *numb.* 4. And here Note. note, that parol agreements and conveyances have the same construction for the most part made upon them, as are made before upon deeds. And therefore if a man, by word of mouth, without any writing, grant all his land in *Dale* to *I. S.* to have and to hold for life, but doth not say for whose life; this shall have the same construction as such a grant made in writing hath (25.) [At this day, in compliance with the provisions of the Statute of Frauds and Perjuries, 29 *Car.* 2, *c.* 3, there must be a writing at least; so that words without writing never can be evidence of a title at law to any estate, except a term not exceeding three years, &c.]

In the reservation of rent: and how that shall be taken.

This is always taken most in advantage of the feoffee, grantee, lessee, &c. and against the feoffor, grantor, lessor, &c. and yet so as the rent be paid during the time (26). And therefore if the reservation be only to the feoffor, grantor, &c. and the deed do not say also [to his heirs, executors, &c.] this reservation shall continue only for the life-time of the grantor, and shall determine with his death. And so also it is where the reservation is to the feoffor, or his heirs, in the disjunctive; for in this case the rent shall continue only during the life of the grantor (27). [This point is now very questionable, since it is agreed that the word "*or*" may be construed in the same sense as the word

Co. 5. 111. 10. 106. 8. 71. Co. super Lit. 47. 213. 214.

(24) See further, in what cases the *habendum* shall be repugnant to the premises, *Vin Abr. Grant* (K. a.) and the case of *Throckmorton* v. *Tracy, Plow.* 145.

(25) See accordingly 1 *Wood*, 254, 5; but see stat. 29 Car. 2, c. 3, and 2 *Bl. Com.* 297.

(26) By what words a reservation may be made. See *Com. Dig. Remainder*, (B. 2.) *Vin Abr. Reservation*, (L.)

(27) And is void as to the heir, 1 *Vent.* 163; for the reservation being in the disjunctive to the feoffor *or* his heirs, both cannot take it, and the word *heirs* cannot be a word of limitation: for if the heirs are to take at all, they must take originally; and if the rent vest in the feoffor, it cannot afterwards go to the heirs, for that would be contrary to the reservation.

"and," as often as the intention requires it, and in this case there cannot be any doubt of the *intention.*] And yet if one make a lease for years, rendering rent yearly during the said term, to the lessor, or his heirs, or executors; this is a good reservation during all the term, by reason of these words, "during the term," (28). So if the feoffor or lessor be * seised in fee, and make a feoffment in fee, or lease for life, or years, rendering rent to the feoffor, or lessor, or his executors or assigns; in this case the rent shall continue only for the life of the lessor; [because it cannot be taken by the executors, and it cannot be claimed by the heirs, inasmuch as they are not named in the reservation.] But if the reservation be to the feoffor, or lessor, his heirs and assigns, in the copulative, or in the disjunctive to him, or his heirs, or to him and his successors (if it be the lease of a corporation) during the term; then all the assignees of the reversion shall enjoy it. And if the reservation be thus, yielding and paying so much rent (without any more words,) this shall be taken for all the time of the estate, and shall go to him in reversion accordingly. And if the reservation be, rendering so much rent during the said term, and doth not say to whom; in this case it shall be construed to be to him that hath the reversion, and accordingly it shall be paid and shall continue during the term (29). [And this is frequently the most eligible mode of reserving the rent, especially when leases are made by virtue of powers. Under a reservation in this form, the rent will follow the reversion; and therefore, if a tenant for life, with remainder or reversion in fee to *B.*, join in a lease rendering rent during the term, this shall be the lease of the tenant for life; and the confirmation of *B.*, during the life of *A.*, and afterwards the lease of *B.*, and the rent, shall belong to *A.* during his life, and afterwards to *B.*; and though in a lease under a power, the reservation be to a tenant for life, his heirs, and assigns, it shall be carried to the owner for the time being, under the remainders and reversions; *Combe's case,*

*P. 115.

Plow. 171. 21 H. 7. 25. 27 H. 8. 19. Dyer 45. [1 Inst. 47.]

(28) If the rent is made payable *yearly*, without saying during the term, the payment must be made during the term. *Moor*, 459.

(29) See accordingly, *Co. Lit.* 47, a.; and further, *Vin. Abr. Reservation*, (N.) By what words the rent reserved may be continued to those who become entitled after the death of the lessor, see *Gilb. on Rents*, 64.

9 *Rep.* 74.] [a] But if *A.* be seised of land in fee, and make a lease for years of it, rendering rent to *A.*, "without saying to his heirs, &c." [or] during the said term; this rent shall continue only during the life of *A.* and no longer. And yet if *A.* be possessed of a term only, and make an under-lease or assignment with such a reservation, *quere.*

[a] So held in the case of Bland, M. 8 Car. B. R.

If the reservation be thus, yielding and paying 20*s.* during the said term, omitting the word "yearly," this shall be taken, to be not once only, but yearly during the term, and accordingly it must be paid. [b] And if a lease be made for years, rendering in every middle of the year, *quolibet medio anni* 20*l.* this shall be paid during the term, [at the end, it is apprehended, of the first half of each year.]

27 H. 8. 19.

[b] Pas. 21 Jac. Hudson & Brent, B. R. Co. 10. 107.

If one, by deed indented, grant lands to *A.* to have and to hold to him for life, the remainder to *B.* and the heirs of his body, and for default of such issue, to remain to *D.* in tail, or for life, yielding therefore yearly, &c. in this case the reservation shall extend to all the estates. [But by express reservation, the rent may be made payable in respect of one only of the estates, or of some and not of all the estates.]

If a lease be made the 10th day of August, rendering rent at our Lady-day and Michaelmas; in this case albeit our Lady-day be first named, yet the first payment shall be at Michaelmas next after the making of the deed, [that both payments may become due within the term, and a half-year's rent must be paid at Michaelmas.]

Dyer, 130. Co. 5. 113. super Lit. 217.

If the reservation be at Michaelmas, or *within* twenty days after; in this case the 20th day shall be taken exclusive. But if the rent be to be paid at Michaelmas, or by the space of twenty days after; in this case the 20th day shall be taken inclusive. [There seems no foundation for this distinction: in each case there seems to be an allowance of twenty days after Michaelmas-day.]

Per. Williams & Yelverton Just. —Ch. Just. contra, 9 Jac. B. R. Co. 10. 106.

If a lease be made in December, from the nativity of *Christ* next for one year, with this addition, *Et si in fine dicti anni ambæ partes agrearent quod eadem dimissio foret renovata tunc habend' & tenend' premissa dicto I. S.* (the lessee) *ab & post dictum festum tunc proxim. sequend. usque finem trium annorum. Reddendo inde annuatim durante dicto termino dict. W. S. &c.*; in this case the reservation

shall relate to both the terms; and the rent shall be paid the first year, although they do not agree to renew the lease. [For the additional years are only an extension of the original term.]

Co. super Lit. 214. * If two joint-tenants by deed poll [as distinguished from an indenture creating an estoppel,] or by word, make a lease for life, reserving a rent to one of them; this shall go to them both (30). So if one of them be tenant for life, and the other in fee, [*read*, if there be two joint-tenants for life, the remainder to one of them,] and they join in a lease for life; or gift in tail reserving a rent; the rent shall enure to them both, [during their lives.] But if tenant for life, and he in reversion, join in a lease for life, or gift in tail by deed reserving a rent, the rent shall enure to the tenant for life only, during his life, and after to him in reversion. *P. 116.

Plow. 171. 289. Co. 10. 106. If two tenants in common make a lease of their land rendering 20*s.* rent; this shall be but one 20*s.* and not two 20*s.* So, if the lease be rendering a hawk or a horse: by this [reservation] they shall have but one hawk, or one horse, and not two hawks or two horses, as it shall be in cases where they do join in the grant of such things out of their land (31). [For when two tenants in common grant a rent, then in respect of their several ownerships there will be two rents, as the only means by which the grant can have full effect. The reason seems to be, that it cannot be the grant of both jointly, on account of their different seisins; and therefore the rule of law is, that the grant shall be complete against each of them, that it may have effect. Equity, however, would, it is apprehended, restrain any abuse of this grant, if the contract required it.]

Co. 10. 106. If one make a gift in tail of two acres of land, the one at the common law, and the other in Borrough-English, rendering an ox to him and his heirs, and the donee having two sons die, and the eldest son doth inherit the one acre, and the youngest

(30) In respect to the joint reversion: so a surrender to one of them shall enure to them both. *Co. Lit.* 214, a.; but if the lease be by deed indented of them both, and the reservation to one of them only, it shall enure to him only, to whom it is made, *Lit.* § 346. See further for the reason, and authorities on this point, *Gilb. on Rents*, 63. *Bac. Abr. Rent*, (G.) *Vin. Abr. tit. Reservation*, (E.) [So if a grant is made to one of them, this shall operate as a grant; and as to one moiety, there will be a merger or surrender in law, not a surrender in fact; and of consequence, the other joint-tenant will not derive any advantage from this grant.]

(31) See accordingly, *Bro. Abr. tit. Reservation*, pl. 44.

son doth inherit the other; in this case the donor and his heirs shall have but one ox, &c.

If one make a lease of land for years if the lessee live so long, and after the lessor by his deed indented doth grant the land to another, to have and to hold the reversion to the grantee for his life *cum post mortem &c. aut aliter acciderit vacare reddend' inde annuatim* to the grantor and his heirs *cum reversio predicta acciderit* 9*s.* 4*d. per annum*; in this case this reservation of rent shall not begin before the reversion happen, [*read*, fall] in possession. Co. 10. 107. 108.

If rent be reserved to be paid at two terms, and it is not said by equal portions; yet it shall be so taken, and it must be so paid (32). 13 H. 4. Avowry 240.

In other respects. If one be possessed of a term of years of land, and grant it by deed to *I. S.* for his life, and after his death to *I. D.*; in this case the whole term is granted to *I. S.* and his executors, administrators, and assigns shall have it, and not *I. D.* But if a term were so devised by will, *contra*. [And even in a grant by deed the land might be limited to *A.* for years by way of under-lease, with a limitation over by way of remainder to *B.*; 2 *Prest. Abstr.* p. 4.] Co. 8. 95. 10. 47. Brow. Done 57. Fitz. Done 2.

Devise.

Remainder. And if one give or grant to another his horse, or his books for his life, and that after his death they shall remain to another, the remainder is void, and the first shall have it for ever, for the gift or grant of such a thing for an hour, is the gift of it for ever (33). [But there may be a reversionary right in chattels; and therefore, if a chattel be leased for a year, the former owner may resume the possession, when that time is expired; but in the mean time the property is in the grantee. And in wills, under the learning of executory bequests, and in trusts, the ownership may be regulated or

---

(32) It is very truly observed, in the preface to Ld. Ch. Baron *Gilbert's Treatise on Rents* that there is no part of the law more extensively useful, and interesting, than that of rents, and yet perhaps no part in which those niceties and distinctions, that are essential to both right and the means of recovering them, are less understood. Those who seek to obtain a clear knowledge of the doctrine of rents, and the practice respecting them, will find very considerable assistance in that excellent book, and in another small treatise of the same author on distresses and replevin. See also the statutes of 32 H. 8, c. 37. 2 W. & M. c. 4 Ann, c. 16, § 10. 8 Ann, c. 14. 4 Geo. 2, c. 28. 11 Geo. 2, c. 19. 20 G. 20, c. 1 § 42; and further in *Co. Lit.* 47, and the notes thereto.

(33) But in a will, such a devise of a personalty, with a remainder over, is good; whether it be by way of use, or not, see the case of *Hyde* v. *Parrat*, 1 *Pr. Wms.* 1. [*Matthew Manning's case*, 8 *Rep.* 94. *Lampet's case*, 10 *Rep.* 46.]

modified in any manner consistently with the rules against perpetuities.]

See more in *Use, numb.* 7 (34).

---

(34) It may not be improper to subjoin some account of the several acts of parliament for *registering deeds* and *wills*.

The first statute in order of time is that of 2 & 3 Ann, c. 4. "For the public registering of all deeds, conveyances, and wills, that shall be made of any honors, manors, lands, or hereditaments *within the West Riding of the county of York*, after the 29th of September, 1704," it enacts, that a memorial of all deeds and conveyances which shall be made after the 29th of September, 1704, and of all wills and devises in writing, where the devisor or testator shall die after the said 29th of *September*, whereby any honors, manors, &c. in the said West Riding, *may be any way affected in law or equity, may, at the election of the parties concerned*, be registered in manner directed by that act; and that every deed or conveyance, (that shall, after any memorial is so registered, be made of the honor, manor, &c. comprised in any such memorial,) [these words are inserted by mistake,] shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered as by the act is directed, before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim; and that every devise by will of the *honor, &c.* contained in any memorial so registered, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as by the act is directed. The act then establishes an office for the register; directs the mode and time of his election by the freeholders, and of a successor on his death, forfeiture, or surrender of the office; the mode and form of the memorial, the ceremonials to be observed thereon, and the fees to be paid for it; and inflicts penalties on the register in case of neglect. The act does not extend to any *copyhold estates, nor to any leases at a rack-rent, nor to any lease not exceeding twenty-one years*, where the actual possession and occupation goeth along with the lease. It directs that memorials of wills registered within six months after the death of every respective testator, dying within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, or within three years after the death of every respective testator dying in parts beyond the seas, shall be as valid against subsequent purchasers, as if the same had been registered immediately after the testator's death.

The statute of 5 Ann, c. 18, is for inrolment of bargains and sales within the West Riding of the county of York, in the register-office there, and for making the said register more effectual.

The statute of 6 Ann, c. 35, establishes a register for the *East Riding of the county of York*, and for the *town and county of Kingston-upon-Hull*, for all deeds, and wills, of lands therein, which shall be made and executed after the 29th of September, 1708, on the same plan, and under nearly the same regulations, as in the before-mentioned act; and this act directs that all the clauses and provisions contained in it, which are not provided for or contained in the said acts of 2 & 3 Ann, c. 4, and 5 Ann, c. 18, shall extend to lands in the *West Riding*, as effectually as if they had been inserted in the said acts for establishing the register in the West Riding.

The statute 7 Ann, c. 20, establishes in like manner a register for the *county of Middlesex*, after the 29th of September, 1709, with an exception not only of *copyhold estates, leases at a rack-rent*, and *leases not exceeding twenty-one years*, as in the several acts before mentioned; but with an additional exception of the *chambers* in Serjeant's Inn, the Inns of Court, or Inns of Chancery.

The statute of 8 Geo. 2, c. 6, establishes in like manner a register for the North Riding of the county of York, after the 29th day of September, 1736.

These acts, except 5 Ann, c. 18, appear at length in 1 vol. *Wood's Convey.* p. 452 to 480. [3 *Newnham*, p. 490.]

For some general observations on the act of 7 Ann, c. 20, clear directions as to the mode of registering deeds and wills, and various precedents of memorials, see *Rigg's Instructions for the Registering of Deeds*, &c. and *Horseman's Prec. in Conv.* 2 vol. 821.

And it is now time that we come to the other parts of a deed, and first to a *condition*.

Mr. Justice *Blackstone*, in 2 vol. of his *Commentary*, p. 343, treating of these acts, says, "but however plausible these provisions may appear in theory, it hath been doubted by very "competent judges, whether more disputes have not arisen in those counties (where regis- "ters are established) by the inattention and omissions of parties, than prevented by the "use of registers." [And now the register is become so multifarious, that it is next to impossible to search the register with any reasonable chance of tracing a title. The register renders it necessary to preserve deeds, which in the absence of a register might be discarded, as having answered a mere temporary purpose.]

By these statutes there is not any time limited for registering deeds; it is therefore obvious from an inspection of the acts, how necessary it is, *that deeds should be registered immediately on their being executed*; to enforce this the more strongly, it may not be useless to consider, if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee, or mortgagee, in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee, or mortgagee, doth not thereby become in a worse situation, than he would have been by law, in case the registering act had not been made. [He certainly will, for the act takes away his priority.]

For the operation and construction of the registering acts, see the cases of *Cheval* v. *Nichols*. [An annuity was not inrolled under the Register Acts: the purchaser had notice and relief against him, so upon notice to the purchaser's agent, *Sheldon* v. *Cox*, *Ambl.* 624. *Le Neve* v. *Le Neve*, 3 *Atk.* 646. *Blades* v. *Blades*, 1 *Eq. Abr.* 358. Even a judgment, though not registered, is an encumbrance against a purchaser.] 1 *Str.* 664. *Honeycomb* v. *Waldron*, 2 *Str.* 1064. [Registry of the assignment of a lease, is no registry of the lease.] *Forbes* v. *Deniston*, 2 *Brown's Parl. Ca.* 425. *Hine* v. *Dodd*, 2 *Atk.* 275. [To intitle an incumbrancer to hold his priority, notwithstanding the omission to register, there must be apparent fraud, or clear and undoubted notice. Suspicion of notice is insufficient.] *Le Neve* v. *Le Neve*, 3 *Atk.* 646; and S. C. 1 *Ves.* 64. [13 *Vin. Abr. tit. Fraud*, (L. a.) 550. *Blades* v. *Blades*, 1 *Eq. Cas. Abr.* 358. *Sheldon* v. *Cox*, *Ambl.* 624. *Drummond and another*, *Cowp.* 712. *Davis* v. *Strathmore*, 16 *Ves.* 419. *Sugd. Vendors & Pow.—Mortg.* A prior mortgagee may tack a subsequent charge to himself against an intervening judgment registered. The registry is not such a notice as entitles the judgment creditor to redeem on payment of the first security only. To entitle himself to do so, he should have given express notice to the mortgagee. *Wrightson* v. *Hudson*, *cor. Sir Jos. Jekyll*, 2 *Eq. Ca. Abr.* 609. See *Powell*, 286, for a comment on this case.

But a subsequent mortgagee, having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered, in equity, as fraudulent and the party hath that notice which the Act of Parliament intended he should have. *Doe* v. *Routledge*, *Cowp.* 712. *Powell's Law of Mortgages*, 257.]

CHAP. VI.

Of a Condition.

1. *Condition, Quid.* A CONDITION is a kind of law, or bridle, annexed to one's act, staying or suspending the same, and making it uncertain whether it shall take effect or no; or, as others define it, it is *modus*, a quality annexed by him that hath estate, interest, or right, to the land, &c. whereby an estate, &c. may either be created, defeated, or enlarged, upon an uncertain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue (1).

Terms of the law. Co. super Lit. 201.

Limitation, Quid.

27 H. 8. 16. Co. 2. 70.

[These passages are not quite accurate: they want distinctiveness. They do not accurately distinguish a limitation from a condition. A condition has uniformly the object of defeating or avoiding an estate.

When an estate is to be granted, created, or enlarged, the clause is, in propriety of technical language, a limitation.

Even a limitation, on a condition or on a contingency, is not a condition. Thus a clause, creating contingent remainders, or executory gifts by devise, or by way of use, is properly a limitation; and though it be by way of shifting use, or executory devise, to defeat another estate wholly or in part, still it is a limitation.

It is the province of a limitation to mark the period or event for the commencement, and the time of continuance or duration of an estate, either by years, lives, or the series of heirs; also the determinable qualities of an estate; as for twenty-one years, if *A.* should so long live; to *A.* and his heirs, so long as a tree shall stand, &c. &c. 1 *Estates*, p. 39. 42; while a condition is a distinct clause, and its office is to defeat the estate on some event which may happen, as on some act to be done, before the estate has filled the utmost measure or time appointed for its continuance. A limitation *will* necessarily determine the estate: a

(1) For the distinction between a condition and a limitation, see *Bac. Abr. Conditions* (H.) and further in 1 *Atk.* 374. 383.

condition *may* defeat an estate. A limitation may *suspend* the vesting; a condition never interferes with the vesting, but may act on the estate or interest before or after it is vested. Every provision which regulates the vesting, is, in essence and effect, part of the limitation.

When a clause stays or suspends the estate, or rather the gift, and makes it uncertain whether the gift shall take effect or not, that clause is properly a limitation, and denominated sometimes a conditional limitation, and sometimes a limitation on a contingency. Also, whatever provision *creates* or enlarges an estate, on a certain or an uncertain event, is of necessity a limitation. That clause only is a condition, which is to defeat the estate after it has been created or enlarged. Hence, the distinctions between gifts and conditions, between absolute estates and estates subject to conditions, and between gifts, &c. on a condition precedent: namely, by conditional limitation or limitations on a contingency, as contingent remainders, &c. &c. and estates on conditions subsequent; that is, conditions to defeat an estate. These distinctions are more fully explained in 1 *Prest. Estates*, p. 45. 48.]

And this [a condition] sometimes is contained in a testament or will, and sometimes in a deed. And when it is in a deed, it hath no proper place assigned it, but it may be in any part of the deed; howbeit, for the most part it is placed next after the *habendum*, [if any,] or next after the reservation of the rent. It is also sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, contracts, and other things; conditions are also contained in acts of parliament and records. But of these we speak not here in the ensuing matters, which are especially to be applied to such conditions as are usually contained in deeds and annexed to the realty, *i. e.* to estates in fee-simple, fee-tail, for life, or years. 27 H. 8. 16. Co. 2. 70.

2. Quotuplex. And of these conditions there are divers kinds. For some are in deed or express, *i. e.* when the condition is expressed by the party in legal terms, and by express words in writing, or without writing, knit to the estate; as if I enfeoff a man of land, rendering rent at a day, on condition, that if it be not paid, it shall be lawful for me to Co. super Lit. 201. Plow. Colthirst's case. Co. 8. 43.

re-enter. And some are in law or implied, *i. e.* when the condition is *tacitè* created by the law, without any words used by the party. The first sort of conditions also are some of them precedent, or executed, [*omit* or executed, for the gift is executory;] *i. e.* when the condition must be fulfilled, are [*read* ere] the estate can take effect, [in other words vest;] as where an agreement is between me and *I. S.* that if he pay me 10*l.* at Michaelmas, he shall have such a ground of mine for ten years; or where I make a lease of land to *I. S.* for ten years, provided that if he pay me 10*l.* at Michaelmas, he shall have the land to him and his heirs; and in these cases, by the performance of the condition, the estate is acquired (2). [These are chattel interests, and may be limited on a contingency. But, by the rules of the common law, no estate of freehold, (except in things created *de novo*, and at the time of the creation thereof, and except estates, to be enlarged on a condition, could be limited to commence *in futuro*, or on an event or contingency, except by way of remainder after, and expectant on a prior vested estate of freehold. See 1 *Prest. Estates, ch. Freehold.*] And some of them are subsequent, and executory, *i. e.* when the estate is executed, but the continuance thereof dependeth upon the breach or * performance of the condition; as where a lease *P. 118. is made for years, on condition that the lessee shall pay 10*l.* to the lessor at Michaelmas, or else his lease shall be void; and in this case, by the performance of the condition, the estate is held and kept (3). These conditions also are some of

(2) Or if an estate be limited to *A.* upon his marriage with *B.* the marriage in a *precedent* condition, and till that happens, no estate vests in *A.* *Shower's Parl. Ca.* 83.—See further 1 *Pr. Wms.* 284. 2 *Atk.* 18. 1 *Ves.* 4. S. C. 1 *Wils.* pt. 1. p. 159. See *Roundel* v. *Currer*, 2 *Brown's Rep.* 67. where testator devised his own estates, together with other estates whereof he was tenant for life, and *A.* tenant in tail, to trustees, in such manner as that *A.* would be tenant for life only of both estates, provided that his own estate was not to be conveyed till *A.* had suffered a recovery, and conveyed the estate to the uses of testator's will. *A.* died before the recovery: this was a *condition precedent*, and the reversion in fee expectant on the estate tail took place.

(3) For the nature and doctrine of conditions *precedent* and *subsequent*, see 2 *Pr. Wms.* 419. 626. 1 *Vern.* 83. 3 *Chan. Ca.* 130. 3 *Lev.* 132. 1 *Wood*, 273. *Ca. Temp. Talb.* 166. *Swinb.* 267. *Eq. Ca. Abr. Conditions* (B.) *Bac. Abr. Conditions* (I.) *Vin. Abr. Conditions* (T.) *Com. Dig. Conditions* (B.) *Fearne on Conting. Remain.* 3 edit. 313. 2 *Burr.* 899. 4 *Burr.* 1930. 1 *Wils.* pt. 1, p. 105. 136. *Randall* v. *Curror*, 2 *Bro. C. C.* 67. There are no precise technical words required in a deed to make a stipulation a condition *precedent* or *subsequent*; neither does it depend on the circumstance, whether the clause is

them in the affirmative, *i. e.* that do consist of doing, as provided that the lessee shall pay the rent, or pay 10*l.* to the lessor, &c. And some in the negative, *i. e.* that consist of not doing, as provided that the lessee shall not alien, &c. And some of them are in the affirmative, which imply a negative, as provided that if the rent be unpaid, that the lessor shall re-enter, which implieth a negative, *viz.* not paid. Conditions also are some of them collateral, *i. e.* when the act to be done is a collateral act, as that the party shall pay 10*l.* go to Rome, or the like. And some are inherent, *i. e.* such as are annexed to the rent reserved out of the land whereof the estate is made; [or rather to the estate in the land, in respect of rent, &c.] And some of them also are restrictive, and contain a restraint; as that the lessee shall not alien, or do waste, or the like. And some are compulsory, as that the lessee shall pay to the lessor 10*l.* such a day, or his lease shall be void. And some of them be single, *i. e.* to do one thing only. And some copulative, [or conjunctive,] *i. e.* to do divers things. And some disjunctive, *i. e.* when one thing of divers is required to be done (4). And some conditions make the estate whereunto they are annexed voidable only by entry or claim. And some of them make the estate void, *ipso facto*, without entry or claim. [This proposition is now doubtful, see *infra*, p. 121.] And sometimes they tend to destroy estates, [and these are properly conditions;] sometimes to make, or to enlarge estates, [and these are properly limitations, or gifts on a condition precedent, *i. e.* conditional limitations;] and sometimes neither to make nor destroy, but only to clog estates, [by way of incumbrance, giving a right to hold *pro tempore*;] as where a lease is made, rendering rent on a day, on condition if it be not paid that the lessor shall enter on the land, and

Co. super Lit. 201.

placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. *Per Ashurst*, in delivering the opinion of the Court of K. B. in *Hotham* v. *East India Company*, *Hil.* 27 *Geo.* 3; *Durnford & East*, p. 645; and *Scott* v. *Tyler*, 2 *Brown's Rep.* 431 to 489. As to a condition annexed to a legacy, that the legatee shall marry with the consent of her mother, is a valid condition; and marrying without becomes part of testator's residue.

(4) If the condition be in the copulative, and it is not possible to be so performed, it shall be taken in the disjunctive. See fully as to conditions copulative and disjunctive, *Vin. Ab. Conditions* (S. b.) and (Y. b. 2.)

Lit. Sect. 327. keep it till the rent be paid. And [in] all these ways conditions may be lawfully made. *Inesse potest donationi modus, conditio sive causa.*

Co. 8. 44. 3. 63. Lit. 325. 378. F. N. B. 205. The conditions in law, or implied, [*Com. Dig. Condition*, (R.)] are either by common law, or by statute laws. The first sort are, some of them, founded on skill, as where an office is granted, there is a condition *tacite* implied, that if the grantee doth not execute it faithfully according to the trust, the grantor may put him out. And some are without skill, as where an estate is made for life or years of land, there is this condition implied, that if the lessee do waste he shall forfeit the place wasted; or if the lessee make a feoffment of the land, he shall forfeit his estate, and the lessor shall enter. And where an estate is made in fee of land; this condition is implied, that the Co. 4. 121. feoffee shall not alien it in mortmain (5). And these conditions do sometimes give a [right or title of] recovery, and no [title of] entry, as in the case of waste. And sometimes they give an entry, and no recovery, as in the case of alienation in mortmain. In the case of exchange also there is a condition in law; for which see *Exchange*; [for a time, while the privity lasts, 1 *Inst.* 174 a. 384 b.]

21 H. 7, 24. Perk. Sect. 707, 708, &c. * It is a general rule, that when a man hath a thing he may condition with it as he will, [for the maxim is, *cujus est dare ejus est disponere.* But this general rule is subject to the qualification, that the disposition must be consistent with the rules of law, and not repugnant to the grant, or to the estate.] Conditions in deed therefore may be annexed to things inheritable, to frank tenements, [*viz.* estates of freehold,] or to chattels real and personal: as for example, if a feoffment in fee, gift in tail, or lease for life, be made of lands or tenements, or a grant be of a rent, common, or the like thing, in fee-simple, fee-tail, or for life, these things may be done [or made] upon condition. So a lease for years of land, or a grant of

*P. 119.

3. *What things may be made and done upon condition: and to what things a condition may be annexed; or not; and how it may be made and annexed thereunto.*

(5) And to every estate of tenant by the curtesy, in dower, for life, &c. there is a condition in law secretly annexed to their estates, that if they alien in fee, &c. [by feoffment, &c.] that he in the reversion or remainder may enter. *Co. Lit.* 233 b. also post.—And if by any accident a corporation is dissolved, the donor or his heirs, *by a tacit condition annexed by law*, shall have the land in reversion, and not the lord by escheat. *Co. Lit.* 13 b. For the law of escheat applies only where there is a failure of heirs; and by alienation, the corporation may defeat this right of reverter to the donor.]

a rent, &c. for years, may be made upon condition. And a lease may be made for five years, on condition, that if the lessee pay to the lessor within the first two years ten marks, then he shall have the fee, otherwise but for five years. [But, as already observed, this clause is rather a grant or limitation than a condition. The clause indeed partakes partly of the nature of a condition, and partly of the nature of a limitation. As far as it is to defeat the lease, it is a condition; and as far as it is to give the fee, it is a grant or limitation. 1 *Prest. Estates*, p. 45.] Also a guardian in chivalry may grant the wardship of the body and land, or either of them, on condition. Tenants by statute merchant, staple, or elegit, may grant [*viz.* assign] or demise their estates upon condition. The lord may grant his seigniory to his tenant on condition, [so that the seigniory, though suspended or extinguished for a time, may revive.] The tenant for life may grant his estate to his lessor, or [to] him in reversion upon condition; [and there will be a merger subject to be defeated by the operation of the condition.] The king may make letters patents of denization to an alien, or a charter of pardon to a man for his life, upon condition. [This is in general, and perhaps *necessarily*, a condition precedent.] Also releases and confirmations, [in enlargement of an estate,] may be made upon condition; [namely, condition subsequent.] And a submission to an award may be upon a condition [precedent or subsequent, as that it shall be made on or before a given day, or that the parties shall consent to be examined on oath.] But an institution to a benefice, or an induction, may not be on a condition. An attornment, or an express manumission of a villain, cannot be upon a condition subsequent, as it may be upon a condition precedent. And a condition cannot be released upon a condition, as some hold. But the contrary is held by others, clearly, and that there is no difference between this and a release of a right: *ideo quere* (6). [It is apprehended a release of right, or of a condition, may be on a condition precedent, and not on a condition subsequent.] An

Perk. Sect. 281. Co. super Lit. 274. Perk. Sect. 724. Co. 8. 98. Dyer, 242.

Co. 2. 74.

Co. super Lit. 274.

(6) A condition cannot be released upon condition; for the condition annexed to the release shall be void, and the release shall be good. *Co. Lit.* 274 b. *Com. Dig. Condition* (A. 8.)

award cannot be made on a condition, as was held
Perk. Sect. 712, 713. in *Sherer's case*, 35 *Eliz.* A contract, or sale of a chattel personal, as an ox, or the like, may be upon condition; as if *A.* sell his horse to *B.* that if *A.* do such an act, then *B.* shall pay 5*l.* at the day agreed upon, otherwise but 4*l.* [This is a condition annexed to the price, and not to the gift.] So if I agree with a physician, that if he cure such a disease he shall have so much; and in this case he cannot have the money until he have done the cure. As where I promise a man 10*l.* when he hath built such a house, [for this is a condition precedent,] in this case he cannot have the money until the house be built. Also retaining of servants, delivery of charters, and divers other
Co. 4. 28. things, may be done upon condition. And if an executor assent to a legacy upon a condition; the assent is good, but the condition is void.

Lit. Sect. 365. Co. super Lit. 161. 216. Dect. & Stud. 16. Perk. Sect. 714. And conditions annexed to estates in all the cases before, howsoever they are most frequently and safely made by deed in writing, yet it seems such conditions may be made and annexed to any estate of a thing, grantable without deed, without any writing at all; howsoever, in some cases, it cannot be well pleaded, nor used without a deed; for it is a rule, that if a condition be pleaded * in *P. 120. any action to defeat a freehold, the deed, wherein the condition is contained, must be shewed. But of chattels real, as leases for years, and the like; or grants of chattels personal, a man may plead, [or show in evidence,] that such leases and grants were made upon condition, without showing the deed. And in the first case also of a condition to avoid a freehold, it may be given in evidence to a jury, and they may find the matter at large as it is, and so the party may have advantage of the condition without showing any deed of it. [At this day there must be, at least, a writing, in consequence of the enactments of the Statute of
Co. 5. 40. Frauds and Perjuries.] Also the pleading of a feoffment in fee on condition, without deed and re-entry, is good if the party confess the condition. A condition may be annexed to a limitation of uses, and thereby the same, [*viz.* the uses or estates arising from the uses,] may be made void (7);

(7) And shall be executed by statute 27. *H.* 8. so that the donor and his heirs may take advantage of the condition. *Sav.* 77. See further in *Vin. Abr. Condition* (N).

[and the use or estate may cease *ipso facto* without entry, for such clause of cesser is in the nature of a collateral determination to the estate. 1 *Prest. on Est.* p. 48; and the limitation over creates a new estate or interest.] See *Use.*

4. The nature of a condition in deed, and of a limitation.

The nature of an express [common law] condition annexed to an estate, in general, is this; that it cannot be made by, nor reserved to, a stranger; but it must be made by and reserved to him that doth make the estate, [or to his heirs, &c. connected with him in privity of estate]. And it cannot be granted over to another, except it be to and with the [estate in the] land or thing unto which it is annexed and incident. And so it is not grantable in all cases; [and at the common law it was not grantable in any case: for though annexed to an estate for years or life, the grant of the reversion would in some cases have suspended, in other cases have extinguished, the condition. But in all cases a condition may be released, by any person who is interested, and to the extent, at least, of his interest;] for the estates of both the parties are so suspended [*read*, affected] by the condition, that neither of them alone can well make any estate, or charge, of or upon the land; for the party that doth depart with the estate, and hath nothing but a possibility [of reverter; namely, a possibility] to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. [And this possibility of reverter on the grant of an estate of inheritance in fee is not devisable. It is releasable to the person whose estate is subject to the condition; and the interest under the possibility may be bound by confirmation or estoppel]. And if he that hath the estate grant or charge it, it [the estate] will be subject to the condition still; for the condition [while subsisting, *i.e.* till discharged, determined, or released,] doth always attend and wait upon the estate or thing whereunto it is annexed, [being an incumbrance on, or qualification to, the estate:] so that although the same [estate] do pass through the hands of an hundred men, yet is it subject to the condition still; and albeit some of them be persons privileged in divers cases, as the king, infants, and women covert, yet they also are bound by the

Co. super Lit. 186. Perk. Sect. 818. Lit. Sect. 358. Dyer, 6.

Dyer, 298. Co. 8. 44. Perk. Sect. 818, 819.

condition (8). [And derivative estates or interests will be defeated by the operation of a condition in fact, but not of a condition in law]. And a man that comes to the thing by wrong, as a disseisor of land whereof there is an estate upon condition in being, shall hold the same subject to the condition also, [*viz.* his title, and not his estate, will be subject to the condition. By the disseisin the disseisor gains the fee-simple, and not the estate of the disseisee. The land, and not the estate of the disseisor, is charged with the condition]. And when the condition, [being a common-law condition,] is broken or performed, &c. the whole estate shall be defeated: so that if there be a lease for life made by deed, and not by will; [for the learning of executory devises may govern titles under wills;] the remainder over in fee, on condition that the lessee for life shall pay 10*l.* to the lessor; if the lessee pay not this 10*l.*, the estate in remainder is avoided also. [See *infra*, p. 131; and *query*, whether the condition is not discharged by the limitation of the remainder: for at the common law, on principles of tenure which governed the rules of investiture, whatever act defeated the particular estate necessarily and of consequence defeated the livery, and therefore the remainder. But in conveyances to uses, or in a will operating under the learning of executory devises, 2 *Prest. Abstr.* p. 151, the particular estate arising from the use, may be defeated without destroying the remainder. So even at the common law, the remainder in fee, or the ultimate remainder, whether for life or in tail, may be defeated without avoiding the prior particular estates]. *Et sic e converso*, unless by special limitation it be otherwise provided; as if *A.* grant by indenture land to *B.* for life, the remainder to *C.* in fee, rendering rent to *A.* and his heirs, with condition, that if the rent be behind, to reenter and retain the land during the life of *B.* and no more, and *A.* doth enter in the lifetime of *B.* for non payment; this doth not destroy the remainder. [If the limitation merely give an entry and retainer, without defeating the particular estate, then the proposition is not open to any

Dyer, 117. Co. 10. in Mary Portington's case. Super Lit. 230. Lit. Sect. 374. Perk. Sect. 564. fo. 168. Lit. fo. 224. Dyer, 127. Co. super Lit. 224.

(8) And although regularly no laches shall be accounted in infants, or feme coverts, for non-entry, or non-claim to avoid descents; yet laches shall be accounted in them, for non-performance of a condition annexed to the state of the land. *Co. Lit.* 246 b.

objection. But if the particular estate be defeated, it would be difficult to reconcile the proposition with principle, since there would be a remainder without a particular estate]. And if tenant for life and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life shall
*P. 121. re-enter; this * is good without defeating the entire estate: [in this instance the condition is good, because there are distinct grants in point of law, *viz.* a grant by the tenant for life, and a grant by the remainder-man. 3 *Prest. Convey.* p. 503: because each grants his estate; and after the tenant for life has restored himself to his particular estate, he is the particular tenant, and the grantee is tenant in remainder]: for [*read*, and yet] regularly a condition cannot avoid a part of an estate only, and leave another part entire; neither can the estate be void as to one person, and good as to another [person], (except it be in case of a condition, [or rather a conditional limitation,] annexed to an estate limited by way of use, as in *Frances'* case, *Co.* 8. 90, [or in a will operating by executory devise. And a condition may avoid a remainder, without defeating the particular estate]. And yet if *A.* make a gift in tail to *B.* the remainder to *B.* in fee upon condition not to alien, and *B.* doth alien; this [alienation] doth defeat the estate tail only, and not the remainder. [This proposition is not law. The condition was defeated by the remainder. Also the whole Co. 4. 121. estate of the whole, [namely, as to all the land,] Dyer, 127. and not of some part only, shall be avoided; except by agreement the condition [shall, as it may,] be specially restrained to some part, and the re-entry given in that part only; as where a feoffment is made of two acres, on condition that if such a thing happen, the feoffor shall enter into one of them. And further, when he that hath right doth Perk. Sect. 840. re-enter by force of such condition, he shall avoid all charges and incumbrances put upon the land after the condition made; for he that doth enter into land by force of such a condition, [in deed], must have it again in the same plight as it was when he parted with it, [unless he has been a confirming party, for by confirmation an incumbrance may be good against him, or the operation of the condition may be suspended; and the rule does not apply to conditions in law creating forfeiture].

See infra.

And finally, a condition for the most part will not, [by the rules of the common law,] determine the estate without entry or claim. [But in limitations of use, and executory devises, the conditional limitation will determine the estate without entry or claim]. So that howsoever a limitation hath much affinity and agreement with a condition, [a] and therefore it is sometimes called a condition in law [b], both of them do determine an estate in being before; and a limitation cannot, [by the rules of the common law,] make an estate to be void as to one person, and good as to another [person]; as if a gift be made in tail to one and his heirs males, until he do such a thing, and then his estate to cease and go to another, [this would be a determinable estate tail; and is not the example intended to have been proposed, see *Arton* v. *Hare*, *Poph.* p. 97; 1 *Fearne*, p. 5. A limitation of this description is good either in a conveyance at the common law, or in a conveyance to uses, for it only gives a collateral and determinable quality to the estate; and a remainder may be limited on the event, or contingency which is to determine the particular estate, and a remainder so limited will be contingent. 1 *Prest. Est.* p. 54. Most probably the proposition of the text was intended to be applied to those conditions which aim to cease the estate as to the ancestor, without ceasing it as to the heirs; and to those conditions which are repugnant to the estate, as affecting, or attempting, to restrain the power of alienation by tenant in tail]: yet herein they, [*viz.* a condition and a limitation,] differ; 1. A stranger may take advantage of an estate determined by limitation, [even though the stranger be to take in the identical event which is to determine the prior estate, as in the instance of the determinable estate tail; and in the instance of a gift to *A.* till his return from Rome, and from and after his return from Rome, then to *B.*; 1 *Fearne*, p. 5; 1 *Prest. Est.* p. 54]; and so he cannot, [by the rules of the common law,] upon [*read*, of] a condition. 2. A limitation, [and also a conditional limitation,] doth always determine the estate without entry or claim, and so doth not a condition [universally] (9).

[a] Lit. Sect. 380.

[b] Co. 9. 128. 8. 17. 6. 41. Plow. 413.

Co. 10. 40. Dyer, 300. Lit. Sect. 90.

(9) For the distinction between *a condition in deed* and a *limitation*, denominated by *Littleton* a *condition in law*, see 2 *Bl. Com.* 155. Also, the books referred to in page 114, note 1; and further, in *Roll. Abr. Conditions* (K.) *Fearne on Conting. Rem.* 194. 196. 423. 1 *Atk.* 383; and the case of *Avelyn* v. *Ward*, 1 *Ves.* 420.

5. When an estate shall be conditional; and what words will make a condition, & what not; and how a condition may be known from a covenant or limitation.

Conditions annexed to estates are sometimes so placed and confounded amongst covenants; sometimes so ambiguously drawn; and at all times have in their drawing, [when deeds, &c. are prepared by unskilful persons,] so much affinity with limitations, that it is hard to discern and distinguish them. Know therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, provided that, or so as, or under this condition, that *B.* do pay to *A.* 10*l.* at Easter next; this is a good condition, and the estate is conditional without any more words, [on the principle, *causa data non secuta*]. But there are other words, as *Si, si contingat*, and the like, that will make an estate conditional also; but then they must have other words * joined with them, and added to them in the close of the condition; as that then the grantor shall re-enter, or that then the estate shall be void, or the like. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, and if, or but if it happen, the said *B.* do not pay to *A.* 10*l.* at Easter, without more words, this is no good condition; [for the cesser of the estate or right of re-entry is not expressed:] but if these or such like words [of cesser, &c.] be added, that then it shall be lawful for *A.* to re-enter, then it will be a good condition (10). [When the sentence is left imperfect, the intention might be to impose a charge, &c. or give a limited right of entry, &c.]

Co. 2. Lord Cromwel's case. 10. Mary Portington's case. Co. super. Lit. 204. 27 H. 8. 16. Lit. Sect. 328, 329, 330, 331.

Proviso. Ita quod, Sub conditione.

Si. Si contingat.

*P. 122.

(10) See more amply by what words a condition may be created, in *Bac. Abr. Conditions* (A.) and *Vin. Abr. Condition* (C.) (D.) (H.)—If the reader considers the very great extent of the title *Condition* in *Viner's Abr.* (being almost an entire volume), and the numerous subdivisions thereof, he will not be surprised at the frequent references to that book. Mr. *Hargrave*, in his edit. of *Co. Lit.* 9 a. note 3, says, "He is the more frequent in his "references to that abridgment, because it tends to facilitate the use of that immense body "of law and equity, which, notwithstanding all its defects and inaccuracies, must be "allowed to be a necessary part of every lawyer's library." The advantages attending frequent references to the abridgments and digests, it is presumed, are too obvious to require to be pointed out: The reader thereby has before him in one view, all the cases on the point, which are by far too numerous to be inserted in a note, even if they were all correspondent, and did not vary in their circumstances or decisions.

Co. super Lit. 146.
Co. 2. 70.
Dyer, 152. 311.
Lit. Bro. 256.
Dyer, 6. 222.
Plow. 136.
5 H. 7. 7.
Perk. Sect. 732.

But here note that these words *proviso, ita quod,* and *sub conditione,* albeit they be the most proper words to make conditions, yet do they not always make the estate [granted] by the deed to be conditional, but sometimes do serve for other purposes; for the word *proviso* hath divers operations besides; [depending on the intention of the parties, and the end they propose to accomplish;] for sometimes it doth serve for and work a qualification, or limitation, [as in the instance of a lease for 99 years, if *A.* should so long live; to *A.* for life, if she should so long remain unmarried, and the like;] and sometimes it doth serve to make and work a covenant only (11). And then only (being inserted amongst the covenants of the deed) it doth make the estate conditional, [*i. e.* subject to be defeated by a common law condition,] when there are these things in the case: 1. When the clause wherein it is, hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself; [*i. e.* when it is a distinct, divided clause, separate from the grant or limitation:] 2. When it is compulsory to the feoffee, donee, &c. [*viz.* is to defeat his estate:] 3. When it comes [in language or in effect] on the part, and by the words of the feoffor, donor, lessor, &c. 4. [So] when it is applied to the estate, [with an intention to defeat the estate,] and not to some other matter; as if one grant a manor with an advowson appendant, and after the *habendum* and reservation of rent, amongst the covenants, there is this clause inserted, "provided that the grantee *shall re-grant* the advowson for the life of the grantor," this is a good condition. [A more appropriate and affirmative example might have been selected. The example of the negative should have been given, *viz.* then a bond of the grantor for 100*l.* shall be void.] And thus it, [the same clause,] may be also a condition and a covenant, as if the words run thus: provided always, and the feoffee, &c. doth covenant, &c. that neither he nor his heirs shall do such an act, this is both a condition and a covenant: [*query.*] But if the clause have dependence on another clause of the

(11) See accordingly *Co. Lit.* 203 b. *Mo.* 337. 707. What shall be a condition, and not a covenant. *Bac. Abr. Condition* (G.) *Nels. Abr. Condition* (B.)

Covenant.

deed, or be the words of the feoffee, &c. to compel the feoffor to do something, then is it not a condition but a covenant only; as if there be in the deed, a covenant that the lessee shall scour the ditches, and then these words follow, "provided that the lessor shall carry away the earth;" or if there is a covenant that the lessee shall repair the houses, and then these words follow, "provided that the lessor do provide timber." So if this clause be applied to some other thing, and not to the thing granted, [without giving a right of re-entry on the lands which are granted,] then is it no condition; [but a condition might be grounded on an act to be done or omitted as to other lands, or the clause may be a mere regulation;] as if a lease of land be made, rendering rent at *B.* provided that if such a thing happen, it shall be paid at *C.*; this [proviso] doth not make the estate conditional, [it merely regulates to whom the payment shall be made.] Or a lease is made for years without impeachment of waste, *proviso quod non prosternet domus voluntarie*; in this case, howsoever this doth make [confer] the privilege [of exemption from waste, with a qualification,] yet doth it not make the estate conditional. Or

*P. 123.

a lease is made for years rendering rent, * provided that the lessor shall not distrain for the rent; in this case this is a good condition [respecting the rent,] but not annexed to the estate, [so as to render it defeasible. This is only an exclusion of the right to distrain: it is a restraint on the lessor, and not on the lessee.] So if in a deed of bargain and sale of land, after the *habendum*, there are these words, *viz.* upon these conditions following, *viz.* that if the vendor pay the vendee 20*l.* at Easter, and enfeoff him of a meadow called *S.* before Whitsuntide, that the bargain shall be void. Provided nevertheless that the bargainer shall hold the land for 20 years, without the let of the bargainee; it seems this provided, in this case, doth not make a condition; [it is an agreement that the bargainor shall have the occupation for 20 years: a mere contract concerning the possession; or may, if such be the intention, render the use future till the end of 20 years.] So if a lease be made of a house, and amongst the covenants these words are inserted, "provided

Dyer, 318.

27 H. 8 15. Bro. Condition, 7.

also, that if the lessor will dwell upon it, or keep it in his hands, then the lessee, his executors and assigns, doth covenant upon one year's warning to remove and give place to the lessor, this lease notwithstanding;" it seems this is no condition, but a covenant only. [a] If a lease be made, provided that if the rent be behind, without any more words; this is no good condition, [for want of a conclusion expressive of the intention.]

[a] Curia pasche 14 Jac. B. R. in the case of Muddy Garum. Co. super Lit. 204.

The word *si* also doth not always make a condition, for sometimes it makes [part of] a limitation; as when a lease is made for years, if *I. S.* shall live so long, [thus giving to the estate a collateral determination.]

Co. super Lit. 236, 237. Dect. & Stud. 128. Dyer, 138. Plow. 142. 7 H. 4. 22. Co. super Lit. 204. Co. 10. 42. Dyer, 318. Dect. & Stud. 34.

There are other words also, that in the king's grant, [and] in last wills and testaments, and [in] other special cases do make conditions, as *ea intentione, ad effectum, propositum, intentionem*, paying, and the like. So that if one devise his land to *I. S. ea intentione, &c.* that he shall pay to *W. S.* 10*l.* or paying, or so as he pay to *W. S.* 10*l.* or to sell, &c. these are good conditions (12). But these words regularly do not make a condition when they are used in deeds. And therefore if one make a feoffment in fee *ea intentione, ad effectum, &c.* that the feoffee shall do, or not do, such an act; these words [create a trust, and] do not make the estate conditional, but it is absolute notwithstanding. And yet perhaps these words, being conjoined with some others, may make a condition; as if lands be granted *ea intentione quod si defecerit, &c. tunc quod reintrabit*, or the like (13). [For by the concluding words, there is an express condition.]

Dect. & Stud. 94. Dyer, 6. 91. 63. 92.

Also conditions are sometimes made, especially in estates and leases for years, [for leases for years are considered only as contracts for the possession,] without any of these formal words, when the apparent intent of the lessor is to make the estate conditional; albeit the words be not used as

---

(12) *A.* devised lands to *B. paying* 40*l.* to *C.* it is a good condition; for *C.* has no other remedy, and a will ought to be expounded according to the intent of the devisor. *Vin. Abr. Condition* (I.) pl. 9. [And if the heir at law enters, it seems that he will be a trustee for the legatee. 1 *Atk.* 483; 1 *Ves.* 47. 423; to the extent of the legacy.]

(13) A condition may be annexed to a devise, as well as to any other conveyance. *Roll. Abr. Condition* (L.) See further by what words a condition may be created in a will, *Bac. Abr. Condition* (B.) and *Com. Dig. Devise* (N. 9.)

the words of the lessor, but as the words of the lessee, or indefinitely [and] of neither [in particular.] And therefore it hath been said, that if an indenture be made between *A.* and *B.* thus: it is agreed and covenanted between the parties aforesaid, that *B.* shall have the land for years, and that he shall not alien it; that this estate is conditional: but it seems this is not law (14). But if this clause be inserted amongst other covenants, *viz.* if the lessee hinder the lessor to fell, cut, and carry away the trees upon the lands demised, that the lessor may re-enter, and the lease shall be void; this is a good condition, and so it hath been adjudged in the case
*P. 124. * *Haward and Fulcher, Hil.* 3. *Car' B. R.* And if a lessee for years do covenant in his lease, that if he, his executors, or assigns, shall alien, that it shall be lawful for the lessor to re-enter; it seems this is a good condition, and not a covenant only (15). And if a lease for years be made, and this clause is inserted in the deed, it is agreed between the parties, that if the lessee do not pay 10*l.* to the lessor at Easter, from thenceforth the lease shall be void; this is a good condition. And if a lease be made with this clause inserted in the deed, it is agreed that whosoever shall have the estate or interest, that he or they shall find sureties within the year for the rent, otherwise the estate shall cease; it seems this is a good condition. And if a lease for years be made with this clause inserted, and that it shall not be lawful for the lessee to alien without licence of the lessor, under pain of forfeiture; this is a good condition. And if a lease for years be made of a house, with this clause inserted in the deed, and the lessee shall continually dwell in the same house upon pain of forfeiture of the said term; this is a good condition. And if in a lease for years the lessee covenant to pay so much rent, and then these words are inserted, and if it shall happen that the said yearly rent, &c. then the lessee doth covenant and

Dyer, 66. 65. Curia Mich. 37, 38 Eliz. B. R.

Dyer, 79. 27. Co. super Lit. 204.

Plow. 132.

(14) If lease be made to a man and his assigns for twenty-one years, provided that he shall not assign. The proviso being repugnant to the premises is void; but it would have been good, if the word *assigns* had been omitted. *Moor*, 881, cited in *Bac. Abr. Grants* (I.) [Or the restraint had been on assignment without consent].

(15) And the lessor may take it as a covenant or condition, but not as both. *Dals.* 8. *Bac. Abr. Condition* (G.)

grant, &c. that the lease shall be void; it seems this is a good condition, and so hath it been ever taken; as was said by *Just. Dodridge, Hil.* 3 *Car'.* And in all these cases the estate is conditional.

Co. super Lit. 204. Doct. & Stud. 94. Dyer, 65. 138.

But in cases of feoffments in fee, gifts in tail, and leases for life, it seems that words penned in this manner will not make conditions, but that in these cases the precise and formal words of a condition are requisite (16). And therefore if a feoffment be made by deed, and therein is inserted this clause, that it is agreed, or that the feoffee doth covenant, that if the feoffor do such an act, the feoffor shall re-enter; this is no condition, nor the estate hereby made conditional. And yet see *Perk. Sect.* 774.

Dyer, 348.

If one make a lease for years on condition to pay rent at four feasts, and after there is a clause in the deed, and if the rent shall be behind, &c. that he shall distrain; this clause doth not take away the condition, but the same doth continue, and the estate is conditional still, [giving to the lessor the option of defeating the estate; or of distraining, and by that means waving, *pro tempore*, the condition]. See more in the next section.

Co. super Lit. 204.

In the making of estates the cause is regarded. And in case of the grant of lands or tenements, *causa* doth sometimes make a condition, as if a woman give lands to a man and his heirs, *causa matrimonii prælocuti*; in this case, if she either marry not the man, or the man refuse to marry her, she shall have the land again to her and her heirs. But on the other side, if a man give land to a woman and to her heirs, *causa matrimonii prælocuti*, though he [do not] marry her, or the woman refuse, he shall not have the lands again to him and his heirs. [Equity would, it is apprehended, relieve]. And in the case of a grant [of a thing] executory, the word "*pro*" may make a

Co. super Lit. 204. Co. 10. 42. Plow. 141. 9 Ed. 4. 19. 15 Ed. 4. 2. Dyer, 6.

* condition. And therefore if a man grant me an annuity *pro una acra terræ*, or *pro decimis*, *&c.* or if he grant me an annuity for a way, or a gutter through my ground, this is conditional, and if he be disturbed in the way, acre of land, tithes, or

*P. 125.

(16) Words of *an express condition*, shall not ordinarily be construed as a *limitation*; but where an estate is to remain over for breach of a condition, which is by express words *a condition*, yet it ought to be intended as a limitation. *Per Holt*, 11 *Mod.* 61. *Page* and *Hayward.* 2 *Salk.* 570. S. C. [Because, as a condition, the clause would be inoperative and void.]

gutter, he may refuse to pay the annuity. So if an annuity be granted to an officer for the executing of his office; or *pro consilio impendendo*, if the grantee do not execute the office, or give counsel, &c. the annuity shall cease (17). [These are illustrations of the rule, *causa data non secuta*]. But if one grant me tithes, or an annuity, and I grant an annuity for these tithes, or grant to give counsel for the annuity; it seems the grants that are in this manner are not conditional, but absolute. [They are mutual grants]. So if I *pro consilio, &c.* or *pro una acra terræ, &c.* make a feoffment in fee, or lease for life of another acre, these estates are not conditional. [The language merely expresses the consideration or inducement of the grant. But mutual grants of exchange give estates, which are by construction of law, while the privity continues, conditional].

Testament.

And if one devise land to be sold by his executors, and to be distributed for his soul; by this [devise] it seems the estate or power of the executors is conditional. [This doctrine is not favoured, and perhaps is not law at this day]. So if one devise his land to find a preacher or a chaplain. [In modern practice the disposition of the courts is to treat these directions as trusts.] But otherwise it seems it is of land so conveyed by deed in a man's lifetime. And if a feoffment be made of land *ad erudiendum filium*; some have said this estate is conditional. [But the doctrine is at least questionable.]

Dyer, 7. 127. See Testament.

Plow. 141, 149.

Limitation.

The most apt and proper words to make a limitation of an estate, are *Quamdiu, dummodo, dum, quousque, si*, and such like. [*Prest. Est. ch. Life*]. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, until *B.* go to Rome; or until he be promoted to a benefice; or until *B.* pay to *A.* or *A.* pay to *B.* 20*l.*; [these examples, by reason of the word heirs, give determinable fees;] or so long as *I. S.* shall live; or if *A.* grant lands to *B.* to have and to hold to him, his executors, &c. if *I. S.* and

Co. super Lit. 234, 235. Co. 10. 42. Plow. 413. Lit. Sect. 90. Dyer, 290.

(17) Regularly, the word *pro*, does not import a condition, but when *the thing granted is executory*, and the consideration of the grant is a service, or some such thing for which there is no remedy, but stopping the thing granted; *as in the case of an annuity granted pro consilio, &c.* the word *pro* has the force of a condition, but not of a condition *precedent*; and therefore the performance thereof need not be averred when the annuity is demanded: but in the case of a personal contract, as, if I sell you my horse for 10*l.* it works by condition *precedent*, and you shall not take my horse, except you pay me 10*l.* *Per Hobart*, Ch. J. *Hob.* 41.

I. D. [*i. e.* both] shall live so long. Or if *A.* grant lands to *B.* to have and to hold to him for the life of *B.*, so that *B.* pay 20*l.* to *A.* at Easter following [*read*, so long as *B.* pay to *A.* 20*l.* yearly, at Easter;] these are not conditional, [*i. e.* words of condition to defeat the estate,] but limited to estates; [*viz.* measure the duration or quantity of estate. The example given in the text on the grant to *B.* is at least questionable]. So if *A.* grant lands to *B.* to have and to hold to him, for so long as he shall keep himself a widower, or *dum sola fuit*, or *durante viduitate*, if the grantee be a widow, these are good limited [or determinable] estates; but these words do not make the estates to be conditional (18); [*viz.* defeasible by condition, but determinable by limitation. See *Prest. Estates, ch. Fee; ch. Life.*]

Dyer, 135. Plow. 159. Perk. Sect. 740.

If the words in the close or conclusion of a condition be thus, That the land shall return to the feoffor, &c. or that he shall take it again, and turn it to his own profit: or that the land shall revert, or that the feoffor shall *recipere* the land; these are either of them good words in a condition to give a re-entry, as good as the word "*re-enter*"; and by these words the estate will be made conditional.

Co. super Lit. 233. 234. Co. 8. 44.

6. What shall be said a condition in law, and when an estate shall be subject to such a condition.

The tenant by the curtesy, the tenant in tail after the possibility of issue extinct, the tenant in dower, the tenant for life, the tenant for years, by statute, or elegit, guardian, &c. do hold their estates subject to a condition in law (19); so that if either of them alien [by feoffment, fine, or recovery, and without the concurrence of the owner of the inheritance. *Com. Dig. Forfeiture,*] his land in fee, or claim a greater estate in a court of record than his own [estate, *Com. Dig. Forfeiture,*] he doth forfeit his estate, and he in remainder or * reversion may enter; and if such a tenant do waste, he in reversion shall recover the place wasted (20), [and treble damages. In *Pelham's* case,

*P. 126.

(18) See accordingly *Co. Lit.* 42. a. 13 edit. and note 6. thereto.—Devise of lands by a testator to his wife *durante viduitate*, is not a bar of her dower. *Lawrence* v. *Lawrence*, *Dom. Proc.* 16th May 1717, [unless so expressed.]

(19) Which is distinguished from a condition in deed, it being that which is implied by law, without any express words in the deed. *Co. Lit.* 232 b.

(20) Waste is either *voluntary* or *actual*, as by pulling down a house; or it is *permissive*, as by suffering it to fall for want of necessary repairs, 2 *Inst.* 145. An action of waste lies against tenant by the curtesy, in dower, for life, &c. by him that hath the immediate

1 *Rep.* 146, it was held, that the recovery of a tenant for life who had a remote estate of inheritance was a forfeiture of his life estate. But in *Smith* v. *Clifford*, 1 *Term Rep.* 738, the court of King's Bench (absent *Kenyon*) arrived at a different conclusion]. The tenant in fee simple doth hold his estate subject to a condition in law; so that if he alien his land in mortmain, he doth forfeit it, and the lord may enter upon him. So also he that doth take land in exchange, doth hold it under a condition in law, *viz.* that if the land he give [gave] in exchange for that land be, [while the privity between the parties continues,] recovered from him that hath it, that he shall enter upon his own land again. [On the law, in this particular, see *chap. Exchange.*] Also every officer that hath to do in the administration of justice, all keepers of parks, stewards, beadles, bailiffs, and such like, hold their offices under a condition in law; so that if they do not duly execute it, [the office,] and do not all that thereunto doth appertain, they may forfeit them, and the grantor may put them out. *In quo quis delinquit in eo est de jure puniendus* (21). [*Com. Dig. Officer*, (K.) 2. 8. 11.]

7. What shall be said a good condition in deed or limitation, in its original creation; and what not.

To every good [express] condition is required an external form, *i. e.* [sufficient] words to declare an intent in the party to have the estate conditional, as in the cases before: and an internal form,

---

estate of inheritance, for waste, or destruction in houses, gardens, woods, trees, or in land, meadows, &c. to the disherison of him in reversion or remainder, *Co. Lit.* 53 a. The doctrine of waste, though very material, is but little explained in the *Touchstone*. It is not within the compass of a note to supply the deficiency, The editor will therefore content himself by referring the reader to some authors respecting waste, under the four following general heads, in order to facilitate his inquiry into any particular point of that doctrine.

1st. What shall be deemed waste, and its different kinds, *Co. Lit.* 53 a. 5 *Co.* 12. *Com. Dig. Waste* (D. 1.) 2 *Roll. Abr.* 814. 2 *Bl. Com.* 281. *Bac. Abr. Waste* (A.) *Observations upon estates for life, respecting waste*, octavo, printed for *Uriel*, 1777.

2d. Of what things, and in what manner, waste may be made. 5 *Co.* 12. 21. 7 *Co.* 15. *Vin. Abr. Waste* (C.) and (D.) *Bac. Abr. Waste* (C.)

3d. By whom, against whom, remedy may be had for it. *Co. Lit.* 285 a. 2 *Roll. Abr.* 824. 6 *Co.* 37 b. 11 *Co.* 49. *Wright's Ten.* 44. 2 *Inst.* 299. Stat. 6 *Ann.* c. 31. *Bac. Abr. Waste* (G.)(H.) 3 *Bl. Com.* 223. *Com. Dig. Waste* (C. 1) 1 *Vez.* 521. 2 *Atk.* 383.

4th. At what time, and in what manner, that remedy can be obtained. *Co. Lit.* 356 a. *Br. Abr. Waste* pl. 42. *F. N. B.* 59. 2 *Inst.* 146. 306. *Bac. Abr. Waste* (I.) *Vin. Abr. Waste* (M. 3.) (*L. a.*) In what cases *injunction* granted, *Vin. Abr. Waste* (R. a.) *Eq. Ca. Abr. Waste.* 1 *Vez.* 546. 2 *Atk.* 183.

(21) In like manner to all *franchises* there is a condition in law annexed, that they shall not be misused. *Mir. ch.* 5. § 4. 2 *Inst.* 223, *Com. Dig. Condition* (R.) What shall be deemed a breach of a condition in law, see in *Com. Dig. Condition* (S.)

i. e. such matter as whereof a condition may be made.

Perk. Sect. 717. Co. 1. 113. Plow. 133. Co. super Lit. 146. 217. Co. 2. 71.

1. *For the manner, frame, and order of making it.*

As to things executed, [and being of freehold,] the condition must be made and annexed to the estate at the time of the making of it; but as to things executory, [including leases for years,] it [the condition] may be made afterwards. [See *chap. Defeasance.*] And if the condition be made in another deed, and not the same deed wherein the estate is made, if it be delivered at the same time, it is as good as if it were contained in the same deed; [for *quæ incontinenti fiunt, in esse videntur*; and the several deeds are parts of the same assurance.] And therefore if a man make a feoffment, lease [for lives,] or the like, by one deed absolute, and at the same time make another deed of defeasance or condition, and deliver both together, this is a good condition, and will make the estate conditional. But if the defeasance be sealed and delivered before, or after the deed, [*viz.* not being parts of the same transaction,] *contra.* And therefore if one make an absolute feoffment in fee, and before or after the sealing or delivery of that deed, [*viz.* at a different time, or rather as a distinct transaction,] the feoffor declare himself by deed, or the feoffor and feoffee agree by deed, that the estate made before, or to be made after, shall be conditional, yet this is not conditional. [For if both instruments be parts of the same transaction, though they may not be delivered *uno flatu*, yet these deeds would, in all probability, be deemed parts of that transaction. In this instance the defeasance or deed, containing the condition, should be in such language as will admit of that construction, and not treat the feoffment as an entire, perfect and independent instrument. Hence also the usual form of indorsements: *Memorandum*, that before the execution of the within written indenture, &c.] And yet if an annuity be granted absolutely [in fee, for life, or for years, or a term of years in land,] by one deed, and after the grantee grant to the grantor, that if the grantor do such a thing, the annuity shall cease: in this case the annuity is conditional (22.) See *chap. Defeasance.*]

(22) Also rents, conditions, warranties, and such like, *inheritances executory*, may be fated by defeasance made either at that time, or at any time after—and so the law is of

A condition may, [at the creation thereof,] be annexed to an estate [arising] by way of use; as if a feoffment be made to *A.* to the use of *B.* and his heirs, on condition that *B.* shall pay to the feoffor 20*l.* such a day; this is a good condition. [Also to an use after its creation, and while it is executory; *sed query.*] So if one covenant to stand seised of lands to the use of *B.* and his heirs, on condition that if he pay him 10*l.* the use shall be void, or the like. Also a condition may be annexed to an estate created by will; as if one devise land to *I. S.* for his life, provided that he pay 10*l.* yearly to *I. D.*; this is a good condition. Whereof see in *Testament.* [So in uses and wills, there may be a clause operating as a condition to a prior estate and a limitation over; but these clauses are properly denominated conditional limitations, giving new estates, and operating as collateral determinations of the prior estates. Powers of leasing, &c. partake of the nature, and are in effect conditional limitations.]

Co. 146. Hil. 40. Jac. B. R. Warner's case. Co. 1. 112. Albanie's case. [Infra, ch. Defeasance, 2 Prest. Convey. 46.] Dyer, 126. 348.

A rent, or any such like thing may, [as its original creation, and as a modification of the estate; 1 *Prest. Estates*, p. 217;] be granted on condition, *P. 127. that * if such a thing be or be not done, the rent shall cease for a time, and then revive again, and this condition is good. But in case of land it is otherwise [at the common law,] for that cannot be granted after this manner. [The object was to avoid the abeyance or suspense of the freehold; 1 *Prest. Est. chap. Freehold.* The same rule applies to grants of rents, &c. already created. But the right, &c. to rents may be suspended by a defeasance; but this of course is a transaction, not between the present owner and his grantee, but between the owner and the person liable to answer the rent.] Also a condition, [at the common law,] to make an estate void for a part of the time, is not good. And therefore if a feoffment be on condition, that upon such a contingent the feoffor shall enter, and have the land for a time, [as distinguished from a right to enter and hold till, &c.;] or the estate shall be void for a part of the time; or make a lease for ten years, provided that upon such a contingent it

Co. 8. 17. 24 Ed. 3. 29.

Co. 1. 86. Perk. Sect. 718 Co. 4. 121. Dyer, 6.

statutes, recognizances, and other things executory. *Co. Lit.* 237 a. [So bonds, judgments, &c. may be defeasanced by a deed of a subsequent date; *infra, chap. Defeasance.*]

shall be void for five years; these conditions are not good. [The last example, as applied to years, is questionable. And in a conveyance to uses, an estate may be postponed, &c. by the introduction, through the medium of a power, springing use, &c. of a particular estate. The like may also be done, by limitations or powers, in a will.] And yet if a feoffment be made of two acres, provided that upon such a contingent the estate shall be void as to one acre only; this is a good condition (23).

Co. super Lit. 214. Doct. & Stud. 94. 159. 100. Co. super Lit. 379. Co. 1. 84. Dyer, 33. 21 H. 7. 11. Dyer, 4. Co. 8. 95.

A condition that a stranger, or the heir of the feoffor, shall do an act, is good; [*viz.* a condition may be so penned as to be operative on an act to be done by the heir of the feoffor, or by a stranger, as well as by the feoffor;] as if a feoffment be made to *I. S.* on condition that *I. D.* shall pay to the feoffor 10*l.* at Easter next; or if a feoffment be made on condition that if the heir of the feoffor pay 20*s.* to the feoffee, that the feoffor, [in one case,] and his heirs, [in the other case,] shall re-enter. But a condition to give a stranger a re-entry, [at the common law,] is void so far forth, [*omit*, so far forth.] And therefore if an estate be made, [at the common law,] upon condition, that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; howsoever this may be so drawn, as it may be a good condition to give him, his heirs, &c. that doth make the estate, an entry, yet it cannot be good to give the estate, or the entry, to the stranger. [It is otherwise in a will and conveyance to uses; but such clauses operate in these instruments as conditional limitations, and not as conditions.] So if a feoffment be made on condition that upon such a contingent the feoffor and a stranger shall enter; this is not good to give an entry to the stranger, but it is good to give [to] the feoffor a re-entry. And yet by will a man may devise a term after this manner. [So he may the inheritance, by way of executory devise. So in a will, even as to estates of freehold, and in limitations of use, a stranger may have an estate, by way of conditional limitation, giving a right of entry.]

Co. super Lit. 213.

If a man enfeoff another, upon condition that

(23) Feoffment of two acres *upon condition*, and that for breach he may re-enter in one; this is a good condition. *Vin. Abr. Condition* (N.)

he and his heirs shall render to a stranger and his heirs a yearly rent of 20*s*. &c. and if he fail of payment thereof, that the feoffor shall re-enter; albeit this [stipulation] as a reservation of rent is merely void, and the condition that doth call it a rent, [instead of an annual sum,] is merely mistaken, yet the condition is good, and *ut res valeat* the words shall be taken contrary to their proper sense; [*viz.* as a condition to enforce the payment of a yearly sum to the stranger and his heirs, and the condition shall give to the feoffor the right of entry, &c. unless the annual sum be paid. Thus an annual sum, not duly reserved as a rent, may be deemed an annual sum to be enforced by means of the condition. This annual sum is not a rent, nor (it is apprehended) an annuity, and the law does not seem to have given to it any denomination. There is not any remedy for it by the owner, except in equity. It is intailable as a tenement; and this is one of the many difficulties involved by this case.]

If I enfeoff *I. S.* of land on condition that if *I. D.* give to him 10*l.* or go to Rome before such a day, &c. that then the feoffee shall pay to me 10*l.* &c. [or, &c. concluding with words of condition;] this is a good condition. Perk. Sect. 798.

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor 10*l.* he [the feoffee] shall have the fee of the land; this is not a good condition, [for want of proper language of conclusion for the benefit of the feoffor.] But if he say further, and if he fail to pay, that the feoffor shall re-enter, this is [a] good [condition] (24). Co. super Lit. 207.

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter; this is a void condition, for when the issues fail, the estate is at an end; [for it is a general rule, that a condition to give a right of re-entry, on the determination of the estate by its limitation, is void; for such a condition cannot have any effect, since the party will be restored to his right of possession, &c. by the determination of the estate, by means Co. super Lit. 224.

(24) The addition of the subsequent words being material, as the feoffee had a fee-simple by the former words. *Co. Lit.* 207 b.

of the limitation; and a condition to defeat an estate already determined, is nugatory. 1 *Prest. on Estates*, p. 47.]

Maddy & Gardner's case. Adjudged pasche 14 Jac. B. R. Co. 6. 41.

* Conditions that are so penned, as that they are insensible and altogether incertain, are void: as if one make a lease on condition that if the rent be behind to restrain, and if there be not sufficient, the ground to enter into the premises; this condition is void for insensibility, [for the intention is presumable only, and not expressed;] and the estate is absolute. *Et sic de similibus.* *P. 128.

[The next section blends, and in some degree, and in many instances, confounds the learning which governs contingent remainders, with the learning on which the doctrine of estates to be enlarged on condition, depends. To the validity of a contingent remainder it is essential, that the remainder should be preceded by and be dependant on, and, as to the right to the possession, await the proper and regular determination of the prior particular estates, by which it is preceded and supported.

These rules flow from feudal principles; from the system of tenures; and an anxiety of the law to guard against the abeyance of the freehold; as the means of having a tenant to answer the actions of those persons who had adverse titles. 1 *Prest. on Estates*, p. 216. The doctrine, that estates may be enlarged on condition, is in many particulars founded on the same principles; but in two respects, at least, it is peculiar: 1. An estate of freehold may be granted to commence *in futuro*, or on an event, as in the examples of an estate for years to be enlarged, on condition, into an estate for life, in tail, or in fee: 2. A condition must, in general, defeat the estate *in toto*; while under this learning a person who has an estate in fee, for life, or in tail, may by the condition be deprived of this estate, and have an estate for years. But it does not appear that an estate in fee could, at the common law, be reduced to an estate in tail, or for life; and if the result of the investigation should be, that one estate of freehold cannot, by reduction or by substitution, be changed into another estate of freehold of inferior denomination, then the law may be accounted for on the ground, that leases for years were merely contracts for the possession; and it was consistent with the law of tenures, that

a term for years should arise from an executory contract, and that it might commence at a future period, or on an event. In this instance there were, in effect, two distinct grants: 1st. Of an estate for years, to arise on a condition or contingency; and, 2dly. An immediate grant of the freehold, subject to this executory grant of the term, and with a protection from extinguishment or virtual surrender by the nature and terms of the grant, and the declared intention of the parties.

The learning of estates to be enlarged on condition, probably suggested the notion of shifting uses, springing uses, and limitations by executory devise; and they who wish to study the general learning connected with the abeyance of the freehold, &c. may find it collected in 1 *Prest. on Estates*, p. 216.]

To enlarge an estate.

A condition, [more properly a limitation,] to enlarge or increase an estate may be good, as if a gift be made in tail, or a lease be made for life, or years, on condition, [or rather on a contingency by way of conditional limitation,] that if such an act be done, or not done, the lessee shall have the land to him and his heirs; as [*read*, or] if one make a lease for life to one, and if the lessor die without heir of his body, then he doth grant the land to the lessee and his heirs for ever (25); [being a contingent remainder in the lessee, and governed by the rules applicable to contingent remainders, rather than the learning of estates to be enlarged on condition:] or if land be granted to a man for five years, on condition that if the grantee pay to the grantor within the two first years 10*l.* then that he shall have the fee-simple, otherwise that he shall have the land but for five years, and livery of seisin be made according to the deed; this is a good condition, and by this [assurance] upon the performance of the condition the fee-simple will pass. [The fee-simple passes immediately, because livery is made; and the first gift is for years, and not of a freehold; and on failure, in performance of the condition, the fee-simple will cease, and an

Co. 8. 75. Plow. 477. 481. Lit. Sect. 350. Perk. Sect. 710. Plow. 135. 10 Ass. pl. 15. Perk. Sect. 745. 707. Plow. 25. Lit. Sect. 707. 350. Plow. 272. 482, 483. 4 H. 7. 4. See more in the Lord Stafford's case, Co. 8. 73.

(25) And such a grant will be good, as well of things which lie in grant, as of things which lie in livery, and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a great estate. *Fearne on Cont. Rem.* 203. [But such increase of estate, by force of such a condition, ought to have four incidents, for which see *Fearne on Cont. Rem.* 204.]

estate for years arise.] So if one grant land for five years rendering rent, and that if the lessee will hold it over to him and his heirs, that he shall pay 20*l.* rent; this is a good condition, and if he pay the rent, he shall have the fee-simple. [*Query*, for there is merely an implication, and not a grant of the fee.] So if a man make a lease for years, and at the same time, for the surety of the term to the lessee, makes a feoffment to him, upon condition that if he be disturbed in his term, he shall have the fee-simple of the land, and deliver both these deeds at one time, and give livery of seisin accordingly; this is a good condition, [and a grant of the fee *instanter*, contrary to the intention. In this case, on account of the livery of seisin, the fee-simple passes immediately. 1 *Inst.* 48 b. 217 a.] So if a lease for life be made upon condition, that if the lessor or his heirs pay to *B.* or his heirs 10*l.* at a certain day, that then the lessor may re-enter, and if he do not pay it at that time, and the lessee pay to the lessor or his heirs 10*l.* at a certain day, after the former day, that then the lessee shall have the land to him and his heirs for ever; this is a good condition, [*viz.* remainder on that contingency; and the grantee hath at first an estate for life, and afterwards the fee-simple, by way of contingent remainder.] But in all cases where these kind of conditions, [*viz.* conditional limitations,] are good, to make the increased estate [enlargement of a particular estate] good, there must be these things in the case. 1. There must be a precedent particular estate, as an estate in tail, for life, or years; for a foundation to erect the subsequent estate upon, and that first estate also must be certain and irrevocable, not upon contingency, or with power of revocation. [Why not? This point does not seem correct.] 2. The privity must, [as to cases of estates to be enlarged on condition, as distinguished from grants of contingent remainders,] remain until the time of the performance of the condition; for if the donee or lessee do grant away the first estate, the condition cannot afterwards be performed, to effect and produce the increasing estate. 3. The subsequent estate must vest *eo instanti*, when the contingency upon which the condition dependeth, shall happen, or never, [*viz.* or it will fail of effect. This rule also

applies to contingent remainders; but a mere right of entry, as distinguished from a right of action, will support a contingent remainder; so that a contingent remainder may become a right by entry, although there be a disseisin of the tenants of a particular estate. 1 *Fearne*, p. 316.] 4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time, for *quæ incontinenti fiunt inesse videntur*. [The general rule of the common law is, that no estate of freehold, in lands, or rents in *esse*, can be granted to vest *in futuro*, except by way of contingent remainder.] 5. The condition [contingency] upon which the increase is [to take place,] must
*P. 129. * be possible and lawful, for upon an impossible condition it cannot, and upon an unlawful condition it shall not, increase (26). [No gift on a contingency will be effectual unless the event arise; and if the event be impossible, no estate can arise; and the law, in order to avoid the temptation to crime, has provided, that a gift on an act which is illegal, *viz.* on murder committed, shall not be effectual, although the event may happen (27).

If one make a lease for life, provided that if the lessee die within sixty years, that his executors shall have the land for so many of the sixty years as shall be to come at the time of his death; this is no good condition [*read*, gift or limitation] to make the estate to increase, but it may be a covenant. [Why is not this a good grant for life, with a remainder over for years. See *Cranmer's case*, *Dyer*, 150 a; *Spark* v. *Spark*, *Cro. Eliz.* 341. In one of these cases the executors took by purchase; and in the other case, the interest limited to the executors, vested in the party. *Bac. Abr. Remainder*. In short this is a reversionary lease. Certain it is, there may be a lease of this descrip-

Co. 1. 155. Dyer, 150.

(26) The first four of these requisites, and the reasons for them, are mentioned in *Lord Stafford's case*, 8 *Co.*; and in *Fearne on Cont. Rem.* 204; but the 5th doth not appear to be specified in either of those books.

(27) [Indeed the deduction in the text is warranted by the general principles of law, for no estate can be limited to commence on an impossible event or on an unlawful act. Between a condition and a limitation there is this difference, a condition which stipulates for an impossible or an unlawful act is void, and the estate remains with the grantee absolutely; while a limitation to take effect on an impossible event or on an unlawful act is void, so that no estate ever arises: and these different constructions owe their origin to the same policy or principle, namely, the determination of the law to take away the inducement to crime or unlawful acts, &c. And see *infra*, p. 129].

tion, if made by formal words. From *Sparke's case, Cro. Eliz.* 341; *Dyer*, n. 150 a; it appears the objection against the operation of the clause as a lease was, that there was not any grantee or lessee; but this objection would not prevail at this day. And see *Bac. Abr. ch. Remainder*, 733; and *Dyer*, 150 a.] And if a lease for years be made, on condition that if the lessor sell the reversion of the same land, the lessee shall have the fee of it; this is no good condition to increase the estate, [because the sale must precede the effect of the contingency; therefore the condition or limitation stipulates for a right to the fee, after the grantor shall have done an act which determines his right to give effect to the grant, and an estate already determined does not admit of enlargement.] And a possibility cannot increase upon a possibility, [*i. e.* one estate, arising by grant in enlargement, cannot be enlarged by a new grant, so as to create three successive estates. 1st. An estate. 2dly. An estate, in enlargement of that estate. And, 3dly. An estate in enlargement of the enlarged estate;] as a lease for years, to a lease for life, by one contingent; and the lease for life to a fee-simple, by another. [Why not? The objection in effect is, that an estate limited in contingency will not admit of enlargement even after it is vested, *sed query*. At all events it is clear, that *A.* may be tenant for life, remainder to him in tail on one contingency, with remainder to him in fee on another contingency.] And if a lease be made to a man and a woman for their lives, on condition that which of them two shall first marry, that one shall have the fee, [namely, a remainder,] and they intermarry; in this case neither of them shall have the fee for incertainty [of the person in whom the fee may vest, since neither can show a title by priority of marriage, and therefore neither of them has any particular right, and consequently the grant faileth for want of a title in any person to claim. This is a contingent remainder. And a remainder to the survivor of several persons may fail of effect, because they are both lost in the same ship, and no evidence can, (as it did in *Broughton* v. *Randall, Cro. Eliz.* 503,) ascertain the survivor. This seems to be the solution of *Gen. Stanwix's case, Fearne's post. Works*, p. 38. *Mason* v. *Mason*,

[1 Inst. 54 b. 10 Vin. Abr. 352.]

Co. 1. 84.

Covenant.

Co. 8. 75.

Co. super Lit. 218.

1 *Mer.* 308. 1 *Inst.* 218. *Buller*, J. refused to try an issue on the fact of survivorship in a case like General Stanwix, depending merely on probabilities.]

To abridge an estate.

If a man make a lease for life, and add this condition, that if the lessee within one year do not pay 20*s.* that he shall have but a term of two years, and he do not pay the 20*s.* by this his lease for life is gone, and he hath now but a lease for two years, [as a new or distinct estate; therefore this is improperly called the abridgment of an estate. It is the cesser of one estate, and the grant of another estate.] Co. super Lit. 218. 50 Ed. 3. 27.

2. *For the matter and substance of it.*

If a lease be made, on condition that if a stranger dislike it, or be discontented with it, that the lease shall be void; this is a good condition: [it is a proper condition defeating an estate, and not a condition preceding the estate.] 1 H. 8. 13.

If a lease be made, on condition that if a lessee be outlawed, the lease shall be void; it seems this is a good condition. [So a lease may be avoided by a condition against assignment, bankruptcy, execution, &c.] Hil. 6 Jac. B. R. Curia.

Prerogative.

If a feoffment be made, on condition that if the feoffee commit treason, that the feoffor shall reenter; in this case the condition is vain, for if the feoffor enter, his entry is not lawful, for the king is entitled, and his title shall be preferred, [and this is a condition in fraud of the prerogative. Besides, it is a condition against the policy of the law, since it would take away the apprehension of forfeiture to the crown, by preserving the estate in the same family.] Trin. 3 E. 6. per Curiam.

Testament. Use.

No condition or limitation, be it by act executed, limitation of a use, or by devise, or last will, that doth contain in it matter repugnant, and tending to the utter subversion of the estate, [this latter branch of the sentence is too ambiguous to be retained,] or matter that is against law, or matter that is impossible to be done, is good. And therefore in all such cases, if the condition be subsequent, the estate [to which it was annexed] is absolute, and the condition void. And if the condition [*viz.* contingency] be to go before the estate, the estate and the condition both are void; [*i. e.* the gift or limitation is void, and no estate ever arises.] Co. 1. 83. 6. 43. Co. 9. 128.

Repugnant conditions.

If a feoffment or other conveyance [by deed or Co. super Lit. 223.

will] be made of land, or a grant of rent, &c. in fee-simple, by deed or will, upon condition that the feoffee or grantee shall not alien to certain persons, [or shall alien to a particular person, &c. *Lit.* § 361,] as to *I. S.* or to *I. S.* and *W. S.* this is a [6 East, 178.] good condition (28). So if one make a feoffment in fee of land, [or a devise,] on condition that the feoffee shall not alien it in mortmain; this is a [1 Inst. 223 b.] good condition (29), [because it promotes the policy of law.] So if *A.* be seised in fee of black acre, and *B.* doth enfeoff *A.* of white acre in fee, [or devise to him in fee,] on condition that he shall not alien black acre; this is a good condition, [because it does not restrain the alienation of the lands which are granted or given; it merely annexes the loss of white acre as a condition to the estate in black acre.] But if the condition be that the feoffee or grantee shall not alien the thing granted to any person whatsoever, or that if he do alien to any person, that he shall pay a fine to the feoffor, these [and the like] conditions are void in * the case of a common person, as repugnant to the estate (30), [since the condition takes away one of the incidents of ownership, namely, the right of alienation, a right which the policy of the law encourages.] But in case of the king, such conditions are good, [on account of the tenure of the king; since, in construction of law, the king is the donor, and has a possibility of reverter.] And in the cases of a common person also, the alienation is good until it be avoided by the feoffor. [By the common law no estate of freehold could be avoided without entry or claim. By a proviso of cesser annexed to an estate, arising under the learning of uses, an estate may *ipso facto* cease by the operation of a conditional limitation, a shifting use, &c.] Bragg and Tanner's case. And in *Pasc.* 19 *Jac. B. R.* it was held by Just. *Dodridge* and *Chamberlain*, that if a feoffment be on condition that if the feoffee alien, he shall pay 10*l.* to the feoffor, that this is a good condition;

To restrain alienation.

*P. 130.

Prerogative.

(28) And the grantee may be also restrained from alienating for a particular time. *Large's case*, 2 *Leon.* 82, and 3 *Leon.* 182. [Being a reasonable time; not trenching on the law against perpetuities.]

(29) Because such alienation is prohibited by law, and regularly, whatever is prohibited *by law*, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*; *Co. Lit.* 223 b.

(30) And the law is the same in a devise in fee, upon condition that the devisee shall not alien; or in any conveyance whereby a fee simple doth pass; *Co. Lit.* 223 a.

but Ch. Just. and Just. *Haughton* held the contrary, for then this shall be a circumvention of the law. If a gift had been made to an abbot, and his successors, on condition not to alien; this had been a good condition [on account of the reversionary right of the grantor; since he will be entitled to the land, by way of reverter, on the dissolution of the corporation. Even on a grant in fee to a corporation, and though the corporation may, unless restrained by condition, alien the fee-simple, yet on the dissolution of the corporation while owner, the reverter would be to the grantor or his heirs, instead of there being an escheat to the lord of the seigniory.] Doct. & Stud. 124.

If one make a feoffment of land to an infant, on condition he shall not alien to any person; this is a good condition during the minority of the infant, but not afterwards; [and *query* if it be a good condition during minority, unless there be that express qualification.] In like manner as if one make a feoffment to a husband and wife, on condition they shall not alien; [too general;] this condition to some intent is good, *i.e.* to restrain alienation by feoffment or deed, and to some intent repugnant and void, *i. e.* to restrain alienation by fine, for that is lawful. So if a gift be made in tail, on condition that the tenant in tail may alien for the profit of his issues; this is a good condition. And so if land be given in tail, upon condition that the tenant in tail or his heirs shall not alien in fee-simple, fee-tail, nor for the term of any others life, but for their own lives; this condition is good. [*Query*, when the condition restrains alienation generally, without prescribing the mode, as alienations which make a discontinuance; *Fearne*, 4th edit. p. 389.] But if lands be given in tail, on condition that the tenant in tail, or his heirs in tail shall not suffer a common recovery, levy a fine with proclamations according to the statutes of 4 *H.* 7. and 32 *H.* 8. to bar the issues; or on condition that he shall not make copyhold estates of copyhold land, according to the custom of the place, [*viz.* of the manor;] or make leases according to the statute of 32 *H.* 8. *ca.* 28. these conditions are held to be repugnant, and for that cause void (31.) And yet see, for Co. super Lit. 224. 10 H. 7. 11. 13 H. 7. 23. Co. 10. 30. Perk. Sect. 739. 21 H. 6. 33.

(31) See accordingly power to suffer a recovery cannot be restrained by condition, 1 *Burr.* 84. It was resolved in *Sonday's case*, 9 *Co.* 128, that no condition or limitation,

the last of these cases, the opinion in *Co. super Lit.* 223. to be contrary, and that a condition to restrain the making of such leases is good; for this power is not incident to the estate, but given to him collaterally by the statute, and *quilibet potest renunciare juri pro se introducto.* But *tota curia* in *Mary Portington*'s case is against him (32.) [Leases and customary grants by copy stand on the same footing; and as to copyhold grants, see *infra*, p. 131.] If a man make a gift in tail to *A.* the remainder to him and his heirs, on condition that he shall not alien; this condition as to the estate tail is good, and void as to the other. [*Query*; for it is apprehended the condition is discharged by the limitation over; since, if the condition might defeat the estate tail, it would necessarily defeat the remainder; see 1 *Fearne*, p. 373; 3 *Prest. Abstr.* p. 285.] And therefore if an alienation be, he shall defeat it only as to the estate tail. [This cannot be under a conveyance at the common law, since the remainder must fail when the particular estate fails.] And if a man make a gift in tail, on condition that the donee or his heirs shall not alien; this is a good condition to some intents, and void to other [intents]; and therefore if he make a feoffment in fee, or any other estate by which the reversion is discontinued tortiously, the donor shall enter; otherwise if he suffer a common recovery. [But see *supra.*] And a gift in tail, on condition that the tenant in tail shall not make a lease for his own life, is not a good condition, by *Co.* 6. 43, against *Co. super Lit.* 223. If one seised in fee of land, make a lease of it for years, or life, on condition that the lessee shall not alien the land leased, or any part thereof, during the term; or on * condition that he shall not alien it, *P. 131.

Dyer, 48. Co. 6. 43.
Co. super Lit. idem. Dyer, 227.
Co. 6. 43.
Co. 6. 43. 4. 84. super Lit. 223.

---

be it by act executed or by limitation of any use, or by a devise in a last will, can bar tenant in tail from aliening by a common recovery. See also *Foy* v. *Hinde*, *Cro. Jac.* 697; [and *Fearne* 183; *ante* 39. note 3. In the case of *Rudhall* v. *Milward*, *Sav.* 76, cited in *Gulliver* v. *Shackburgh*, *Ashby*, 4 *Burr.* 1935, upon a *devise to a younger son and the heirs of his body, upon condition that neither he nor any of the heirs of his body should alien or discontinue the lands*, it was held to be a *condition*; and a fine levied by him *with proclamations*, was held such a breach of the condition, as to entitle the heir of the testator to enter. This case, *Fearne* in his *Essay on Cont. Rem.* 3 edit. p. 313, observes, was in 38 *Eliz.* antecedent to the cases of *Sonday* and *Mary Portington*; and before the distinction between *a fine at common law* and *one by the statute*, in respect to the first being capable of being restrained by a condition annexed to an estate tail, and the latter not appears to have been taken.]

(32) 10 *Co.* 39 a.

or any part of it, during the term without licence of the lessor; these are good conditions, [on account of the privity, and the relation of lord and tenant.] So if one be seised in fee of a manor, and he make a lease of [*read*, for] years of it to *I. S.* on condition that he shall not make voluntary estates by copy; this is a good condition. But in a feoffment in fee such a condition is repugnant and void. [*Query*; as it is a partial, and not a general restraint.] And if one be possessed of a lease for years, or of a house, or of any other chattel real or personal, and he give or sell all his interest therein, [as distinguished from an underlease,] upon condition that the donee or vendee [generally, and not partially, and under due restraints,] shall not alien the same; this condition is void for repugnancy, and the gift or sale is absolute.

If one make a feoffment of land in fee, on condition that the feoffor shall retain the land for twenty years without interruption; it seems this is a good condition and not repugnant. [This is merely an agreement for the occupation of the feoffor, and not to defeat the estate, and therefore the stipulation is not repugnant to the estate.] Co. 2. 72. Dyer, 318.

If I grant land to another for life, if it shall please me so long to suffer him; it seems this condition is repugnant and void; [because it imports, under the qualification, to be only an estate at will, though the freehold is granted by the limitation. This is an insensible or repugnant qualification, to turn an estate of freehold into an estate at will.] Dyer, 94.

If a feoffment be made of land in fee, on condition that the feoffee shall not enjoy the land, or shall not take the profits of the land, or on condition that the heir of the feoffee shall not inherit the land, or on condition that the feoffee shall not do waste, or on condition that his wife shall not be endowed; in all these, and the like cases, the condition is void as repugnant to the estate. [The difference is between a condition to exclude the right of enjoyment generally, and a condition which stipulates for a permissive enjoyment of the feoffor for a limited time. The former stipulation is repugnant to the estate, and void; the latter stipulation is consistent with the estate, and good. A trust or use, properly framed, producing the effect of the intended condition, would be good.] Co. 10. 39. super Lit. 206. Plow. 77. 133. 21 H. 7. 8. 8 H. 7. 10. Perk. Sect. 731.

Co. 6. 41. 1. 84. super Lit. 224. If a gift in tail be made, on condition that the donee or his issues shall not take the profits of the land; or on condition that if the donee die, his estate shall go unto another; or on condition that their wives shall not be endowed; or on condition that they shall not do waste; or on condition that warranty and assets, or a collateral warranty, shall not bar the issues in tail; all these conditions are repugnant and void. [Dower is an inseparable incident to an estate of inheritance, and cannot be excluded by condition; but a condition may be added that a man shall not marry a particular woman, or which is, in effect, the same thing, that the estate shall determine if he marry a particular woman; and by these means a title of dower in her may be prevented; but a condition in restraint of marriage generally is void. It is against the policy of the law.]

Co. 1. 84. If lands be given or granted to two and their heirs, on condition that the survivor shall have the whole notwithstanding partition; or on condition that the survivor shall not have the whole albeit there be no severance; these conditions are repugnant [to the nature and quality of the estate] and void. [But a condition may be so penned as to give effect to the intent; as if either of them should alien during the life of the other, then the estate of the person so aliening should cease. But this condition would revest the estate in the grantor, and defeat the grant. For that reason it would be preferable to limit the estate so as to secure it to the survivor. The limitation might be in this form: to the two during their joint lives; to trustees during the same period to support contingent remainders; remainder to the survivor in fee. Frequently estates are limited to several persons jointly, with an intention to confer a right by survivorship. In general, this object would be accomplished with greater propriety by distinct limitations. For instance, if a grant, prior to the marriage, be made to a man and woman who are about to marry, for their lives and the life of the survivor, the husband may alien a moiety, or defeat the right of his wife as to that moiety. But if the limitation had been to him for life, remainder to the woman for life, or to the husband and wife during their joint lives, remainder to trustees during

the same period to support contingent remainders, remainder to the survivor for life, no alienation of the husband would prejudice the wife. It is observable also, that no alienation of the husband will prejudice the wife when they are tenants by intireties for life, in tail, or in fee.]

If one make a lease for life, on condition that the lessee shall not do fealty; this condition is not good. Perk. fol. 141.

If lands be given to one and the heirs males of his body, provided that if he die without heirs females of his body, that the donor shall re-enter; this condition is repugnant and void. [No repugnancy exists in this case.] Co. super Lit. 204.

If one have land in possession, or reversion, and he grant a rent out of it, on condition that the grant shall not charge the person of the grantor; this is a good condition, [or rather regulation or qualification,] and not repugnant. But if a man grant a bare annuity, or grant a rent-charge out of another man's land with such a condition; or if one grant a rent-charge, on condition that the grantee shall not [*viz.* neither] distrain, nor charge the person of the grantor; or if one grant a rent out of land, on condition that the land shall not be charged with it; all these conditions are repugnant and void, [as they would wholly defeat the grant.] So if two grant a rent-charge out of land, provided * that it shall not extend to one of them; this condition is repugnant and void; [but a condition that one of them should not be personally chargeable, would be good.] Co. super Lit. 146. 10 H. 7. 8. Co. 6. 41. 5 H. 7. 7. 7 H. 6. 44. Perk. Sect. 732.

*P 132.

If a man seised in fee of land make a lease for years rendering rent, and after the lessee makes a lease to the lessor of other land, on condition that he shall not distrain for his rent in the former lease made to this lessee; this is a good condition, [*read*, contract,] and not repugnant. [This is a mere stipulation not to exercise the right of distress.] Perk. Sect. 733

If one make a feoffment in fee, or lease for life, with warranty, on condition that the feoffee or lessee shall not vouch to warrant, nor recover in value; or if the lease be made without impeachment of waste, on condition that if the lessee do waste the lessor shall re-enter; these are good conditions, and not repugnant (33). [They are regulations Perk. Sect. 73 Dyer, 47.

(33) And in case of any repugnancy or inconsistency, the condition or limitation determine or avoid the whole of the estate to which it is annexed; and not determine

rather than conditions. Besides, in the first case, the grantee may have benefit of the warranty by rebutter; in the second instance, the grant merely protects the lessee from an action for waste; and the condition, or rather regulation, does not interfere with the grant. It gives a right of entry on all the parcels, instead of the place wasted.]

Co. super Lit. 223. 224. 207. Perk. Sect. 722, 723.

Conditions against law.

All conditions annexed to estates, being compulsory, to compel a man to do any thing that is in its nature good or indifferent; or being restrictive, to restrain or forbid the doing of any thing which, in its nature, is *malum in se*, as to kill a man, or the like; or *malum prohibitum*, being a thing forbidden by any statute, or the like; all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void (34). And therefore if lands be given or granted to a man, upon condition, [*i. e.* on a condition subsequent,] that he shall kill a man, or upon condition that he shall burn his neighbour's house, or upon condition that he shall forswear himself, or upon condition that he shall save and keep harmless the grantor whatsoever he shall do, or that if he do not these things, the grant shall be void; this condition is void (35). Or if lands be given or granted to an officer, upon condition that he shall not duly execute his office; this condition is against law, and void: *Et sic de similibus.* So if a gift be made in tail, upon condition that the donee shall discontinue; or [if] one give or grant land, on condition that the grantee shall be a forestaller against the

Perk. Sect. 727.

part only, and leave it good for the residue. See *Fearne on Cont. Rem.* 3d edit. 178; and further as to *repugnant conditions*, *Vin. Abr. Condition* (Z.) [As to conditions repugnant to the grant, *Vin. Abr. Condition* (A. a.)] *Bac. Abr. Condition* (L.) and *Com. Dig. Condition* (D. 4.)

(34) The law distinguisheth between a condition against law for the doing any act that is *malum in se*, and a condition against law that concerns not any thing that is *malum in se*, but is therefore *against law* because it is *repugnant to the estate*, or against some maxim or rule in law; when therefore it is said, that if the condition of the bond be against law, that the bond itself is void, it must be understood of a condition against law for the doing of some act that is *malum in se*; and yet therein also the law distinguishes; as if a man be bound upon condition that he shall kill *J. S.* the bond is void; but if a man makes a feoffment upon condition that he shall kill *J. S.* the estate is absolute and the condition void. *Co. Lit.* 206 b. See also *Carpenter* v. *Beer*, *Comberb. Rep.* 246.

(35) Condition to do any thing which amounts to *maintenance*, is void; as to save *A.* harmless from such appeal of robbery as *B.* hath against him; this condition is against law. 3 *Inst.* 4. 28. *Roll. Abr.* 417.

statutes; these and such like conditions are void. And hereupon it is, that conditions annexed to land, that the profits thereof shall be employed to superstitious uses, are void. And hence also it is that such conditions as are against the liberty of law, as that a man shall not marry, or the like, are void. [But a condition that a man shall or shall not marry a particular woman, or that he shall not marry a Scotch woman, is good. As to conditions, in restraint of marriage, see 4 *Burr.* p. 2055; and *Thomas, Co. Lit.* 2 vol. p. 19.] And hence also such as are against the public good. And therefore it seems if one grant his land to *I. S.* on condition that he (being a husbandman) shall not sow his arable land; this condition is void (36). [But a condition that he shall not sow the land with any particular grain, or that he shall lay it down to grass, would be a good condition]. And in all these cases if the condition be subsequent to the estate, the condition only is void, and the estate good and absolute; if the condition be precedent, [this, as frequently observed, is a limitation, not a condition,] the condition and estate both are void, for an estate can neither commence nor increase upon an unlawful condition. [Under conditions against law, may be added those which impose a general restraint on trade. *Thomas, Co. Lit.* 2 vol. p. 24. *Per* Lord C. J. *Parker.* "All these instances of conditions against law in a "proper sense, are reducible under one of these: "1st. Either to do something that is *malum in se*, or "*malum prohibitum.* 1 *Inst.* 206. 2nd. To omit "the doing of something that is a duty. *Palm.* "172; *Hob.* 12, *Norton* v. *Sims.* 3rd. To en- "courage such crimes and omissions. *Fitz.* tit. "*Oblig.* 13; *Bro.* tit. *Oblig.* 34; *Dyer*, 118. Such "conditions as these the law will always, and with- "out regard to circumstances, defeat, being con- "cerned to remove all temptations and inducements "to those crimes; and therefore, as in 1 *Inst.* 206,

Co. 1. 24. 6. 43.

Dyer, 343. Co. super Lit. 206.

Co. 11. 53. 7 Ed. 3. 65.

Perk. Sect. 722. 725.

(36) See more amply as to conditions *against law*, and therein, particularly as to bonds of resignation; the validity of these bonds, and the propriety of their being supported as matter of policy, was discussed in the case of *The Bishop of London* v. *Fytche*, *Dom. Pro.* May 1783. See *Cunningham's Law of Simony*, for this case at length; and *Bac. Ab. Simony*, (B.) and *Vin. Abr. Simony*, (F.); *Partridge* v. *Whiston*, Clerk, *Term Reports Trin.* 31 Geo. 3; what condition therein will make them void, and in what cases equity will grant a perpetual injunction against them, in *Bac. Abr. Condition* (K.) *Eq. Ca. Ab. Bonds* (C.) *Com. Dig. Condition* (D. 7.) *Vin. Abr. Condition* (Y.)

" a feoffment shall be absolute for an unlawful con-
" dition, and a bond void].

Co. 6. 41. super Lit. 207. 219. 206. Dyer, 252. 262. Plow. 152. Perk. Sect. 935. 789. Plow. 272. 286. Co. 1. 84. super Lit. 207.

Conditions impossible.

* All conditions annexed to estates, that contain in them matter at the time of making them impossible to be done, are void. And therefore if one give or grant land, on condition that a man shall go to Rome in three days, or on condition that a man shall enfeoff * a corporation, when there is none such; [at least the examples, in illustration of the doctrine, are to be reconciled with other and more obvious rules in law: namely, gifts to persons, &c. *tamque in esse*, are void for want of objects; the authority however is not relevant;] or if one give lands in tail, on condition that the estate shall cease, as if the tenant in tail be dead; [which is impossible, since there cannot be any person to take the estate tail, till the failure of the issue of the tenant in tail;] or if one grant lands, on condition that a man shall enfeoff his wife, [husband and wife being in intendment of law one person, a man cannot for that reason enfeoff his wife, though he may devise to her, or make a grant to uses or in trusts for her benefit;] all these and such like conditions are void. [A condition, specially penned, may provide for the enfeoffment of a corporation to be created; but, to be good, it must have reference to the corporation as one which is to be created, and not as to one which is in being. The doctrine of a possibility, on a possibility, may be doubted. *Cholmley's case*, 2 *Rep.* 17 a.] And in these cases also [of the text,] if the condition be subsequent, the condition is void only, and the estate is absolute; and if the condition be precedent, the condition and the estate both are void; for an estate can neither commence nor increase upon an impossible condition. And if the thing to be done by the condition, [being a condition subsequent,] be possible at the time of the making of the condition, and do afterwards by the act of God become impossible; the condition is become void, and the estate absolute (37); as if a feoffment be made, on condition that the feoffee shall, before Easter following, enfeoff the feoffor, and the feoffee die before the day; or on condition that the feoffee shall appear in such a court before or at Easter,

*P. 133.

(37) See accordingly the case of *Thomas* v. *Howel.* 4 *Mod.* 66. *Skin.* 301.

and he die before the time; in these cases the condition is gone, and the estate is absolute (38). [So if the condition become impossible by the act of the party, it is discharged if it be a condition subsequent; but in cases of conditions precedent, the grantor cannot, merely by his own act, as refusal to accept money tendered, prevent the estate from vesting: tender and refusal would be tantamount to payment.]

Limitation.

And the same law is for the most part of limitations, if they be repugnant, impossible, or against law, as is before showed to be of conditions; [with this difference, the limitation will not operate, or the estate arise, unless the event, on which it is to arise, shall happen]. See more in the next division following. Co. 6. 41. 1. 84.

8. *How a condition in deed, or a limitation, shall be taken and expounded. And how it must and ought to be performed.*

1. *In respect of persons.*

It is a general rule, that such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the law, are taken, [*viz.* construed or expounded,] strictly, and shall not be extended beyond their words, unless it be in some special cases (39). And therefore if a lease be made, on condition that if such a thing be not done, the lessor "without any words of heirs, executors, &c." shall re-enter and avoid it; in this case regularly the heir, executor, &c. shall not take advantage of this condition. So if one make a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, that he shall depart; in this case if the lessor die, his heir, executor, &c. shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them, [for it is merely personal]. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without the licence of the lessor; in this case the restraint shall continue only during the lives of the lessor and lessee, and no longer. And yet this rule hath Co. 8. 90. super Lit. 219. 27 H. 8. 14.

Not to alien.

Dyer, 66.

Co. super Lit. 219.

(38) When a condition consists of two parts in the disjunctive, and both are possible at the time of making the condition, and afterwards one of them becomes impossible by the act of God, a performance of the other is not compellable. 5 *Co.* 22 a. 3 *Mod.* 233. See further as to conditions *impossible*, in *Vin. Abr. Condition* (C. a.) *Bac. Abr. Condition* (M.) *Com. Dig. Condition* (D.)

(39) See accordingly 4 *Leon.* 241. Conditions, when they tend to defeat estates, are *stricti juris. Lit. Rep.* 128. *Roll. Rep.* 70. Conditions in restraint of marriage are odious and are therefore held to their utmost rigour and strictness, *per Ld. Mansfield*, 4 *Burr.* 2057. *Long* v. *Dennis.*

an exception; for if a man mortgage his land to *W.* upon condition that if the mortgagor and *I. S.* pay 20*s.* such a day to the mortgagee, that then he shall re-enter, and the mortgagor die before the day; in this case *I. S.* may pay the money and perform the condition. But otherwise it is while the mortgagor doth live, for in that time *I. S.* alone without him, may not tender it; and if he do, this tender is no performance of the condition. And in case where a condition doth tend to create [*viz.* doth require the creation of] an estate, there it shall have the most favourable exposition that may be. [This does not seem to be the ground: The true reason is, that conditions of this sort admit of being performed in substance, and they must be performed *cy pres*; *viz.* as near the intent as circumstances admit;] and therefore in that case, albeit the words be not satisfied, yet * if the intent be satisfied, it sufficeth (40). And therefore if one make a feoffment in fee, on condition that the feoffee shall make an estate back again in tail to the feoffor and his wife before such a day, and before that day the feoffor die; in this case the condition shall be performed as near to the intent as may be; and therefore [*read*, also] if the condition be, that he shall make the estate to them two, *habendum* to them and the heirs of their two bodies engendered, the remainder to the right heirs of the feoffor, the estate shall be made to the wife for life without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife. [As the wife was to be tenant in tail jointly with her husband, why should not the gift be made to her and her heirs of her body begotten by her deceased husband? so that she may be tenant in tail, and the issue of herself and her deceased husband may be inheritable under the intail. Perhaps, in the case supposed, the wife was to be tenant in tail *ex privisione viri*; and in that case, it seems reasonable that the wife should not have more than a life-estate, with a remainder to the heirs of the body as purchasers, as in the text of *Lit.* § 352.] And [*read*, so] if *A.* enfeoff *B.* on condition that *B.* shall make an estate in frankmarriage to *C.* with such a one the daughter of the feoffor; in this case, albeit an

To pay money.

Lit. sect. 352. Co. super Lit. 219. Co. 8. 60.

*P. 134.

To make an estate.

[Infra 136.]

(40) See accordingly, 10 *Mod.* 420.

estate in frankmarriage may not be made, yet an estate shall be made to them for their lives (41). *Et sic de similibus. Conditio beneficialis, quæ statum construit, benigne secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte secundum verborum proprietatem est accipienda.* [These propositions, though generally true, are not universally applicable. They are proper to estates, with a condition subsequent, distinguished from gifts, providing for the creation or limitation of estates; for words of conditional limitation must receive their true and genuine interpretation. The events which are described must happen, and cannot be compensated or satisfied by corresponding events, or equivalents, or compensations.]

2. *In respect of time.*

In all cases where a time is set, for the doing or performance of the matter contained in the condition, be it to pay money, make an estate, or the like, it must be done at the time agreed upon, and set down in the condition (42). And in cases where it is to be done before a time certain, it must be done before that time, or else the condition is broken. But in all cases where no time is set for the doing of the thing contained in the condition, be it to pay money, make an estate, or the like, if the act to be done, be to be done to the party that doth make the estate; or be to be done to him and a stranger, and be such a thing as is for the benefit of him that doth make the estate, and for his benefit only, there regularly the party that is to do the thing shall have time to do it during his life, unless the party, feoffor, &c. that doth make the first estate, whereunto the condition is annexed, doth hasten the doing thereof by request; for if he request the doing thereof and set no time, it must be done within a convenient time after that request; and if he request and prefix a time convenient when he doth desire to have it done, it must be done at that time; and in these cases the condition cannot be broken without a request, so long as he, to whom the estate upon condition is made, be living. [And in this case

Co. super Lit. 209. 208. 219. Co. 2. 79. 6. 31. Lit. 353. Plow. 30. Perk. Sect. 155. 779. 794. 787. 793. 789. 788. 38 Ed. 3. 11. Dyer, 311.

(41) See further how a condition shall be construed, *Com. Dig. Chancery* (2 Q); and by whom and to whom a condition is to be performed, *Bac. Abr. Condition* (P.) *Vin. Abr. Condition* (F. a.) (G. a.) *Com. Dig. Condition* (G.)

(42) If the condition be to pay money *at such a day*, it is sufficient if it be paid before the day, if the party accepts it, for that amounts to payment upon the day, *Co. Lit.* 212 b.

if he die, without having performed the condition, (except perhaps where the feoffment fixes a convenient time, and the feoffee dies before that time,) the condition is broken; but if a condition is to be performed by the feoffee on or before a certain day, and the feoffee die before that day, the condition will be discharged, and the estate become absolute.] And therefore in this case it is not like to a condition made by a will; for if one devise his land to *I. S.* so as he pay the 20*l.* to *I. D.* the testator doth owe him, and no time is set for the payment thereof; in this case he must pay it as soon as it is demanded, or he doth forfeit the land; and, [unless the right of entry be given to some other person by a valid conditional limitation,] the heir may enter. But if the thing to be done, be to be done to a stranger, and be for the profit and benefit of a stranger only; as if a feoffment be made, on condition that the feoffee shall marry the daughter of the feoffor (43); or on condition that the feoffee * shall enfeoff a stranger, and no time is set for the doing hereof; in these cases the feoffee shall not have time during his life to do it, but he must do it in a reasonable time, and that without any request at all, or else he doth break the condition (44). And in some special cases, when the act to be done is to be done to the party himself, [and a change of circumstances would be injurious to him, and defeat the object of the parties,] the party shall not have time to do it during his life; as if one grant land to *I. S.* on condition that he shall grant an advowson to the grantor for his life; or on condition that he shall grant a rent-charge to the grantor during his life, to be paid at Michaelmas and Lady-day; in these cases the grant of the advowson must be before the advowson fall, and the grant of the rent must be before either of the days of payment come, and that without request, else the condition is broken (45), [since otherwise the right of presentation in one case, and in the other case part of the rent would be lost.] And if the condition be, that if *I. S.* do

To pay money. Testament.

To marry *I. S.*

*P. 135.

To enfeoff.

To grant an advowson or a rent.

Perk. Sect. 9. 798.

(43) And he doth not when thereunto required, but continues to hold the lands, this is a deforcement which arises upon a breach of the condition. See 3 *Bl. Com.* 173.

(44) See accordingly *Bac. Abr. Condition*, pl. 26, and pl. 217.

(45) If a man grant an advowson, upon condition that the grantee shall re-grant the same to the grantor in tail, in this case if the church become void before the re-grant, or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight it was at the time of the grant. *Co. Lit.* 222 b.

To pay money. such an act, that then the feoffee shall pay 10*l.* to the feoffor, else that the feoffor shall re-enter, and no time is set when the feoffee must pay this 10*l.*; in this case it seems the payment must be as soon as the same act is done, and that without any request at all, [not merely on account of the word then, but in respect of the rule of law.] And in case where the feoffee, &c. or a stranger, be to do an act, and he alone is to do it, and it doth nothing concern the feoffor, &c. as to go to Rome, or the like, there the feoffee, &c. or stranger, shall have time during his life to do the thing, and it cannot be hastened by request. [All these cases flow from general principles of law established for defining the operation of deeds, when the deeds themselves are silent in the particular to which the rule applies; for when the deed defines the time, &c. the rule is, *expressio facit cessare tacitum.*] Co. super Lit. 209.

To make a lease. If lands be granted, on condition that the grantee shall make a lease for life of other lands to the grantor, the remainder to a stranger; in this case the feoffee shall have all the time of his life to do it, if he be not hastened by request. But if the condition be to make a gift in tail to a stranger, the remainder to the feoffor; in this case it must be done in time convenient without request; [because in one case the feoffor, and in the other case a stranger, is to have the first estate under the grant, and consequently the immediate benefit of the same grant; and, by delay, the stranger would be deprived of the intermediate rents.] Co. super Lit. 220. 222.

If the king licence his tenant to enfeoff *A.* and *B.* so as they give the land again to the feoffor, and the heirs males of his body, and he [*read, A.* and *B.*] make a feoffment accordingly; in this case it must be re-conveyed before the death of the feoffor, or else the condition is broken.

To enfeoff. If *A.* enfeoff *B.* of black acre, on condition that if *C.* enfeoff *B.* of white acre, *A.* shall re-enter [on black acre]; in this case *C.* shall have time to do this during his life, if *B.* do not hasten it by request. Co. super Lit. 208.

To get the good-will of *J. S.* If a lessee grant his estate to a stranger, on condition that the grantee do get the good-will of the lessor, and no time is set when he shall get his good-will; it seems in this case he shall have time to get his good-will during the term, and that although he deny it at the first, yet if he grant it afterwards that this is sufficient. Perk. Sect. 796.

Lit. Sect. 342. Co. super Lit. 213.

When a time is set in certain for the payment of money, or the doing of any other thing generally, neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certain, but no hour of the day is set down wherein the * same shall be done; in this case they must attend such a distance of time before the sun set, as may be convenient to do that work in; [consequently, the last part of the day is the time to attend for performing conditions. So in conditions for re-entry for non-payment of rent, &c. the rent must be demanded at sun-set on the last day. *Duppa* v. *Mayo*, 1 *Saund.* p. 282.] *P. 136.

And if the ancestor die in the last day of payment of rent and before payment of the rent, the rent will belong to the heir, and not to the executor]. And if the condition be to pay money at a place certain, at any time during life; in this case the money may not be tendered at any time in the place, in the absence of him that should receive it; but he that is to pay it must give notice to the other party beforehand, at what time he will tender it, that the other may be ready to receive it. Or if at any time the parties happen to meet at the place, a payment or tender then at that place is sufficient (46). And the same law is for the most part in [the performance of] conditions of obligations (47).

To pay money.

Obligation.

Co. super Lit. 210, 211. 213. Lit. Sect. 343. 345. Bro. Condition, 60.

3. *In respect of places.*

In cases where a place is set down for the doing of the thing contained in the condition, there it must always be done at that place, unless by some agreement made between the parties afterwards, another place be appointed; otherwise the condition is not performed, and the parties are not bound to attend in any other place (48). But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service, as to pay money, or any such like thing, the party that is to do it [the act] must, at his peril, seek out the person to whom it is to be done, if he be *infra regnum Angliæ*; but if he be not within the kingdom, he is not bound to seek him, and yet the

(46) See more fully as to the time of performance of a condition, *Vin. Abr. Condition* from (C. b.) to (M. b.) *Com. Dig. Condition* (G. 3.) *Bac. Abr. Condition* (P. 3.)

(47) See the chapter on obligations.

(48) Where a certain place is appointed for payment, the one party is not bound to pay, nor the other to accept payment, in any other place. 1 *Rol. Abr.* 444.

condition is, [by reason of the impossibility,] not
To pay money. broken. And if the thing to be done be either local, *i. e.* such a thing as must be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like; in this case the thing must be done at that very place, and a tender of doing it in that place is a sufficient performance of the condition: as for example, if a feoffment be made, on condition that the feoffee shall pay to the feoffor 20*l.* on Easter day at *Dale*, and the feoffee tender the 20*l.* the same day at *Sale*; and albeit the feoffor be at *Sale*, and he tender the 20*l.* to his person there the same day, yet this is no performance of the condition, [unless the money be accepted; for a tender at a place not appointed, or at any other period than the time fixed, is not a legal tender]. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is set for the payment thereof; in this case the mortgagor must seek the mortgagee and tender it to his person at his peril; and tender of the money upon the land mortgaged, is not a sufficient performance
To enfeoff. of the condition (49). And if a feoffment be

(49) The mortgagor, in order to perform the condition and make a sufficient tender, must be attentive likewise to the time and manner of making his tender: as to the *time*, if the payment is mentioned to be made on the day indefinitely, any convenient time before the last instant of the day is the uttermost time appointed by law. *Co. Lit.* 202 a. See also *Com. Dig. Condition* (G. 8.) with respect to the *manner* of making a legal and sufficient tender of the mortgage money, if the condition be (as it usually is) to pay *lawful money of Great Britain*, that is to be understood money coined by the king's authority, or foreign coin by proclamation made current within the realm; *Co. Lit.* 207 a; 5 *Co.* 114 b; and though it may be very inconvenient to a mortgagor to procure the whole sum in cash, yet he is to consider that banknotes are not strictly a legal tender, unless offered to be turned into money. *Eq. Ca. Abr. Mortgages* (D.) pl. 9. *Vin. Abr. Tender* (B.) The mortgagor may bring the money in purses or bags, without showing or telling it; it being incumbent on the mortgagee to put it out, and tell it. It also behoves the mortgagee to inspect the goodness of the money, for if there is any bad money in the bags, and the mortgagee accepts of it, the mortgagor is not bound to change it. 5 *Co.* 115. *Co. Lit.* 208 a. See further in *Vin. Abr. Tender* (E.) [It is apprehended this proposition is not law: for payment in bad money is not any payment, if the mortgagee is deceived as to the money, and can prove the deceit. By bad money, base money, not money short of weight, is to be understood. And fully as to the estate of mortgagor and mortgagee in the mortgaged premises, see *Pow. on Mortgages*, 301, and note to 1 *Inst.* 13th edit. 215 a. And in a late case in the K. B. Mr. J. *Buller* says, "this court has never yet determined that a tender in banknotes was, at all events, a good tender; but if they have been offered, and no objection has been made on that acocunt, this court has considered it to be a good tender." See *Wright* v. *Read*, 3 *Term Rep.* p. 554; in that case, Lord *Kenyon* C. J. declared, that banknotes are considered as money for many purposes; his lordship mentioned *Miller* v. *Trace*, 1 *Burr.* 452. According to that reporter, Lord *Mansfield* declared, that banknotes have acquired, by the general consent of mankind, the credit and currency of money, to all intents and purposes; and that they are as much money as guineas themselves are, or any current coin. The case in *Burr.* was not, however, a case of tender; and it is quite clear, that a tender of banknotes is not, in itself, a legal tender, if the creditor require to be paid in current coin.]

made, on condition that the feoffee shall enfeoff the feoffor of white acre in *Dale*; in this case the feoffment, or the tender of it must be in *Dale*, and cannot be elsewhere, and a tender of it there, is sufficient to perform the condition; [because the livery is, in intendment of law, to be made to the feoffee in person on the land]. So if the condition be, that the feoffee shall in Easter Term next acknowledge satisfaction upon a judgment in the King's Bench; this must be done there [in person, or, it is apprehended, by attorney,] and cannot be done elsewhere: [an acknowledgment on the record is the main point]. So if a feoffment in fee be made of white acre, rendering rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and * no place is set for the payment of it; in this case the feoffee is not bound to tender his rent anywhere for the saving of the condition, but upon the land, and a tender there is sufficient. And if a man make a feoffment in fee, without any reservation of rent precedent in the deed, on condition that the feoffee and his heirs shall render a yearly rent of 20*s.* a year to the feoffor and his heirs, and if they fail, that the feoffor shall re-enter; in this case also, it seems, the payment or tender must be upon the land. [And yet, this is a sum in gross; but the reason for the payment on the land is, that the parties have treated this yearly sum as a rent by giving to it that denomination]. But if the condition be, that he shall render 20*s.* a year to a stranger and his heirs; this is no rent, nor in the nature of a rent, and therefore in this case the feoffee must tender it to the person of the stranger where he can find him at the day, or else he doth break the condition; and tender upon the ground, [in the absence of the payee,] is not sufficient. But in these cases if the nature of the thing to be done be such as will not admit of such a carriage from place to place, to seek out the person of the feoffor, &c. there albeit the thing to be done be corporal or transient, and not a local thing, yet he that is to do it shall not be bound to seek out the person of the other: as for example, if an estate be made, on condition that the grantee shall deliver twenty quarters of wheat, or twenty loads of wood, to the grantor at such a time, and no place is set for the doing

To acknowledge satisfaction.

*P. 137.

To pay rent.

To deliver wood or corn.

thereof; in this case the grantee is not bound to carry the same about to seek the feoffor or grantor, as he is bound to carry money; but before the day, the grantee is to know of the grantor where he will appoint to receive it, and there it must be tendered. And the like law is for the most part in conditions of obligations.

Obligation.

A caveat.

It is best therefore in all these cases, (and herein he that is to be the agent is) to take care to have certainty of time and place set down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him (50).

4. *In respect of other matters.*

To pay money.

If a lease be made, on condition that the lessee shall pay to the lessor all such sums of money as the lessor shall lay out in such a business; in this case, the lessor must first tender to the lessee a note of the charges, before the lessee is bound to pay; and until this be done, the condition cannot be broken. And after a note is given also, he shall have some reasonable time to provide the money. And if he tender him a note of more than in truth he doth lay out, the lessee, if he know it, may pay so much as is laid out, and he may refuse to pay any more. Per Just. Bridgman.

To make an estate.

If lands be granted, upon condition that *A.* shall make an estate of lands at the charges of *B.*; in this case *A.* must do the first act, *viz.* notify to *B.* what assurance he will make, before *B.* is bound to tender the charges. Co. 5. 22.

To deliver household stuff, or pay money.

*P. 138.

If a feoffment be made, on condition that the feoffee shall give so much household stuff to the feoffor, or so much money for it as it shall * be rated at by two indifferent persons to this end to be chosen; it seems, in this case, the election of the two men must be by the feoffee; but if the words be, by two persons to be indifferently chosen, then the election shall be by both parties, for in the first case the word indifferent doth go to the [ap]praising, not to the persons; [*read*, doth apply to the persons as disinterested; and, in the second case, it applies to the mode of election.] Pasche 17. Jac. B. R.

To cleanse ditches.

If a feoffment be made of a ground, on condition that the feoffee shall rake the ditches; in this case if the feoffee do it once, it is a sufficient per- 27 H. 8. 1. Plow. Colthirst's case, 21.

(50) See further as to the performance of a condition at a certain place, in *Bac. Abr. Condition* (P. 4.) *Vin. Abr. Condition* (U. b.) *Com. Dig. Condition* (G. 9.)

formance of the condition. And yet if a man grant a house for life, on condition that the lessee shall dwell and be resident in the house during the said term; in this case it is not sufficient that he dwell in it once during the term, but [he] must do so all the term, or else the condition is broken. To dwell in the house.

Perk Sect. 804. If an annuity be granted of ten marks *per annum* to a man, on condition, or till he be promoted to a benefice by the grantor, and it is not said of what value the benefice shall be; in this case it shall be taken for a benefice of as great value, and of as good an estate as the annuity is; otherwise the grantee may refuse it, and yet his annuity shall continue. To give goods.

Perk. Sect. 742. If a feoffment be made, on condition that the feoffee shall give all his goods *si quæ fuerint*, or give all his pikes in his pond *si quæ fuerint*; in this case the words shall be taken in the present tense, for the goods and pikes that are at the time of the grant. But if a feoffment be on condition that the feoffee shall give all his goods in *London si quæ fuerint*, that did belong to *I. S.*; in this case the words shall be taken in the preterperfect tense.

Haward & Fulcher's case, Hil. 3 Car. B. R. If one make a lease of the manor of *Dale*, (wherein is a wood called *Dale-wood*,) excepting all the woods and underwoods growing in *Dale-wood*, and all the great trees growing elsewhere, and this is upon condition, that if the lessee shall disturb the lessor to cut and sell the wood and underwood excepted, the lease to be void; in this case it seems the condition shall extend only to the wood and underwood in *Dale-wood*, and not to the trees elsewhere. [The ground of this case is, that though the trees of all the manor are excepted, the condition is confined to the wood and underwood in *Dale-wood*, from the use, in contrast of the terms woods, underwoods, and timber.] But if the words of the condition be, "shall disturb, &c. to cut, &c. the wood and underwood on the premises," *contra*; [because the word premises extends the import beyond *Dale-wood*. This is a very refined distinction.] Not to disturb the lessor in taking the wood.

Dyer. 142. If one grant land, rendering rent at the feasts of S. Michael and Lady-day, or within a month after, on condition that if it be behind after the feasts and days limited by the space of eight To pay rent.

weeks, that the lease shall be void; in this case the eight weeks shall be accounted from the [end of the] month which is the twenty-eighth day after the feast, [and exclusively of that day.]

[Copulative.] If the condition be made in the copulative, and consist of divers parts, every part must be observed, or the condition will not be performed (51). 12 H. 7. 10. Co. super Lit. 225. Perk. Sect. 746 Dyer, 337. 372.

[Disjunctive.] But when it is made in the disjunctive, if any part of it be observed, it is a sufficient performance of the condition. And therefore if a feoffment be made, on condition to re-enfeoff and pay * 20*l.* and the feoffee do re-enfeoff, but not pay the 20*l.*; in this case the condition is broken. But if the condition be to re-enfeoff or pay 20*l.* and the feoffee do one of them, it is a good performance of the condition (52). And when it is made in the copulative and disjunctive both, it shall be taken in the disjunctive only: as, if a lease for years be made to *A.* and *B.* his wife, on condition, [*viz.* with a collateral limitation,] that the said *A.* and *B.* or any child between them shall so long live; this shall be taken in this sense if the husband, wife, or child, shall so long live; so that the lease shall not be determined by the death of the husband or wife alone (53). [Cases of this sort depend on the context.] If there be two provisoes in two several indentures of conveyance of several manors to *A.* and *B.* that if the feoffor pay or tender 20*s.* to *A.* and *B.* or the heirs of *A.* that the conveyance shall be void, and *A.* die; in this case tender to *B.* is not sufficient, and it must be made to the heir of *A.* and it must be 20*s.* for every proviso: but otherwise it is of a collateral act. [And if only one sum be paid, the tender will be void for uncertainty, unless application, or rather appropriation, be given to the tender, by showing in respect of which proviso it is made. See *Thomas Gresham's case*, 1 *Leo*, 89.]

*P. 139.

If the words of a condition be thus, that upon Co. 3. 64.

(51) But if such condition copulative is impossible to be performed, it shall be taken in the disjunctive. *Owen*, 52. As where the condition is, *that he and his executors* shall do such a thing, [*viz.* one act,] this is in the disjunctive, because he cannot have an executor in his lifetime. *Roll. Abr.* 444. *ante* 115.

(52) If *A.* obliges himself to pay to *B.* 10*l.* or so much as *J. S.* shall appoint; if *J. S.* will not appoint any sum to be paid, *A.* shall pay the 10*l.*; *Lutw.* 694. What shall be deemed a condition disjunctive, how it shall be performed, and when the performance shall be excused, see in *Com. Dig. Condition* (K.)

(53) See accordingly the case of *Baldwin* and *Cocks*, 1 *Leon*, 74. *Owen*. 52. S. C.

super Lit. 203. 204. Dyer, 6. 127. 11 H. 7. 21.

such a contingent the party shall enter and retain the land until the thing be done, &c. in this case, and by these words, the estate is not determined, as it is by these words, "that the estate shall be void, or that the grantor shall re-enter, or the like." And in these words there is a difference also to be observed; for if the words be, that upon such a contingent the estate shall cease and be void, and it be a lease for years to which the condition is annexed, the estate is *ipso facto* void without entry, or claim, and can never be affirmed afterwards. [But if the condition be for the benefit of the reversioner, then the lease will be void only if the reversioner choose to avail himself of the condition; for the lessee will not be allowed to profit by his own wrong, and discharge himself from the lease, against the will of the reversioner.] But if the words of the close of the condition be, that the feoffor, lessor, &c. shall re-enter, without any other words, albeit it be in a lease for years, yet the lease is not void until he hath made an actual re-entry; [or rather, declared his election to take advantage of the forfeiture.] But in both cases, if the estate to be avoided be an estate in fee, or for life, it is only voidable by the breach of the condition, and must be made void by entry, or claim; and, until this be done, the grantor can make no new estate of the land, [*Doe d. Freeman* v. *Bateman*, 2 *Barn. & Ald.* 170, so as to confer the right of entry or re-entry. *Co. Litt.* 214, a. And the right of re-entry will be waived by the acceptance of rent, &c. for any time subsequent to the period when the right of entry for the forfeiture accrues. But by a proviso in a conveyance to uses, the estate may be made to cease *ipso facto*, though the proviso be annexed to an estate of freehold. Also by a limitation, as during widowhood; or a collateral limitation, as to *B.* for ninety-nine years, if *B.* should so long live; the estate will *ipso facto* cease by marriage in the first instance, and by the death of *B.* in the second instance.] But, in the first case before, [in the text,] the party shall retain the land, and take the profits of it in the nature of a pledge, until the thing be done agreed upon in the condition, and then the other party shall have the land again. See more in the

next questions. And in *Obligation, numb.* 7. *Covenant, numb.* 6.

9. *When and how a condition or limitation shall be said to be performed; or not.*

1. *When the act is to be done between the parties themselves.*

The words of a condition may be performed, and not the intent; and the intent may be performed, and not the words; and then, for the most part, a condition is performed, when the intent and meaning of it is observed; [and the difference between conditions precedent, and conditions subsequent, must be kept in mind.] And therefore if a feoffment be made, on condition that the feoffee, or his heirs, shall make an estate to the feoffor and his wife in tail before such a day, and before the day the husband die, and then he make an estate as near it as he may, *viz.* to the wife for life, without impeachment of waste, and after to the heirs of the body of the husband; this is a good * performance of the condition. [See observations in p. 113.] And if the condition be, that the grantee shall make a feoffment of land; and he make a lease of the land first, and then a release to the lessee and his heirs; this is *tantamount*, [*i. e.* is, as far as respects the conveyance of the property, equal to a feoffment,] and a good performance of the condition (54), since it is a conveyance in fee; [but *query* if a lease and release would be sufficient, if the party required a feoffment to be made.]

Co. 8. 90. Lit. Sect. 352. Co. 3. 64. 282. 2 H. 4. 11.

To make an estate.

Co. super Lit. 207.

*P. 140.

[1 Inst. 207 a.]

To pay money.

If a feoffment be made, on condition that if the feoffor or his heirs pay 10*l.* by a day, the feoffment to be void, and the feoffor before the day doth commit treason and is executed, and so dieth without heir; and after, [and] before the day, the heir is restored, [in blood,] and he at the day doth pay the money; in this case this is a good performance, notwithstanding there was once a disability. So as if heretofore one had made a feoffment, on condition to re-enfeoff by a day, and before the day the feoffee had entered into religion, and then had been dearraigned, and at the day had made the feoffment; this had been a good performance of the condition. [And note the difference between a condition and

Co. super Lit. 222. Perk. Sect. 802, 803.

(54) If a man is bound in an obligation upon condition to enfeoff *J. S.* and he makes a lease for years and release to him in fee; he has performed the condition, although he has not performed the words. *Plow.* 7. It is well performed, because this in law amounts to a release. *Br. Abr. Condition*, pl. 158.

a limitation; for when once an estate determines under a limitation, it can never revive, though the event described may arise at a future period: as, a gift during such time as there shall be a continuance of the issue of *A.* the estate will determine by the temporary failure of issue, though there should be issue at a subsequent period. 1 *Prest. Estates*, p. 44. *Sed quære*, if at this day issue *en ventre sa mere*, be not considered as issue in being, for the purpose of continuing the estate; and therefore the more apt illustration may be made, by referring to a limitation so long as a man shall pay a sum of money, or a woman shall remain sole: in the former case, the estate will determine by a single failure in the payment; and, in the latter case, a marriage will determine the estate, though the woman become again, and immediately, sole by the death of her husband.]

Co. 5. 96. & super Lit. 208. 207.

If a feoffment be made, upon condition that if the feoffee shall pay to the feoffor 10*l.* such a day, that then he shall have the land to him and his heirs, otherwise that the feoffor shall re-enter; or if it be made, on condition that the feoffee shall pay 10*l.* to the feoffor such a day, and before the day the feoffee sell the land; in this case the seller or the buyer, either of them, may tender the money at the day, and this will be a good performance of the condition; for he that hath interest in the land on the one side, or in the condition as party or privy on the other side, may tender and perform the condition to save the estate.

By and to whom money shall be paid upon condition.

Lit. Sect. 534. 337. 18 H. 7. 2. Co. super Lit. 206.

If lands be mortgaged, or (which is all one) if a feoffment be made of lands, on condition that if the mortgagor or feoffor pay 10*l.* to the feoffee such a day, that then the estate shall be void, and before the day the mortgagor or feoffor die; in this case the heir or executor of the feoffor, the ordinary, the guardian in chivalry, or socage of the heir of the feoffor, or any other by either of their commandment precedent, or assent subsequent, may pay this money at the day; and payment or tender of it, by either of them at the day, is a good performance of the condition (55). † And so also it

Lit. Sect. 195.

Testament.

(55) Because they represent the person of their testator, &c. and have an interest in the land; and the feoffee has the same advantage if the payment be made by the heir, &c. as if it were by the feoffor himself. *Co. Lit.* 209. But if the money is not paid at the day, whereby the condition is lost, and the estate of the mortgagee becomes absolute at *law*, the

seems is the law upon a devise of land to *I. S.* paying to *I. D.* 20 *l.*; if *I. S.* die, his heir or executor may pay the 20 *l.* and this is a good performance of the condition. But in these cases, if a stranger, of his own head, without any such commandment or agreement, pay the 10 *l.*; this will be no good performance of the condition. And yet, perhaps, if the party that is to pay it be an idiot, [or infant,] the payment or tender by any one in his behalf shall be a good performance of the condition (56). And if a feoffment be made, on condition that if the feoffor pay 10 *l.* to the feoffee, that the estate shall be void, and no time is set for the payment of this money, and the feoffor die before any payment or tender made; in this case his heir cannot tender it and so perform the condition, [because the feoffee had only during his life to perform the condition; otherwise if a time had been fixed for the performance of the condition, and the feoffee had died before the time appointed, and the heir had paid within the time. Lit. Sect. 337.

*P. 141. * If a feoffment be made, on condition that if the feoffor and *I. S.* pay 10 *l.* such a day, the feoffment to be void, and the feoffor die before the day, Co. super Lit. 207. Bro. Condition, 109.

---

mortgagor is allowed in *equity* to redeem, on payment of the money due; and this is called his *equity of redemption*. The doctrine of redemption of estates in mortgage is very interesting and very extensive. The reader will find a full explanation of the nature of it, what persons are entitled to it, after what length of time, and in what manner, in *Bac. Abr.* tit. *Mortgage* (E.) *Com. Dig. Chancery* (4 A. 4.) *Vin. Abr. Mortgage* (Q.) The mortgagor, upon non-payment according to the condition, became irrelevant, except in a court of equity, until the statute of 7 Geo. 2, c. 20. That act recites, that in ejectments by mortgagees for the recovery of the mortgage lands, and in actions on the bonds given by the mortgagors to pay the money, *courts of law have not power to compel mortgagees to accept the principal and interest due to them, and costs*, or *to stay mortgagees from proceeding to judgment in such actions, but mortgagors must have recourse to a court of equity*, in which case courts of equity do not relieve till the hearing of the cause: For remedy thereof it is enacted, that in action on bond for payment of mortgage money, or in ejectments in any of the courts at *Westminster*, at sessions in *Wales*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, for the recovery of mortgaged lands, when there is no suit depending in equity for foreclosing thereof, if the person having right to redeem, and who shall become defendant in such action, shall, at any time pending such action, pay such mortgagee, or, in case of his refusal, bring into court all principal and interest due on the mortgage, and all costs; the monies paid to such mortgagee, or brought into court, shall be in full discharge of the mortgage, and the court may compel such mortgagee to re-convey the mortgage lands, and deliver up all deeds relating to the title thereof. And it also enacts, that in all suits in equity for foreclosure, *courts of equity*, upon application made by the defendant having a right to redeem, and upon admitting plaintiff's right, may, at any time before the cause be brought to hearing, make such decree therein, as they could have made in case such cause had been regularly brought to hearing.

(56) If the heir be an idiot of what age soever, any man may make the tender for him in respect of his absolute disability; and the law in this case is grounded upon charity, and in like cases. *Co. Lit.* 206 a. *Vin. Abr. Condition* (K. a.) pl. 10.

and *I. S.* alone pay it; this is a good performance of the condition.

Co. super Lit. 210. 5. 96. Dyer, 181. 101. Co. 6. 69. Lit. Sect. 339.

If a feoffment be made, on condition that the feoffor pay to the feoffee or his heirs 10*l.* such a day, and before the day, the feoffee doth grant the land away to another; in this case the money may be paid to the feoffee himself, or if he be dead to his heirs, and this payment is a good performance of the condition (57), [because it is paid agreeably to the terms of the deed.] And if the words of the condition be, "that if he pay to the feoffee, his heirs or assigns, &c." in this case, payment to either of them is a good performance of the condition; so as if in this case the feoffee make a feoffment over, it is in the election of the first feoffor to pay the money to the first or second feoffee, and if the first feoffee die, to pay it to his heir or [to] the second feoffee. But payment to an executor or administrator in this case is not a good performance. [But as to mortgage debts, equity requires the money to be paid to the personal representatives. When the money to be paid is not mortgage money, the heir will be entitled to retain it to his own use. There are cases in which equity would consider the money so paid, as liable to be invested in the purchase of real estate, for the benefit of persons entitled under a strict settlement.] And yet, if the words of the condition be, that if he pay to the feoffee, without the words "heirs, executors, &c." 10*l.* such a day, in this case the payment [on the day] may be made to the executor or administrator of the feoffee after his death, and such a payment is a sufficient performance of the condition; [and, in this instance, a payment to the heir would not be a performance of the condition;] and if the words of the condition be, that if the feoffor pay to the feoffee, his heirs, executors or administrators, &c. in this case payment to either of them is a good performance of the condition, [since the words of the condition give the option of the person to whom the payment shall be made.] But payment to an assignee in this case is not good (58). And if the words be,

(57) And in such case the money shall not be paid to the executors. 5 *Co.* 96 b.

(58) If the words of the condition are, to pay the *feoffee*, his executors, or assigns, and the feoffee make his sons his executors, and dies, and administration is committed during

that if he pay to the feoffee and his heirs, &c. in this case payment to his executors, or to his assigns is not a good performance of the condition. [In *Goodale* v. *Wyett*, *Cro. Eliz.* 383, *Gawdy* seems to have thought that the payment should be to the assignee.] So that in all these cases, it seems, that as to the person to whom payment is to be made, the words of the condition are precisely to be pursued.

To tender money.

If a feoffment be made, on condition that if the feoffor shall tender 12*d.* to the feoffee such a day, the feoffment to be void, and afterwards the feoffee is disseised of the land, and after the feoffor doth tender the 12*d.* to the feoffee at the day; this is a good performance of the condition, [and entitles him to re-enter.] Pas. 9. Jac. 5. Sir Richard Lee's case.

To re-enfeoff.

If a feoffment be made to two men, on condition that they shall re-enfeoff the feoffor, or make a lease to him by a day, and before the day one of them die, and the survivor doth re-enfeoff, or make the lease; this is a good performance of the condition. And so also it seems the law is, if both the feoffees be living, [and one of them make a feoffment of a moiety, and the first feoffor accept the feoffment]; for by his [the feoffor's] own acceptance, it seems, he hath dispensed with the condition, and so cannot enter for the breach of it; [and as the condition was entire, it is discharged as to both moieties.] Dyer, 69. 41 E. 3. 25.

If a feoffment be made, on condition that the feoffee shall enfeoff the feoffor of the manor of *Dale* by such a time, and before the time appointed the feoffee doth grant a rent-charge out of the manor to a stranger, and then at the time appointed makes a * feoffment of the manor according to the condition; in this case this is a good performance of the condition. [It is apprehended not. See 1 *Inst.* p. 208, a.] But if in this case the feoffee, before the time appointed, grant away to a stranger twenty acres parcel of the manor, and then doth make a feoffment of the manor according to the condition; this is no good performance of the condition. And if a feoffment be made, on condition that the feoffees or lessees, in trust of such Plow. 23. 3 H. 7. 4. 21 H. 6. 101.

*P. 142.

their minority, the safest way is to pay the money to the executors or one of them, the administrator being but a bailiff to them. 3 *Leon.* 103. [*Query*, for the administrator *durante minore ætate* is the personal representative for the time being.]

land, shall grant an annuity out of it, and some of them only do grant this annuity; this is no good performance of the condition.

44 E. 3. 22. If there be a feoffment made, upon condition that the feoffee shall make a lease of land to the feoffor for life, the remainder to *I. S.* in fee, and the feoffee make a lease to the feoffor for life, and after by another deed doth grant the reversion to *I. S.* this is a good performance of the condition. [And yet the tenure is varied; for the tenant for life, would have held of the superior lord, in case the fee had been granted by way of remainder; while under a grant of the estate for life, reserving the reversion, he holds of the reversioner.] To make a lease.

Perk. Sect. 807, 808. 21 H. 6. 28. Dyer, 15. If a feoffment be made, upon condition that the feoffee shall purchase lands or tenements to the value of 20 *l. per annum*, and he purchase a rent, common, or any such like thing, to that value; this is a good performance of the condition: [for a rent, and also a common, is a tenement, at least within the statute *de donis.*] But if, in this case, the feoffee and another purchase so much land together jointly; this is no good performance of the condition; [for though joint-tenants are seized *per my et per tout*, yet the purchase in contemplation was a purchase by the feoffee solely.] So if the feoffee alone purchase lands to the value of 20 *l. per annum*, and there is a rent issuing out of it, which must be deducted; this is no good performance: [for the rent is a reprize or deduction from the value.] And yet, in these cases, if the stranger joint-tenant release to the feoffee all his right in the land, or the grantee of the rent release to him the rent before the time of the performing of the condition, the condition is well performed in both cases; [because, in effect, he has now solely purchased lands of the given value.] *Tantum valet terra quantum vendi potest.* And if one make a feoffment in fee, on condition that if the feoffee purchase land to the value of 20*s.* the feoffment shall be void, and after the feoffee disseise another man of land to that value; it is said, that by this the condition is performed. *Sed quere*, [it is apprehended this is not a good performance.] And if he recover so much land in value in an action; that this is no performance of To purchase lands.

Perk. Sect. 812.

Payment.

the condition. *Sed quere*; for this seems to me a better performance of the condition than the former. [Lands recovered are not considered as lands purchased, at least by the mere act of the recovery. But a disseisin of land is sometimes called a purchase, though not with accuracy. It is so far a purchase, that the disseisor becomes the stock of the family to regulate the course of descent; and to this intent, he is called the purchasing ancestor, or first purchaser.]

To pay money. Tender.

If lands be granted, on condition to pay money, and the money is tendered according to the condition, but either nobody is ready to receive it, or it is refused; this is a good performance of the condition. And after a man hath once refused the money, so tendered to him according to the condition, [and declaration of a refusal to accept money, if tendered, dispenses with the necessity of a tender; see *B. N. P.* p. 156; 3 *Term. Rep.* 684;] he hath no remedy in law to recover it, except it be money lent upon mortgage; [see *B. N. P.* p. 166; or due for a subsisting demand. The difference seems to be where there is a debt, a tender is merely an answer to damages for the detention. And the party must plead *tout temps prist (semper paratus)*, and a right to damages may arise from a subsequent demand and refusal to pay; but where there is not any debt, a tender and refusal discharges the duty; but *query*, if equity would not relieve.] [a] And if the payment be made part of it with counterfeit coin, and the party accept it and put it up; this is a good payment, and consequently a good performance of the condition. [*Query*, though it may be a good payment, as to the performance of the condition, it should seem the party may be relieved either by an action of *deceit*, or an implied *assumpsit* that the money was good, or by a bill in equity.] [b] And if at the day of payment the parties do account together, and he to whom the money is to be paid being indebted to the other, that debt by [*] agreement is allowed, and the residue is paid and accepted; this, [as between the parties,] is a good performance of the condition; [but, as against a principal, &c. a payment, and not merely an allowance on account, must be made to the broker, agent, &c. not being a factor. *Baring* v. *Currie*, 2 *Barn. & Ald.* 137.] [c] So if the party, that

Dyer, 181. Lit Sect. 334. 335. 338. Co. super Lit. 209.

[a] Terms of the law. tit. coin.

[b] Co. super Lit. 212. Fitz. Barre, 343.

Acceptance.

*P. 143.

[c] Co. super Lit. 212.

is to receive it, accept and take new security by bond or statute for the money; this is a good performance of the condition. [4] And so in most cases, when by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way; this is a good performance of the condition (59). *Volenti non fit injuria.* But if the thing to be done, be to be done to a stranger, and one that is no party to the condition, and it be done in any other manner, and he accept thereof; this is no performance of the condition; [and therefore a payment *pro forma*, or a covenous payment, or an allowance in account, will not be a performance of a condition, so as to prejudice a stranger. *Goodale* v. *Wyet*, *Cro. Eliz.* 383; *Doe & Martin*, 4 *Term Rep.* p. 39.] And so also if the time of doing the thing be past, as if one make a feoffment to me, on condition that if he pay me 10*l.* such a day, the feoffment shall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heir and me, he doth pay me the 10*l.* and I receive and accept it, and thereupon I suffer him to enter and hold the land; in this case the condition is not performed, but I may enter upon him and oust him notwithstanding. [Therefore, in cases of this sort, either a new conveyance, a release, or a confirmation, should be taken, according to the circumstances. In cases of this description equity has jurisdiction.]

[4] Dyer, 45. Co. 5. 96.

Perk. Sect. 392.

Adjudged Mich. 40 & 41 Eliz. B. R. Powel versus Bartholomew.

If the mortgagor pay the money according to the condition, and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed, and the mortgage discharged notwithstanding. [But, as against strangers, a payment *pro forma*, or a covenous payment, is as no payment, and the condition will not be performed, as already noticed.]

Co. 5. 96. super Lit. 209.

If a feoffment be made to *I. S.* on condition that if the feoffor pay to the executors or administrators of *I. S.* 10*l.* the feoffment shall be void, and *I. S.* die, and the 10*l.* are paid to the executors of *I. S.* according to the condition, but it is covenously done, *i. e.* there is a private agreement, that the feoffor shall have all, or part of his money again; this payment, in this case, is no good performance

(59) See accordingly *Goodale* v. *Wyet*, *Cro Eliz* 283. *Moor* 708.

of the condition; but that payment that must be a performance of a condition, in this case, to fetch lands out of the hands of an heir, must be real, full and effectual. [4 *Term. Rep.* p. 39.]

To get the good-will of *I. S.*

If a lease be made, on condition that the lessee shall get the good-will of *I. S.* and the lessor doth come to *I. S.* first, and ask his good-will, and he deny it him, and after, when the lessee doth ask it, he doth grant it him; in this case the condition is performed. So if the condition be, that he shall get his good-will by such a day, and at the first being desired he denied it, but afterwards and before the day he doth grant it; [because he obtain his good-will before the appointed day.] And yet if no day be set, and he desire his good will, and *I. S.* denieth it, and afterwards, he doth get his good-will; it seems this is no performance of the condition, [because the condition was once broken.] 14 H. 8. 17.

If there be two things in the copulative to be done by the condition, both must be done, otherwise the condition will not be performed; [unless one of them becomes impossible by the act of God, or by the act or default of the other party, not being a stranger.] Perk. Sect. 746. See before.

2. *When the act is to be done by a stranger. To pay money.*
*P. 144.

If a feoffment be made, on condition that if the feoffor and *I. S.* * pay 10*l.* at Michaelmas, the feoffment shall be void, and before the day the feoffor die, and *I. S.* pay the money; this is a good performance of the condition. But if the feoffor be living, *contra.* [*Query*, whether one may not pay in the names and on the behalf of both; and whether a payment, by one generally, would not be deemed a payment by both.] Co. super Lit. 219.

3. *When the act is to be done to a stranger. To make an estate.*

If a feoffment be made, on condition to make an estate to a stranger by a day, and before the day he die; in this case, if an estate be made as near the condition as may be, it is sufficient. [An executory devise was to take effect, on payment by *C.* of a given sum of money, within three months after the death of *A.*: payment by the heir of *C.* was deemed a performance of the terms of the limitation. *Marks* v. *Marks*; *Str.* 129.] Plow. 133. Co. 3. 64.

† Tender.

† If a feoffment be made to *I. S.* on condition that he shall enfeoff *I. D.* [being a stranger,] and his heirs; and *I. S.* doth tender the feoffment to Co. super Lit. 209. 19 H. 6. 67. Perk Sect. 815, 816.

2 E. 4. 2. 19 H. 6. 67.

I. D. and he doth refuse to take it; this is no performance of the condition in this case. But if it be to be done to the feoffor himself, *contra.* [For in the case of a stranger, the party takes on himself to do the act, and the condition will operate, unless the act be done. The true ground of the case seems to be, that the nature of the contract requires that the feoffor should have the land again, unless *I. D.* would accept it. No intention existed that it should remain with the feoffee.] And so also it is, if the condition be to make an estate tail, or any lesser estate to a stranger, and he tender it, and the stranger refuse it; this is no good performance of the condition. And if a feoffment be made, on condition to re-enfeoff the feoffor and his wife in tail, the remainder to *W.* in fee, and he tender it to the wife only, and not to him in remainder; this is no good performance of the condition (60).

And the same law, for the most part, is in conditions of obligations. See more in *Obligations, numb.* 9.

10. *What act shall be a breach of a condition in deed: and when a condition in deed shall be said to be broken; or not.*

Co. super Lit. 222. Dyer, 45, 46.

If a feoffment be made, on condition that the feoffee shall not enfeoff *I. S.* of the land, and the feoffee doth make a feoffment to *I. S.* and *I. D.*; this is a breach of the condition, [for he hath enfeoffed *I. S.*] And so also it is, if the feoffee make a feoffment to *I. D.* to the intent that he shall alien to *I. S. Quando aliquid prohibetur fieri directo prohibetur & per obliquum.* And yet if the feoffee, in the case before, alien to *I. D.* and after he [*I. D.*] doth [of his own accord] alien to *I. S.* this is no breach of the condition. And if the condition be, that the feoffee shall not enfeoff *I. S.* and he die, and his heir enfeoff *I. S.* this is no breach of the condition, [for the restraint was personal to *I. S.*]

Not to alien.

Dyer, 45. 65.

If a lease for years be made, on condition that the lessee shall not assign, or alien, the term, or the land, during his life, without the licence of the lessor, and the lessee doth give it by his will without licence; this is a breach of the condition, and forfeiture of the estate. But if he make an executor of his will only, this is no breach; [for there is not any alienation, but merely a devolution

(60) See more amply by whom, and to whom, a condition is to be performed, in the references in a note to page 131. See further *Marks* v. *Marks, Str.* 129. *Vin. Abr. Conditions* (K. a.) (L. a.)

by act of law. Or, it should seem, if the same person be *legatee* and *executor*. *Lord Windsor* v. *Barry*, note to *Dyer*, 45 b. *sed query*; and see *Moor*, p. 351, *contra*.] And if the condition be, that the lessee shall not alien, and he die, and his executor alien, this is no breach of the condition, [for the condition is not extended to the executor.] And if the condition be, that the lessee shall not alien but to his children, and the lessee by will devise it to his executors; it seems this is a breach of the condition. So if he devise that *A*. his son, shall have his term after his wife, and doth make *A*. his son, his executor; it seems this is a breach of the condition. But if he do not make *A*. his executor, *contra*. [For in one case there is impliedly a bequest to the wife; in the other case there is not any. See *Essay on Est.* vol. 1, p. 195. So if I devise to my heir, after the death of my wife, the wife will have an estate for life, by implication; otherwise if the devise be to a stranger after the death of my wife.] And in cases of devise, albeit the executors do not assent, yet the condition is broken; as in case where a reversion is granted, on condition that the grantee shall not alien it, and he doth alien it, but no attornment is to this grant; yet it seems this * is a breach of the condition, [for he has aliened as far as it was in his power. But if the conveyance was defective, for want of some essential circumstance; then, as there is not any alienation, there would not be any breach of the condition. On this point, see *Testament*, and *Constructive Revocations*.] And if a lease for years be made, on condition that the lessee or his assigns shall not alien, and the lessee doth make his wife his executrix, and she doth take another husband, and he doth alien it; it seems this is a breach of the condition, and a forfeiture of the estate. But if a lease be made, on condition that the lessee shall not alien without the licence of the lessor, [so as to be personal to him,] and after the lessor die and the lessee assign, or the lessee die and his executors, or administrators, assign; this is no breach of the condition in either of these cases (61), [for the

Per 3 Justices. B. R. 3 Jac.

*P. 145.

Dyer, 6.

(61) And if the condition be not to alien the land, nor any part thereof, and the lessee aliens part with the lessor's assent, he may afterwards alien the residue without his assent; the whole condition being gone, for it cannot be divided. *Roll. Abr.* 471. See further *Com. Dig. Condition* (Q.)

restraint was personal to the lessee and lessor, and is determined.] So if a lease be made, on condition that the lessee shall not alien the term during his life, and he makes an executor, but doth not devise it to him; this is no breach of the condition. [See p. 144.] And if a lease be made, on condition that the lessee, his executors, or assigns, shall not alien the term to any persons without the licence of the lessor, but to the wife, or one of the children of the lessee, and the lessee die, and his executors alien to one of the children of the lessee, and he alien to a stranger, without licence; this is no breach of the condition (62). [The opinion of *Dyer*, &c. in the note, seems most reasonable, since the condition is extended in terms to the assigns; and the son is an assignee.] And if one make a lease of a house and land, on condition that the lessee shall not parcel out the land or any part of it from the house, and the lessee doth grant all his term in the house and part of the land, and doth keep the rest, and after doth lease that part also; this is a breach of the condition; [for the object of the condition, and therefore the construction, is, that the house and land should be held together, and should not be separated by alienation or reservation.]

Dyer, 152a. Co. 4. 120.

[5 Taunt. 254. 14 Ves. 174.]

Hil. 38 El. Marsh v. Curtis.

Co. 8. 92. If a lease be made of a house, on condition that the lessee shall not suffer any woman great with child to harbour or lodge in the house six days after notice given by the lessor, and the lessee do suffer any such person after notice given, albeit the lessor consent to it; yet the condition is broken; [but equity might relieve.] But if the lessor do *nolens volens* keep such a woman there against the mind of the lessee; this is no breach of the condition; [since this is the act of the lessor, and not of the lessee; and the lessor cannot take advantage of his own wrong.]

Not to suffer a woman with child in the house.

12 H. 4. 5. Bro. Condition, 40. If a lease be made, on condition that if any waste be done the lessor shall re-enter; in this case, if the house fall by a tempest, this is no breach of the condition, for this is not waste; but if it [the

Not to do waste.

(62) In *Dyer*, 152 a. *Brooke*, *Brown*, and *Dyer* held, that by the grant to one of the sons, the restraint was not determined, and that the son could not grant over to a stranger without licence; but *Stamford* and *Catline*, *contra*. See further the case of *Thornhill and Adams* v. *King and Wife*, *Cro. Eliz.* 757.

her, so that the feoffee cannot perform the condition; in these cases the condition is not broken; [for these acts of the feoffor are a dispensation with the condition. It would be otherwise in case the act were done by a stranger.]

To employ the profits to charitable uses.

If one make an estate of lands (held in *capite*,) on condition that he to whom it is made, shall employ the profits thereof to divers charitable uses, and he die, his heir within age, by reason whereof the king hath the land during the minority of the *P. 147. * heir, so that the profits cannot be employed; this is no breach of the condition; [for the law is the cause of the disappointment, and this preference of the lord was incidental to the tenure, and *actus legis nemini facit injuriam.*] Trin. 13 Jac. Slade v. Tompson. B. R.

To re-enfeoff.

If one make a feoffment of land, on condition to re-enfeoff in convenient time, and the feoffee doth not so, but doth make a lease to another; this is a double breach of the condition. And the same law is of a devise by will in this manner. Co. 1. in Porter's case.

To make an estate.

If a feoffment be made, upon condition that the feoffee shall make some estate to the feoffor, or some other, by a day, and the feoffee before the day, say to him to whom the estate is to be made, that he will never make the estate, and notwithstanding he doth make the estate before the day, according to the condition; in this case it is said the condition is broken. *Sed query* of this, for it seems if he really deny it before, and actually perform it at the day, that this is a good performance of the condition. [And there seems to be a difference between this case and that in which a party is to tender money or make a feoffment: there, a declaration that the party will not accept the money or the feoffment, may dispense with the necessity of making the tender; in other cases the maxim is, *quod factum est non quod dictum est, respicitur.*] As if a lease be made of a house, on condition that the lessee shall not disturb the lessor in the taking away of his goods out of the house, and when the party doth come or send to fetch them, the lessee doth only forbid them; this in this case is no breach of the condition, [see *Dougl.* 27;] and it was agreed in this case, that words, (without some deed, as shutting the door against them, forcible resistance, or laying of hands upon them, or the like,) are no breach of such a condition. And if a Perk. Sect. 796. Co. 8. 90. See the parable Mat. 21. 28.

To suffer one to take his goods.

3 H. 4. 8.

lease be made, on condition that the lessor shall be four times a year in the house demised, without being ousted by the lessee, and the lessee seeing him coming doth shut the door or windows against him; this hath been thought to be no breach of this condition. To suffer one to come into a house.

Dyer, 38. If a lease be made, on condition that the lessee shall pay yearly to the lessor, during the term, 10*l.*; in this case if he fail of payment once, the condition is broken, and [the] estate forfeit. So if one make a feoffment in fee of land, on condition to pay 10*l.* yearly to *I. S.* if he fail once the condition is broken. [But if the condition be only to re-enter, this condition may be dispensed with by acceptance of rent, for a time subsequent to the breach of the condition. *Cowper's Rep.* 243. 803.] To pay a yearly rent or sum.

Penner versus Glover. 37 & 38 El. Mic. B. R. per curiam. If a lease be made of a manor in which are divers copyholders, on condition that the lessee shall not molest, vex, or put out any copyholder, paying his duties and services; in this case if the lessee enter upon, and put out any one copyholder, this is a breach of the condition. But if he enter *vi et armis* upon a copyholder's tenements, and there beat him only, or the like; this is no breach of the condition; [for the molestation, &c. are referrible to the enjoyment of the land by the copyholders; not to the persons of the copyholders.] Not to molest copyholders.

Crompt. Jus. 64, 65. If there be a condition to pay rent, and the lessee let part of the land to other undertenants; or let all the land to another for part of the time; and he undertake the rent still, and fail of payment; in this case the condition is broken, and the estate forfeit; [and the estate of the undertenants will be defeated, because their title is subject to the condition. It is otherwise when the tenant surrenders, or his estate merges, or he forfeits by alienation, under the rules of law which annex an implied condition to a particular estate.] But if there be any covin and practice in the case, between the first lessor and the lessee, the undertenants may perhaps have relief in equity (64). To pay rent. Equity.

(64) Covins, frauds, and deceits, for which there is no remedy by the ordinary course of law, are properly cognizable in equity; and matters of fraud were one of the chief branches to which the jurisdiction of chancery was originally confined. 4 *Inst.* 84. *Bac. Abr. Fraud* (B). Equity will give relief, though it is agreed that no relief shall be prayed in equity. 1 *Mod.* 305. See fully in what cases relief may be had in equity. *Com Dig. Chancery* (3 F.) *Vin. Abr. Chancery* (N.) 2 *Atk.* 306. 1 *Vez.* 95. 126. 387.

Not to disturb. If one make a lease for years of land, and then also, [*viz.* at the same time] make a feoffment in fee of the lands, on condition that if the lessee *P. 148. be * disturbed in his term that he shall have the fee simple, and he is disturbed by the feoffor or by his means; in this case the condition is broken, and the lessee shall have the fee simple; [or rather the contingency, on which the grant is to operate, hath arisen. If the lessee was the feoffee, the fee must have passed *instanter*.] But if the disturbance be by a stranger, and not by the feoffor, or by his means or consent; this is no breach of the condition; [for by disturbance, is to be understood a disturbance by the feoffor or his heirs.] Co. 8. 90.

Not to be outlawed. If a lease be made, on condition that the lessee shall not be outlawed, and he is outlawed without proclamation; it seems this is no breach of the condition, because the outlawry is not good. Per 2 Justices. H. 7 Jac. B. R.

[Possible in part.] If a condition possible at the time of creation, become after impossible in part, by the act of God, and the party do not perform that which is possible, the condition is broken (65). Lit. Sect. 356. Co. 2. 59.

If a man make a lease for years on condition, and the lessee doth not know of it, and after the lessor doth by will give the land to the lessee without condition, and the lessee doth such an act as is a breach of the condition; in this case the condition is not broken, for the lessee must have notice of the condition ere he can break it; [*i. e.* he must agree to the estate before there can be a merger of his prior estate; or more correctly, by disagreeing to the estate given by the will, that estate never vests in him. If the estate vest, the donee must at his peril take notice of the condition; *Lady Ann Fry's case*, 1 *Mod.* p. 86; with the exception, that if an estate be devised to the heir, subject to a condition, and he enter as heir, he must have notice of the condition before there can be a forfeiture; *Frances' case*, 8 *Rep.* p. 92. This rule does not extend to conditional limitations, with or without notice; *Lady Ann Fry's case*, 1 *Mod.* p. 86; though equity may relieve, if there be a fraudulent concealment.] Co. 8. 90.

To pay rent. If a lease be made rendering rent, on condition that if the rent be not paid within twenty days, the Doct. & Stud. 13 H. 4. 17.

(65) See *ante*, 130, note 2.

lessor shall re-enter, and the rent is not paid; in this case the condition is broken, but the lessor cannot enter until he hath made a legal demand, [and it must be demanded on the twentieth day, unless there be a power to re-enter on or at any time after the twentieth day. And therefore it is advisable that the condition should run, that it shall be lawful for the lessor, his heirs, &c. to re-enter, if the rent shall be in arrear for days; and the same should be lawfully demanded on or at any time after the expiration of the said days; and not paid when demanded,] and if he die before he do it, his heir shall never take advantage of that breach, but it is discharged for ever (66); [for the right of re-entry, for a condition broken, is personal to the individual to whom it accrues, since it merely confers an option; and no person, except the individual to whom the right of entry accrues, can elect to take advantage of a condition.]

Lit. Sect. 353. Plow. 30. When an act is to be done in time convenient, or otherwise, and the party do it not by the time appointed by law; the condition is broken.

21 Ed. 3. 7. 8 H. 6. 24. Dyer, 369. If one grant an annuity *pro consilio impenso & impendendo*, and the grantor require advice, and the grantee refuse or neglect to give it; this is a breach of the condition, and a forfeiture of the estate. [This condition is implied by law; its principle is the *causa data non secuta* of the civilians.] And if the deed be, that he shall go to such a place to give counsel, and he require him to go thither, and he refuse it, this is a forfeiture of the estate. But if he refuse to go with him to another place, or give counsel to his adversary, being not required to give counsel to him, this is no breach of the condition, nor forfeiture of his annuity. To give advice.

Lit. Sect. 383. And if one had heretofore devised his land to be

(66) There is a material difference between a remedy by *re-entry*, and a remedy by *distress*, for the non-payment of rent. For where the remedy is by way of *re-entry* for non-payment, there must be an *actual demand* made *previous* to the entry, otherwise it is *tortious*; because a condition of re-entry is in *derogation* of the *grant*; and the estate at law, being once defeated, is not to be restored by any subsequent payment; and it is presumed, the tenant is resident on the land, to pay the rent, and preserve his estate; and therefore unless there be a *demand* made, and the tenant appears not to be on the land ready to pay his rent, the law will not allow the lessor the benefit of *re-entry* to defeat the tenant's estate, without a wilful default in him, which cannot appear without a *demand* hath *actually* been made upon the land. See further as to *demand* of rent, and in what cases necessary, *Gilb. on Rents*, 73. and *Bac. Abr. Condition* (O. 2.)

sold by his executors, and to have been distributed for his soul, and the executors had not sold it in time convenient, or had taken the profits to their own use; this had been a breach of the condition (67). [In modern times there is a trust, and not a condition.] See more in the last foregoing division, and in *Obligation, numb.* 10. *Covenant, numb.* 7. The same law is for the most part of conditions of obligations. See *Obligation, numb.* 10.

11. *When a condition in law shall be said to be broken; or not.* Forfeiture.

Every particular estate hath a condition in law annexed to it: and therefore if tenant for life, in dower, by the courtesy, or in tail after possibility of issue extinct, lessee for years, tenant by statute merchant, elegit, or the like, make any absolute or conditional estate of the lands they hold, in fee simple, fee tail, or for life, and give livery of seisin thereupon; or levy a fine *sur conusance de droit*; or suffer a recovery of the land, * or the like; this is a breach of the condition in law, and a forfeiture of their estate (68). [The fine must be to the conusee generally, or for a larger estate than the cognizor has; for a fine *come ceo* may limit a particular estate; and if the particular estate be warranted by the ownership of the cognizor, there will not be any forfeiture. According to *Pelham's case*, 1 *Co.* p. 146, there will be a forfeiture, though the tenant for life has a remote estate of inheritance. But in *Doe d. Smith* v. *Clifford*, 1 *Term Rep.* 738, the court of B. R. decided differently. From the decisions, it is clear that a feoffment or fine will, under similar circumstances, be a forfeiture. If one tenant for life make, and another tenant for life accept, a feoffment or fine, importing to pass a larger estate than they can rightfully convey, such fine or feoffment will be a forfeiture of both their estates.] Also if any such tenant (except tenant in tail after possibility of issue extinct) (69), do waste in the lands they do

Co. 2. 15. 8. 44. super Lit. 233.

*P. 149.

(67) See further as to what will be deemed a breach of a condition in deed, *Bac. Abr. Condition* (O.) *Vin. Abr.* (C. c.) *Com. Dig. Condition* (M.)

(68) The condition annexed by law being, that they shall not attempt to create a greater estate, than they are themselves entitled to. 2 *Bl. Com.* 153. *Co. Lit.* 215. Tenant for life, or in dower, &c. may not cut down timber, or do other waste; if they do, an action of waste lies against them by the person that hath the *immediate inheritance*. What shall be deemed waste, by whom committed, and how and by whom it shall be remedied, see in *Co. Lit.* 53. 2 *Bl. Com.* 122.

(69) For although by the possibility of issue being extinct and gone, he is become in effect, as to the duration of his estate, only tenant for life, yet, having by the original creation

so hold; this is a breach of the condition in law, and a forfeiture of their estate in so much as [*viz.* to the extent of the place in which] the waste is committed (70). But if an infant, or feme covert, that hath such an estate, shall make any such estate, &c. this is no breach of the condition in law. And yet if such a person do waste, this is a breach of the condition in law. And so also, if any such person be an officer, and do any thing which is a cause of forfeiture in another; this will be a forfeiture in him or her also. [But the estates of undertenants are not involved by this forfeiture in law, although they are subject to express conditions.]

Infant.
Woman covert.

Co. super Lit. 223.

If any keeper of a park, without warrant, kill any deer, fell or cut any wood, and convert it to his own use, pull down the lodge, or any house within the park, used for hay for the deer, or the like; this is a breach of the condition in law. So also, if a keeper shall not look to the game, but the deer be killed by his default, and damage come to the lord; by this [act] also the condition is broken. But the not attending upon such an office for two or three days, if the lord have no special loss thereby, is not cause of forfeiture.

Co. super Lit. 234.

Offices that are for the administration of justice, or of clerkship in any court of record, or concerning the king's treasure, revenue, account, alnage, auditorship, &c. have also conditions in law annexed to them; and therefore if such officers shall sell their offices or misdemean themselves in their offices, by this [sale or misdemeanor] the condition in law may be broken, and they may forfeit them (71).

Lit. Sect. 347. Plow. 175. Co. 3. 2. 347. 5. 56. Dyer, 131. Co. super Lit. 214, 215. Doct. & Stud. 93. Perk. Sect. 830, 831. 833. 835. Plow. 488, 489.

12. *Who may enter for a condition broken; and what persons shall take advantage of a condition or a limitation; and what not.*

As no man may create or annex a condition, [as distinguished from a conditional limitation,] to an estate, but he that doth create the estate itself; [while in assignments of terms, &c. a condition may be annexed to the assignment; *Doe d. Freeman* v. *Bateman*, 2 *Barn. & Ald.* 168; and a defeasance or condition may be annexed to a term of years already created, without any assignment of the term: being exceptions to the general rule; for the rule is, in this particular, applicable only to

---

of his estate, an estate of inheritance, the nature of the estate is not changed by the possibility of issue being extinct, but continues to have in it inherently an exemption from waste.

(70) See *ante*, 122.

(71) See further as to what shall be deemed a breach of a condition in law, *Com. Dig. Condition* (S.)

estates of freehold; and a condition may be annexed, even to a term for lives, on an assignment thereof, as between the assignor and assignee;] so neither can a man give or reserve the power, title, or benefit of re-entry and avoidance of an estate, upon the breach of a condition, to any other but to him, or them, or at least to one of them that doth make the estate, his or their heirs, executors and administrators, &c.; [but on conveyances to uses, and by means of executory devises, an estate may be made to cease as to one person, and to vest in another person; 3 *Prest. Abstr.* p. 126;] for it is a rule of the common law, that none may take advantage of a condition but parties and privies in right and representation, as heirs of natural persons, [*quoad* estates descendible to them;] executors, &c. [*quoad* estates transmissible to them; for the heir cannot take advantage of a condition annexed to estates of a chattel quality;] and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat; nor in deed, as grantees of reversions, [grantees of reversions, *expectant on particular estates*, may now take advantage of conditions broken after their time; see stat. 32 Hen. 8, c. 34;] nor privies in estate, as he to whom a remainder is limited, shall take benefit of entry or re-entry by force of a condition (72). [At the common law, a remainder-man cannot claim any benefit from conditions annexed to a particular estate; but if a lease for years be made to *A.* and then the reversion is granted to *B.* for life, remainder to *C.* in fee; in this instance, as between the tenant for years and *C.* the estate of *C.* is a reversion, and not a remainder; and after the determination of the particular estate of *B.*, *C.* may take advantage of a condition annexed to the estate of *A.* and broken in his time. 2 *Prest. Abstract*, 186. 190; 3 *Ibid.* 133.] And therefore if a man had made a lease for a life, reserving rent, on condition that if the rent be behind, the lessor, his heirs and assigns, shall re-enter; and after, had granted the reversion to a stranger; this grantee should not, by the common law, have had benefit by this condition, [though broken in his time.]

(72) An entry by a stranger without authority is good, if it be assented to afterwards; and will support an ejectment, if the assent be before the demise in the declaration. See the case of *Fitchet* v. *Adams*, *Str.* 1128.

But if the lessor had died, his heir, or the guardian in chivalry, or socage of such an heir, if he had been an infant * and in ward, might have taken advantage by the condition, [if broken in his time; for the heir, &c. cannot avail himself of a condition broken in the lifetime of his ancestor, since the right of taking advantage of a condition is merely personal.] And if one had been possessed of a lease for years, and had granted his term upon condition, and had died, [and after his death the condition had been broken,] his executors or administrators might have had advantage of this condition. *P. 160.

Co. super Lit. 202. 12.

And at this day the law is still the same as touching privies in blood, [on a condition reserved to a grantor and his heirs;] for an heir shall take advantage of a condition, though no estate descend to him from the ancestor (73). And therefore if one be seised of land of the part of his mother, and he make a feoffment in fee of it on condition, and die, and the condition is broken; in this case the heir of the part of the father shall enter; but as soon as he hath entered, his estate vanishes for the benefit of the heir of the part of the mother. [*Doe* v. *Bateman, per Abbott*, C. J. 2 *Barn. & Ald.* p. 171. The first is heir to the person and to the condition, the other is heir to the estate. The position is peculiar to grants in fee, and is an anomaly. The writ of error belongs to the heir to the seisin, and so does the benefit of a condition annexed to a particular estate. It is a strange departure from principle, that one man should enter when his entry is merely *actum agere*. Besides, as far as respects the estate, the heir *ex parte paterna* seems to be a mere stranger, and the heir *ex parte materna* might be excluded either by the release of the heir *ex parte paterna*, or his refusal to enter; so that there would be an interest without a remedy.] And if a man be seised of land in the right of his wife, and he make a feoffment in fee of it upon condition, and die; the heir of the husband shall enter for the condition broken, but the wife shall have the land; [for the husband gains a new title by the feoffment, and the condition is annexed to the seisin thus acquired. At the common law the feoffment created a dis-

(73) Equity will relieve against an entry made by heir at law, for the breach of a condition. *Cha. Rep.* 85, *Underwood* v. *Swain*.

continuance to the wife, and the discontinuance was determined by the entry of the heir. Now suppose a husband, seised in right of his wife, make a feoffment, on condition to be void on payment of 1,000*l.* at the end of ten years, and the feoffee levy a fine with proclamations, and die; the wife, to avoid the fine, must enter, &c. within five years, or she will be barred. Suppose five years to elapse without entry, &c. and the heir to enter for the condition broken; by this entry of the heir the fine is avoided; and as between the wife and the heir, the wife may enter at any time; for the heir cannot insist on the fine as a bar to her, since he has defeated the seisin on which the fine was grounded; *Plow. Com.* p. 358. *Remoto impedimento emergit actio.* But if the heir of the husband should release the condition, the wife and her heirs would, after such non-claim on a fine, be remediless.] And so also is the law as touching privies in right and representation; for executors and administrators shall take advantage of a condition now as heretofore. And so also shall the successors of a dean and chapter, bishop, archdeacon, parson, prebend, or any body politic or corporate, ecclesiastical or temporal. These shall take advantage of conditions as heretofore they did. So also the law is the same as touching privies in law; for they shall no more take advantage of a condition now than heretofore. But as touching grantees of reversions, and privies in estate, there is some alteration made of the law; for by a new law it is provided, that all persons which shall have any grant of the king of any reversion, &c. of any lands, &c. which appertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heirs, executors, successors and assigns, shall have like advantage against the feoffees, &c. by entry for non-payment of rent, or for doing waste, or for other forfeiture, &c. as the said lessors or grantors themselves ought, or might have had (74). [In the case of a common person there cannot be any reversion, when there is a feoffment in fee; and at the common law, the heir,

Stat. 32 H. 8. cap. 34.

(74) See more amply what persons may by force of this statute of 32 H. 8. c. 34, take advantage of a condition broken, in *Co. Lit.* 215. *Cro. Eliz.* 832. 5 *Co.* 112. b. 2 *Leon.* 33. *Vin. Abr. Covenant* (K. 3.) *Com. Dig. Condition* (O. 2.)

&c. and not an assignee, might have taken advantage of a condition annexed to a feoffment in fee, or to a particular estate.]

Co. super Lit. 214. Plow. 27.

And for the true understanding of the sense of this statute, and the ancient common law further touching this point: 1. These diversities must be observed to be taken, before the statute will take place still:

Co. 10. 36. F. N. B. 201.

1. Between a condition that doth require a re-entry, and a limitation, [or a conditional limitation,] that doth *ipso facto* determine the estate without entry; for albeit a stranger might not take advantage of the first, yet he might take advantage of the last, [*read*, a limitation annexed to a particular estate, even] by the common law. And therefore if a man at this day make a lease to another *quousque*; or until *I. S.* come from Rome; or if a man make a lease to a woman *quamdiu casta vixerit*; or if a man make a lease to a * widow *si tamdiu in pura viduitate viveret*; or if a man make a lease to another for 100 years if he live so long, [in all which examples the limits of the estate are measured, and the estates leave a reversion in the grantor;] and then the lessor doth grant the reversion to a stranger; in all these, and such like cases, the grantee of the reversion may take advantage of the limitation; for after the estate is ended by the limitation, he may enter. *P. 161.

Co. 3. 64, 65. Co. super Lit. 214. 11 H. 7. 17. Plow. 136.

2. Between a condition annexed to a freehold, and a condition annexed to a lease for years; for if before the statute a man had made a gift in tail, or lease for life, on condition that if the donee, or lessee, did not pay 10 *l.* by such a day, the gift, or lease, should be void, or cease; in this case the grantee of the reversion could not by the common law have taken advantage of the condition; for it could not be void, or cease, but by entry, which could not be transferred to another. But [in wills, and also in conveyances to uses, and by a conditional limitation, as distinguished from a mere condition, an estate of freehold may cease as to one person, and commence in another person without entry or claim. And] if a lease for years had been made on such a condition, a grantee of the reversion might, by the common law, have taken advantage of this condition, for the estate in this case was, by the breach of the condition, *ipso facto*

void, without entry. [Such is the language of the books. The proposition is, however, questionable; since by a recent decision, as well as by principle, the estate does not cease unless the reversioner elect to take advantage of the condition; and that option could not, it is apprehended, have been transferred to the grantee of the reversion.] But now the grantee of the reversion shall have advantage of the condition in both these cases (75) [of leases; *i. e.* the benefit of the condition, on a future breach, may pass to him with the reversion.]

3. Between a condition in deed, and a condition in law; for by the common law, not only the grantee of the reversion, but also the lord by escheat, may either of them have advantage of a condition in law, [*i. e.* a forfeiture for waste, tortious alienation, &c.] for any breach in his own time. Co. super Lit. 214.

2. These resolutions and judgments upon the statute must be marked: 1. That the statute is general, and the grantee of the reversion of every common person, as well as [of] the king, may take advantage of conditions. 2. That the statute doth extend to grants made to the successor of the king, as well as to the king, albeit he [the king] only be named in the statute. 3. That he that comes to the reversion by fine, feoffment, grant, limitation of use, common recovery, or bargain and sale, is such a grantee as is within the intendment of the statute. 4. That where the statute doth speak of feoffees, &c. it doth not extend to gifts in tail; and therefore if a gift in tail be upon condition, and after the donor doth grant the reversion, this grantee shall never have any benefit of this condition. 5. That where the statute doth speak of grantees and assignees of the reversion, hereby an assignee of part of the [e]state of the reversion, [in all the land,] may take advantage of the condition; as if lessee for life be, and the reversion is granted for life, &c. or if lessee for years be, &c. and the reversion is granted for years, &c. in these cases the grantees of the reversion shall have advantage of the conditions. Co. super Lit. 214. Co. 5. 13.

† So if a lessee for 100 years make a lease for ten years, rendering rent, with condition of re-entry, and the first lessee doth afterwards grant his term † Davy and Mathew's case, per 9 Justices, Trin. 14 Jac. B. R.

(75) See accordingly, and further, *Vin. Abr. Condition* (N. d.) pl. 10.

and estate to *I. S.*; in this case *I. S.* * is such a grantee, and assignee of the reversion, as shall take advantage of the condition. 6. That as well mediate, as immediate, grantees, *i. e.* the grantees of grantees *in infinitum*, are intended within this statute. 7. That a grantee of part of the reversion, [or more correctly, the grantee of the reversion of part of the lands,] cannot take advantage of a condition by this statute. And therefore if a lease be made of three acres, reserving rent, upon condition, and the reversion is granted of two of the three acres; in this case the rent shall be apportioned, but the condition is destroyed, except it be in the king's case. [But under this statute, a grantee or lessee of part of the land shall have the benefit of the covenants knit to the reversion. *Twynam* v. *Pickard*, 2 *Barn. & Ald.* p. 105.] And yet a condition may be apportioned by the act of law, or by the wrong of the lessee (76). As if a lease be made of two acres (the one of the nature of borough English, and the other common law,) upon condition, and the lessor having issue two sons, dieth; in this case each of them shall enter for the condition broken; [the common law heir on the lands which descend to him, and the customary heir on the lands which descend to him; for *actus legis nemini facit injuriam*. The remedy was given by the common law to the heir to the estate, and the statute did not place him in a worse condition.] And if the lessee [holding] upon condition, make a feoffment of part of the land; this doth not destroy the condition [as to the residue of the land, or as to the land in the feoffment.] There is therefore herein a difference between a condition that is compulsory, and a power of revocation that is voluntary: for he that hath such a power may by his own act extinguish it in part, by levying a fine of part of the land or otherwise; and yet his power may remain for the residue as in the case of a limitation; but in the case of a condition he cannot do so. [The power is an interest in him; the condition is an interest in a stranger. The fine may conclude himself, but it cannot, except by non-claim, affect a stranger. But if a person, entitled to the benefit of a condition annexed to an estate in fee,

* P. 152.

Co. 5. 112, 113. Co. super Lit. 214.

Prerogative.

Apportionment.

Power of revocation.

(76) See accordingly, *Dyer* 308.

levy a fine of the land, (except for further assurance,) he will extinguish the condition; and though the fine be levied of part of the lands, the condition, as being an entire thing, will be wholly destroyed. This is the essential difference between a power of revocation and a condition.] 8. Such grantees as shall have advantage by this statute, must be complete grantees; and therefore grantees of reversions by fine, or deed, must have attornment, [that is, their titles must be complete,] ere they can take advantage of the condition. [The necessity of attornment is now superseded by the stat. of 4 & 5 Ann, c. 16.] And yet if a reversion be granted by fine to one that hath no attornment, [for the conusee had a perfect title without attornment, for every other purpose than to sue the tenant as tenant,] and he grant it to another that hath an attornment; in this case the second grantee shall take advantage of the condition, albeit the first grantee shall not (77). And the lessee must have notice of the grant of the reversion, ere he in reversion can take any advantage of a condition. And therefore it is, that if the lessor bargain and sell the land by deed indented and inrolled, (in which case there needs no attornment); or if the lessor make a feoffment of the land, and so oust the lessee, and the lessee re-enter (which is an attornment in law); the grantee, or feoffee, in these cases, cannot take advantage of any condition, before he hath given notice to the lessee of this grant of the reversion. [So under the statute, which supersedes the necessity of attornment, the grantee must give notice of his title before he can charge the tenant for rent. 4 & 5 Ann, c. 16. But he will, from the time of notice, be entitled to all the rent to become due from the tenant; and also, to all the rent in arrear, and unpaid by the tenant, which became due subsequent to the grant.] 9. Such as come in merely by act of law, or paramount, as the lord of a villain, the lord by escheat, the lord that doth enter for mortmain, or the like, cannot take advantage of a condition within this statute. And hence it seems it is, that if the lessee for forty years make a lease for thirty-seven years on condition, and after surrender his estate to his lessor; that the surrendree

Co. 5. 113, 114. Co. 8. 92.

Co. super Lit. 214. Pasche 7. Jac. Co. B. per 2 Justices.

(77) For the doctrine of attornment, see chapter 13. *post*. Attornment is rendered unnecessary by the statutes of 4 Ann, c. 16. § 9. and 11 Geo. 2. c. 19. § 11.

shall not have advantage of this condition. [So if the term be merged; because in each case the reversion is extinguished; in one case by the surrender; in the other case by the merger; and there is not any privity of estate between the underlessee and the surrenderee. *Wright* v. *Russell*, 3 *Term Rep.* p. 401; 3 *Prest. Convey.* p. 129].

† Co. super Lit. 215. Dyer, 309. Curia in Leek's case. Pasche 7. Jac. Co. B.

10. † Albeit the words of the statute be general, yet grantees and assignees shall not take benefit of every forfeiture by force of a condition, nor yet of all conditions, but only of such as are inherent, * *i. e.* such as are either incident to the reversion, as for payment of rent; or for the benefit of the estate, as for restraining of waste, for causing of reparations, making of fences, scowering of ditches, preserving of woods, and the like. And of conditions that are collateral, such grantees shall not take benefit. And therefore if the condition be for payment of a sum of money in gross; to restrain alienation; for the delivery of corn, wood, or the like, [unless they are to be yielded as rent,] the grantee of the reversion of the land shall not have advantage of it by this statute; for these remain (as they were before the statute) at the common law. 11. Such conditions as are on the part of the lessor, it seems, are not within this statute; and therefore if one make a lease for years, on condition that if the lessor, his heirs, or assigns, pay 10*l.* to the lessee at Lady-day, the lease to be void, and the lessor doth grant the reversion to a stranger before the day; it seems the grantee shall not take advantage of this [condition]; but the condition is gone. [*Query*, in equity, as a contract to surrender.]

*P. 153.

Per Justice Bridgman.

Doct. & Stud. 35. 13 H. 4. 17.

If one make a lease for years, rendering rent to him and his heirs, on condition that if it be not paid within fourteen days, that he and his heirs shall re-enter, and the rent is behind, and the lessor doth demand it, and then die; in this case the heir may enter. [Under the rules of the common law it is difficult, if possible, to support this proposition, unless the lessor re-entered or determined the lease]. But if he die before demand, the heir cannot make a demand, and so take advantage of that breach of the condition, which was in the time of his ancestor (78).

(78) See before in page 145.

If a man be possessed of land for twenty years, in the right of his wife, and he make a lease of it for ten years, rendering rent, with condition of re-entry for default of payment, and after the husband die; in this case the wife shall have the rent, but it seems she shall not take advantage of the condition. [It has since been determined, that when a husband alone makes a lease, reserving a rent, and dies in the lifetime of the wife, the rent becomes a rent in gross, and belongs to the executors of the husband, and the reversion, *cæteris paribus*, will devolve to the wife. The wife cannot entitle herself to the rent, as she was not a demising party. If she had joined in the demise, the rent and the condition would have been annexed to her reversion]. Perk. Sect. 834.

If a lease be made to *I. S.* on condition that if such a thing be, or be not done, that the land shall remain to *I. D.* or that *I. D.* shall enter; in this case *I. D.* shall never take advantage of this condition, either by the common law, or by this statute; [for a remainder cannot be limited to take effect on the operation of a condition. But though this object cannot be accomplished by means of a condition, it may be effected through the medium of a limitation; as to *I. S.* till, &c. and after, &c. or in case, &c. then to *I. D.*; as in 3 *Rep.* 20 b; *Arton* v. *Hare*, *Poph.* p. 97; 1 *Fearne*, p. 3.] Co. 1. 85. super Lit. 379. Dyer, 127. 117.

13. *Where entry or claim is needful to avoid an estate on condition; and where a man may take advantage of a condition without entry, or claim; and where not.*

Regularly where a man will take advantage of a condition, if he may enter, he must enter, [at this day, bringing an ejectment is equivalent to actual entry for this purpose,] and when he cannot enter, he must make a claim; for an estate of freehold or inheritance will not cease without entry or claim (79). And he that is to have advantage by the condition, may waive his advantage if he will, [even though the condition be annexed to an estate for years, and declare that the lease shall be *void*. 3 *Prest. Abstr.* p. 397.] And, [by force of a condition annexed to an estate in fee,] until such entry or claim made, the party that should enter can make no good estate of the thing to any other; [for he Co. super Lit. 218. 237.

(79) *Entry*, by a legal owner, is a notorious act of ownership, and equivalent to a feodal investiture by the lord, and gives the owner seisin, and makes him complete owner of the estate and capable of conveying it from himself, either by descent or purchase. See further, as to the nature and manner of making entry and claim, *Co. Lit.* 15. 254. b. 3 *Bl. Com.*

has merely a right or title, and not any estate; and no one can convey unless he has an estate. But the person, entitled to the benefit of the condition, may release or confirm the estate. And the impediment to conveying exists only when the condition is annexed to the inheritance or other entire estate; for if annexed to a particular estate, the reversioner may convey his reversion; but this conveyance will be a dispensation, with the right of entry existing at the period of the conveyance.] But herein a difference is to be observed, in the penning of a condition, between a lease for years, and a lease for life, or a greater estate; for if a lease for years be made, on condition that upon such a contingent the estate shall cease, or the lease shall be void; in this case when the thing doth happen, the lease is *ipso facto* void, without entry or claim. [*Query*; and see p. 153.] But otherwise it is of a lease for life, [or other estate of freehold,] albeit there be * the same words in the condition. And if one make a lease for years, on condition that if such a thing be done, the lessor shall re-enter; in this case an entry is needful to avoid the estate (80). [An actual entry is not necessary in this case. Indeed the only case in which an actual entry is now necessary is, to avoid the bar of a fine with proclamations. An ejectment, and confession of lease, entry and ouster in the ejectment, have superseded in a great degree, the practice of actual entry.] *P. 154.

If one make a feoffment in fee, gift in tail, or lease for life, on condition that upon such a contingent the estate shall be void; in this case there must be an entry made, after the condition is broken, to avoid the estate. So if one bargain and sell his land by deed indented and inrolled, with proviso that, if the bargainor pay, &c. then the estate shall cease and be void, and he doth pay the money; in this case the estate is not revested in the bargainor, before an actual re-entry is made. [But in the cases of provisoes, creating shifting uses, &c. which operate partly as conditions and partly as limitations, 1 *Inst.* 237 a, one estate will cease, and the other commence, without any entry or claim.] And so it is also, if lands be devised to a man and his heirs, on condition that if the devisee do not pay

(80) No one can enter for a condition broken as bailiff to another, without the special command of him to whom he is bailiff. *Mo.* 52.

20*l.* at a day, his estate shall cease and be void; in this case the estate is not void until an actual re-entry be made. [But under the learning of executory devises, one estate will cease, and another estate commence, without entry or claim. The conditional limitation produces this effect. 1 *Prest. on Est.* p. 46; 3 *Prest. on Abstr.* p. 126.] And so also it is if a reversion, remainder, advowson, rent, common, or the like, be devised on such a condition; in these cases there must be a claim before the estate will be determined. And therefore if a man grant such a thing to another and his heirs, on condition that if the grantor pay 20*l.* on such a day, the estate of the grantee shall cease or be void, and the grantor doth pay the money according to the condition; in this case the estate is not revested in the grantor, before a claim made at the church in case of an advowson; and in other cases, upon the land. But in case where a man cannot make an entry or claim, there the law will not compel him to it. And therefore if one grant land to another for five years, on condition that if he pay to the grantor, within the two first years, forty marks, that then he shall have the fee, otherwise but for term of five years, and livery of seisin is made accordingly, and the grantee doth not pay this money; in this case, after the two years are past, the freehold shall be in the grantor without entry or claim; for, as this case is, he cannot enter, but he must oust the lessee of his term. [In this case, as livery was made, the grantee had the fee immediately; and, on the breach of the condition, the fee ceased, and he had a term.] So if I grant a rent-charge out of my land upon [*viz.* subject to a] condition; when the condition is broken, the rent is extinct, and there needs no claim. [*Doe d. Hanley* v. *Wood*, 2 *Barn. & Ald.* 724.] So if a man make a feoffment of land to me in fee, on condition that I shall pay him 20*l.* such a day, &c. and before the day I let the land to him for years, rendering rent, and after the condition is broken; in this case he may retain the land without entry or claim, and the rent is extinct; [for when the condition operates, it defeats the title on which the term depended; and he shall hold the possession by virtue of his title under the condition. To enter would be *actum agere.* So

if one covenant to stand seised to the use of himself for life, or otherwise, and then after to the use of others, with a proviso of revocation, &c. and after he doth revoke it; in this case all the estates are revested in him, without entry or claim. [This last case is referrible to the learning of conditional limitations, and not of conditions.]

Co. 4. 120. Perk. Sect. 840. Plow. 186. 482. 14 H. 8. 17. [8 Rep. 42.]

14. *When a condition broken shall make the estate, &c. void* ab initio; *and when not. And to what intents the lessor, feoffor, &c. shall be adjudged by his re-entry to be in of his first estate. And to what intents not.*

It is generally true, that he that doth enter for a condition broken doth make the estate void *ab initio*; and that he shall be in of his first estate in the same course and manner as it was when he * departed with the possession, and at the time of the making of the condition (81). And hence it is, that if there be any charge or incumbrance on the land: as if lessee of land upon condition grant a rent-charge out of the land, or enter into a statute, or recognisance, and the conusee have the land in execution, and this charge is [created] after the condition is made; in this case, when the condition is broken, and the party doth re-enter, he shall, by relation, avoid the rent, statute, and recognisance, and hold the land freed from them all; [on the principle of *cessante statu primitivo cessat deinvativus*]. And if an estate be to pass by way of increase, upon condition; or a lease is to be made upon a condition precedent; when the condition is performed, the party shall hold his estate free from all after-charges and clogs: [for his title has relation to the date of the grant.] And if a man enter for breach of a condition in law, he shall avoid all charges and acts done after that thing is done, which doth produce the forfeiture, [for his title has relation to the period of forfeiture;] but he shall not avoid any thing done before that time, for he must take the thing as he finds it: as if a house, or land, belong to an officer, in respect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this case the rent shall continue. And if lessee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this case the rent shall continue, and the lessor cannot avoid [it]. But if lessee for life of land make a feoffment in fee of it,

*P. 155.

Co. super Lit. 234. Perk. Sect. 843. 844. Co. super Lit. 233. [See Whittingham's case, [8 Rep. 45.]

(81) Regularly it is true, that he that entereth for a condition broken shall be seised of his first estate; but that faileth in many cases: see the instances in *Co. Lit.* 202 a. See further in *Com. Dig. Condition* (O. 6.) *Vin. Abr. Condition* (P. d.)

20*l.* at a day, his estate shall cease and be void; in this case the estate is not void until an actual re-entry be made. [But under the learning of executory devises, one estate will cease, and another estate commence, without entry or claim. The conditional limitation produces this effect. 1 *Prest. on Est.* p. 46; 3 *Prest. on Abstr.* p. 126.] And so also it is if a reversion, remainder, advowson, rent, common, or the like, be devised on such a condition; in these cases there must be a claim before the estate will be determined. And therefore if a man grant such a thing to another and his heirs, on condition that if the grantor pay 20*l.* on such a day, the estate of the grantee shall cease or be void, and the grantor doth pay the money according to the condition; in this case the estate is not revested in the grantor, before a claim made at the church in case of an advowson; and in other cases, upon the land. But in case where a man cannot make an entry or claim, there the law will not compel him to it. And therefore if one grant land to another for five years, on condition that if he pay to the grantor, within the two first years, forty marks, that then he shall have the fee, otherwise but for term of five years, and livery of seisin is made accordingly, and the grantee doth not pay this money; in this case, after the two years are past, the freehold shall be in the grantor without entry or claim; for, as this case is, he cannot enter, but he must oust the lessee of his term. [In this case, as livery was made, the grantee had the fee immediately; and, on the breach of the condition, the fee ceased, and he had a term.] So if I grant a rent-charge out of my land upon [*viz.* subject to a] condition; when the condition is broken, the rent is extinct, and there needs no claim. [*Doe d. Hanley* v. *Wood*, 2 *Barn. & Ald.* 724.] So if a man make a feoffment of land to me in fee, on condition that I shall pay him 20*l.* such a day, &c. and before the day I let the land to him for years, rendering rent, and after the condition is broken; in this case he may retain the land without entry or claim, and the rent is extinct; [for when the condition operates, it defeats the title on which the term depended; and he shall hold the possession by virtue of his title under the condition. To enter would be *actum agere.* So

if one covenant to stand seised to the use of himself for life, or otherwise, and then after to the use of others, with a proviso of revocation, &c. and after he doth revoke it; in this case all the estates are revested in him, without entry or claim. [This last case is referrible to the learning of conditional limitations, and not of conditions.]

Co. 4. 120. Perk. Sect. 840. Plow. 186. 482. 14 H. 8. 17. [8 Rep. 42.]

It is generally true, that he that doth enter for a condition broken doth make the estate void *ab initio*; and that he shall be in of his first estate in the same course and manner as it was when he * departed with the possession, and at the time of the making of the condition (81). And hence it is, that if there be any charge or incumbrance on the land: as if lessee of land upon condition grant a rent-charge out of the land, or enter into a statute, or recognisance, and the conusee have the land in execution, and this charge is [created] after the condition is made; in this case, when the condition is broken, and the party doth re-enter, he shall, by relation, avoid the rent, statute, and recognisance, and hold the land freed from them all; [on the principle of *cessante statu primitivo cessat deinvativus*]. And if an estate be to pass by way of increase, upon condition; or a lease is to be made upon a condition precedent; when the condition is performed, the party shall hold his estate free from all after-charges and clogs: [for his title has relation to the date of the grant.] And if a man enter for breach of a condition in law, he shall avoid all charges and acts done after that thing is done, which doth produce the forfeiture, [for his title has relation to the period of forfeiture;] but he shall not avoid any thing done before that time, for he must take the thing as he finds it: as if a house, or land, belong to an officer, in respect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this case the rent shall continue. And if lessee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this case the rent shall continue, and the lessor cannot avoid [it]. But if lessee for life of land make a feoffment in fee of it,

14. *When a condition broken shall make the estate, &c. void* ab initio; *and when not. And to what intents the lessor, feoffor, &c. shall be adjudged by his re-entry to be in of his first estate. And to what intents not.*

*P. 155.

Co. super Lit. 234. Perk. Sect. 843. 844. Co. super Lit. 233. [See Whittingham's case, [8 Rep. 45.]

(81) Regularly it is true, that he that entereth for a condition broken shall be seised of his first estate; but that faileth in many cases: see the instances in *Co. Lit.* 202 a. See further in *Com. Dig. Condition* (O. 6.) *Vin. Abr. Condition* (P. d.)

and then grant a rent out of the land; in this case the lessor shall avoid it; [for in the former case the rent depends on the rightful ownership, and is prior to the right arising under the forfeiture; in the latter case, the right of entry for the forfeiture accrued by the feoffment, and the rent was granted subsequent to the feoffment, and of course was subsequent to the right of entry for the forfeiture.] And if a lessee grant a rent out of his land, and then do waste, and the lessor recover the land, he cannot avoid this rent, but shall hold the land charged with it. But if the lessee do waste first, and then he grant a rent-charge to a stranger out of the land, and after the lessor recover the place wasted; in this case he shall hold the land discharged; [because his title hath relation to the time when the forfeiture, in other words, the waste, was committed.] And if lessee for life make a lease for years, and after enter upon the lessee for years, and make a feoffment in fee; this [act of forfeiture, by the tenant for life,] shall not avoid the lease for years. And if a man make a lease for years, rendering rent, with clause of entry for non-payment, and the lessee doth make under-leases of part of this land, and after the rent is unpaid, and the lessor doth enter; in this case he shall have all the land, and avoid all the under-leases: [for in this instance the forfeiture is by a condition, in deed, and by contract; and the estate of the under-tenants is a derivative interest, subject to the rule *cessante statu primitivo, &c.*] But if there be any covenous practice in the case, [between the original lessee and the reversioner, to defraud the under-tenants,] the under-tenants may have remedy in equity. And if a lease be made for life, the remainder in tail, on condition; in this case if the condition be broken, both the estates be avoided, [provided the condition extend to the estate for life as well as to the estate tail. But a condition may be annexed to a remainder without affecting the prior estates; and if the particular estate can be defeated by a condition, the remainder will also and necessarily be defeated. But this rule does not extend to cases of shifting use, executory devises, &c. and other like limitations in wills and conveyances to uses; for, in these cases, one estate may be defeated by a proviso of cesser, and

Crompt. Jur. 64, 65.

Equity.

Co. 10. 41.

Co. super Lit. 202. Perk. Sect. 842, 843.

other estates be accelerated, &c.] *Et sic de similibus.* But this general rule doth fail in divers particulars: as if a man be seised of land in the right of his wife, and he maketh a feoffment in fee by deed indented, upon condition that the feoffee shall devise the land to the feoffor for life, &c. and the husband dieth, and then the condition is broken; in this case the heir of the husband shall enter, and yet he shall not have the estate of the feoffor, for this doth presently, after his entry, vanish away. [So that the entry of the heir of the husband restores, *ipso facto*, the seisin of the wife, without any entry by her]. So if a tenant in special tail hath * issue, and his wife dieth, and tenant in tail maketh a feoffment in fee upon condition, [operating as a discontinuance,] the issue dieth, the condition is broken, and then the feoffor doth re-enter; in this case he shall have but an estate for life, as tenant in tail after possibility of issue extinct; [and if the issue had continued, he should have had his former estate tail]. So if a lessee for life, or years, make a feoffment in fee on condition, and after doth enter for the condition broken; in this case he shall [be in of the same estate as he originally had, but] not be in the same course, for now his estate is subject to entry for forfeiture, though he be tenant for life, [&c.] still. So if a disseisor be of certain land, and he die seised thereof, and his heir is in by descent, [which act by the common law tolled the entry of the disseisee,] and the disseisee enter upon the heir, [being an entry not warranted by law,] and enfeoff a stranger upon condition, and the heir of the disseisor doth enter upon the feoffee, [as he lawfully might,] and the disseisee doth sue a writ of entry *sur disseisin* against the heir of the disseisor, and doth recover and hath execution, [by which action he reduces the original seisin,] and the feoffee on condition doth re-enter, and after the condition is broken; in this case the feoffor is not in the same case; for now the disseisor cannot enter upon him as he might before; [for the disseisor's right of entry was defeated by the action which avoided the original disseisin.] And in some cases the feoffor, by his re-entry, shall be in his former estate, but not in respect of some collateral qualities: as if tenant by homage ances-

[3 Barn. & Ald. 168.]

*P. 156.

trel, make a feoffment of the land he doth so hold, in fee, on condition, and entereth for the condition broken; in this case it shall never be held in homage ancestrel again: [for there is an interruption to the privity of title to which the warranty was annexed.] And so if a copyhold escheat be, [*dele* be,] and the lord make a feoffment in fee upon condition, and entereth for the condition broken; in this case the custom annexed to that land is gone: [for, by the feoffment, it ceased to be demisable by copy of court roll. So also, if he had made a lease for years, the demisable quality, and the custom annexed to the copyhold title, would have been extinguished.] So if there be lord and tenant by fealty and rent, and the lord is in seisin of the rent, and granteth his seigniory to another and his heirs, on condition, and the tenant doth attorn, and payeth his rent to the grantee, and the condition is broken; the lord distraineth for his rent, and rescous is made; in this case the former seisin shall not enable him to have an assize without new seisin. If there be lord and tenant, and the lord disseise the tenant of the tenancy, and thereof doth enfeoff a stranger on condition, and after the condition is broken, and the lord enter, and the tenant doth enter upon him; in this case the seigniory is not revived: [for it was extinguished by the feoffment of the lord; *viz.* the lord cannot have the seigniory contrary to his own feoffment, for he is estopped; and the feoffee cannot have the seigniory, for he purchased the land, and not the seigniory].

If tenant in tail make a feoffment in fee on condition, and dieth, and the issue in tail, within age, doth enter for the condition broken; in this case he shall be in first, [and for an instant,] as tenant in fee-simple, and heir to his father, and then shall be presently remitted; but if he be of full age, he shall not be remitted (82).

If one make a feoffment of white acre, and black acre, on condition, &c. and that he shall enter into black acre only; in this case, upon

Co. super Lit. 202, 203.

(82) Because he might have had his formedon against the feoffee, and the entry for the condition is his own act. *Co. Lit.* 202 b. *Remitter* is an operation of law, upon the meeting of an ancient right remediable, and of a latter state, in one person, where there is a folly in him, whereby the ancient right is restored and set up again, and the new defeasible estate cleared and vanished away. *Co. Lit.* 347 b. For the doctrine of remitter, see 3 *Bl. Com.* 19. 189; and fully in *Com. Dig.* and *Vin. Abr.* tit. *Remitter.*

breach of the condition, he shall enter into that part only.

If the words of a condition be, that if such a thing be not done, the feoffor or lessor shall enter into the land, and take the profits thereof until the thing be done, or to the like effect; in this case * if the feoffor, or lessor, enter upon the breach of the condition, he doth not avoid the estate, or get any thing by his entry, but the possession only in the nature of a pledge, or a distress, until the thing be done; and if the condition be for the payment of the rent, he shall hold the land until he be paid the rent. And if the words be, "that the feoffor, &c. shall enter, and take the profits, until thereof he be satisfied, or until he be satisfied, or paid the rent," in the first case as soon as he is paid, either by the receiving of the profits, or payment of the rent behind, or both together; and in the last case, as soon as he is paid the rent by the feoffee or lessee, the feoffee or lessee may enter again into the land (83). *P. 157.

Co. super Lit. 207. 219. 15 H. 7. 13. Dyer, 262.

If a condition be possible in its creation, and after become impossible by the act of God, the condition is discharged and gone for ever, and the estate is absolute (84). As if a feoffment be made to me, on condition that I shall re-enfeoff the feoffor before a day, or on condition that I shall appear at Westminster in the King's Bench such a day, or on condition that I shall go to Paris about the affairs of the feoffor before such a day, and before the day appointed it doth happen that I die; in all these cases the condition is discharged [at law.] So if the condition of a feoffment be, that if the feoffor, or his heirs, pay 10*l.* to the feoffee such a day, and before the day the feoffor dieth without heir; in this case the condition is gone. And if the condition become impossible in part only, then it is discharged for so much only (85).

15. *When and by what means a condition shall be discharged and extinguished for ever, or suspended for a time; or not.*

1. *By the act of God.* Conditions impossible.

Perk. Sect. 819.

If there be lord and tenant, and the tenant doth enfeoff a stranger on condition, and the feoffee die

(83) See further what act destroys a condition, *Com. Dig. Condition* (Q.)

(84) See accordingly *Co. Lit.* 206 a. *Roll. Abr.* 449. 2 *Leon.* 155.

(85) And if the condition consists of two parts, one of which was impossible at the time making the condition, yet it is a good condition, and the other ought to be performed. 5 *Eliz.* 780. [It is otherwise if he be to perform one of two things at his option, and one of them become impossible.]

without heir, so that the tenancy escheat; in this case the condition doth continue, and the lord must hold it subject to the condition; [so that the lord by escheat is subject to a condition, though he cannot take advantage of a condition.]

2. *By the act of law.* Albeit a condition cannot be divided by the act of the parties, but it will be destroyed, yet it may be divided by the act of law; and therefore if a lease for years be made of two acres of land, (the one of the nature of borough English, and the other at the common law,) on condition, and the lessor, having issue two sons, dieth; in this case, albeit the condition be divided, yet it is not gone, but doth continue still, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reversion, grant part of his reversion to a stranger, [that is, part of the land,] the condition is destroyed in all, for it cannot be apportioned by the act of the parties, as it may by the act of the law, or the wrong of the lessee (86). Co. super Lit. 215. Co. 4. 120.

3. *By the act of the parties.* A condition may be destroyed in the very creation of it: as if one devise lands for life, with express words of a condition, and not words of limitation, or words that may be so taken, the remainder over to a stranger; in this case the stranger cannot enter, neither is the remainder good, nor the condition effectual. [In wills, words which give an estate are universally construed as words of limitation; and in wills, under the learning of executory devises, a remainder-man may take advantage of such condition, or conditional limitation, if there are words to give him an estate in that event on which the condition, or rather clause of cesser, is to operate. The same learning is applicable to limitations of use. But, in conveyances at common law, a remainder-man cannot take advantage of a condition; and the remainder would be void, if it depends on the event on which the condition is to operate. But if the remainder be limited independently of that event, then the condition is discharged, and the remainder is good.] Or it may be discharged by matter *ex post facto:* as in the examples following. * If one make a feoff- Co. 2. 59. the Lord Cromwel's case. Dyer, 309. Co. super Lit. 265. 379. Co. 10. 41.

*P. 158.

(86) See fully in what cases the non-performance of a condition shall be excused by the act of God, or by act of law, *Com. Dig. Condition* (L. 12.) *Bac. Abr. Condition* (G.) *Vin. Abr. Condition* (G. c.) to (K. c.)

ment in fee of land upon condition, and after and before the condition broken he doth make an absolute feoffment, or levy a fine of all or part of the land to the feoffee, or any other; by this the condition is gone and discharged for ever, [except such fine is for further assurance.] And yet if one grant a rent out of his land upon condition, and after make a feoffment of this land [to another person,] this doth not extinguish the condition, [because there is not any inconsistency between the feoffment of the land, and the grant of the rent.] And if a fine in this case be levied in pursuance of a former agreement: as if one by indenture bargain and sell his land to another, and in the indenture there is a covenant that all other assurances shall be to the use of the bargainee, according to the first agreement, and the bargain and sale hath a condition annexed, that the bargainee shall make a feoffment [*read*, fine] of part of the land to the bargainor, and after the bargainor doth levy a fine to the bargainee in corroboration of the first bargain; in this case the condition is not extinct, but saved by the original agreement; [for in this case the fine is, by construction of law, for further assurance only.] And if one make a feoffment in fee of land upon condition, and after and before the condition broken he doth make a lease for years only of the land, or part of it, to the feoffee, or any other; by this the condition is suspended for that time. And if the feoffor, after a feoffment made of land upon condition, enter upon all or part of the land, and be impleaded, and lose it; by this the condition is gone for ever. [See page 152.] And if he enter and hold the possession only, by this the condition is suspended during his possession; and if he hold the possession so long that the feoffee cannot perform the condition, the condition is discharged for ever. And if one make a feoffment of land upon condition, and after and before the condition broken the feoffee doth make a feoffment, [or other conveyance in fee,] of all or part of the land to the feoffor; by this the condition is gone for ever; [in one case, because it is not apportionable: in the other case, because the original feoffor cannot have the estate, and also the condition.] And if the feoffee make a lease for life, or years only, of part of the land; by this the condition is suspended for

Co. 2. 59. Perk. Sect. 819, 820. 169. Lit. Rea. Sect. 212. Co. super Lit. 219.

Co. 7. 14. 4. 52. Lit. Rea. Sect. 212. 85. Co. super Lit. 218.

that time. But if the feoffee make a feoffment in fee, lease for life, or years to a stranger; this is no extinguishment nor suspension of the condition. And if the condition be to pay money, or do any such collateral thing; if in this case the feoffee make a lease to the feoffor, this [lease] doth not suspend the condition.

Release. If the feoffor, or lessor, release to the feoffee, or lessee, all conditions, or all demands in the land, or confirm the estate of the feoffee without condition, &c. by either of these means the condition is destroyed and gone for ever; [but, by special limitation, the confirmation may be confined to a particular period.]

Perk. Sect. 823. Co. 1. 147. See Release and Confirmation. Co. 2. 59. Perk. Sect. 163. Co. 4. 119.

If one make a lease for life, or years, of land on condition, and after grant the reversion of part of this land; hereby the condition is destroyed for ever. And if he make a lease of part of it only; by this the condition is suspended [during the lease.]

[Marriage.] A condition may be extinct, or suspended, by the intermarriage of the parties to the condition: as if a feoffment be made by a woman, on condition to pay 10*l.* or on condition to enfeoff * her by a day certain, and before the day they two do intermarry, and the marriage doth continue until after the day; in this case the condition is gone: [for in point of law a man cannot pay money to his wife; and, on account of the unity of their persons, he cannot enfeoff her, though he may make a conveyance to her use, or in trust for her.] And if the condition be to re-enter for not payment of rent; the condition shall be suspended, and no rent be paid during the coverture.

Perk. Sect. 763. 765. 764.

*P. 159.

If a lease be made for years, on condition that the lessee or his assigns shall not alien without the licence of the lessor, and the lessor licence the lessee alone to alien, or licence him to alien a part of the land, or licence him to alien all the land for a time; or if the lease be to three on such a condition, and the lessor licence one of them to alien; in all these cases the condition is gone for ever: [for a condition once dispensed with, in the whole or in part, is dispensed with for ever; and as to all the land, for a condition is entire, and cannot be apportioned, except by act of law. *Dumport's case*, 4 *Rep.* 119. 3 *Prest. Abstr.* 398.]

Co. 4. 119. 5. 32. 2. 39. 714. Dyer, 309.

If one had enfeoffed me, on condition that I should pay him 10*l.* at Easter, and before the

Perk. Sect. 766.

time he had entered into religion, and made me his executor, and had not been dearraigned; in this case the condition had been gone for ever: [for, as executor, the feoffee was entitled to the money, and his right to the money is equivalent to the payment of it. The money is at home.]

Perk. Sect. 822. If I be seised of land in fee, and take a wife, and during the marriage enfeoff a stranger on condition, and die, and the feoffee endow my wife of her third part; in this case the condition is not destroyed, and yet the third part is, [during the estate of the dowress,] freed from the condition; but the reversion of that third part is not freed from the condition. And if she grant her estate again, [or surrender it,] to the feoffee, the condition is revived: [on the ground of merger or extinguishment; for [from] the moment the particular estate is merged, the impediment to the operation of the condition, in regard to the possession, ceases.] So if there be lord and tenant, and the tenant make a feoffment in fee upon condition, and the feoffee is attainted of felony, &c. so that the tenancy doth escheat; in this case the condition is not gone, but the tenancy is charged with it; [and on breach of the condition, the feoffor may enter on the land by escheat. But the lord by escheat cannot take advantage of a condition, *Co. Litt.* 215;] but if a disseisee die, without heir, before the lord has accepted the disseisor as tenant, or his assignee or heir had become tenant to the lord, *Co. Litt.* 268, the lord may enter.]

Co. 3. 64. super Lit. 211. If a feoffment or lease be made, rendering rent, on condition for non-payment a re-entry, and the feoffor, or lessor, after the breach of the condition doth distrain, or bring an assize for the rent, or doth accept the rent at another day; hereby the condition is not destroyed, but it is discharged for that time; so that the feoffor, or lessor, cannot take any advantage of that breach. [See *Chamber's on Leases*, 186; he accurately distinguishes between waiver and dispensation.] And if the act to be done by the condition be a collateral act, as not to alien, or the like, and the condition is broken, and the feoffor not having notice thereof, doth accept the rent; in this case also, and by this means, the condition is not discharged (87); [but acceptance

(87) See more amply in what cases conditions shall be discharged by the act of the parties, *Bac. Abr. Condition* (Q. 3.) *Vin. Abr. Condition* (K. d.) *Com. Dig. Condition* (L. 4.)

of rent after notice, and for a time subsequent to the forfeiture, is a waiver.]

4. By the act of a stranger.

If one disseise the feoffee, or the heir of the disseisor, or any other that hath lands by a just title, and thereof enfeoff a stranger on condition, and the land is lawfully recovered from him by him that hath the title; hereby the condition is destroyed for ever: [for *debile fundamentum fallit opus.* As the estate or title to which the condition was annexed is defeated, the condition annexed to that estate or title, fails with the title.] And if a disseisor make a feoffment in fee on condition, and after the disseisee doth enter upon the feoffee on condition; this [entry] doth extinguish the condition, [by defeating the title to which it was annexed; it would be a more correct conclusion to say, defeat the estate, and consequently and inclusively the condition.] But if the disseisee release [his right] to the feoffee on condition; this release doth not discharge the condition, [because the releasee has the seisin under a feudal contract, and has accepted the estate on those terms. See 1 *Inst.* 277 b.] But if a disseisor make a lease for life, and the lessee for life make a feoffment in fee on condition, and the disseisee release to the feoffee of the tenant for life; by this *P. 160. [release] * the condition in law, [*viz.* the right of the lessor to enter for the forfeiture,] is destroyed; [for no interest remains in the lessor; his seisin was defeated by the feoffment of the rightful owner. See the reason in 1 *Inst.* 276 n. and *infra, ch. Release.*] And if the feoffee upon condition, [under a feoffment by a disseisor,] make a feoffment over, without condition, and the disseisee release to the second feoffee; by this [release] the condition is destroyed, bc the release before the condition broken or after, [because he is not estopped by acceptance as the first feoffee on condition was. 1 *Inst.* 277 b; *Mayow's case,* 1 *Rep.* 146 b.] And if feoffee on condition make a lease for life, and the feoffor release to the feoffee on condition, or lessee for life, all conditions, or all demands to the land; by this [release] the condition is discharged. And if the feoffee on condition make a feoffment to another on condition, and after the first feoffor doth enter for breach of the condition; hereby the second feoffment, and the condition also, is gone for ever,

Lit. Sect. 476, 477. Co. super Lit. 277.

Perk. Sect. 823. 821.

[because it defeats the title to which the condition was annexed.]

Perk. Sect. 820. If a man seised of land in fee, let it to a stranger for years, and one that hath no right doth oust the lessee, and thereof die seised, and his heir is in by descent, and he doth make a feoffment to a stranger upon condition, upon whom the lessee for years doth enter within the term, claiming his term; in this case the lessee shall hold the land discharged of the condition; [but the re-entry of the lessee doth not restore the seisin of the reversioner, since by the descent cast, the reversioner had a mere right of action, and not of entry. If the reversioner retain a right of entry, then the entry of the lessee for years would restore the seisin of his reversioner. 2 *Prest. Abstr.* 294.]

And now we pass to a *covenant*, being another part of a deed.

CHAP. VII.

Of a Covenant.

Terms of the law. Plow. 308. A COVENANT is the agreement or consent of two or more by deed in writing, sealed and delivered, whereby either or one of the parties doth promise to the other, that something is done already, or shall be done afterwards (1). And he that makes the covenant is called the covenantor; and he to whom it is made, the covenantee. 1. Covenant. *Quid.* Covenantor. Covenantee.

Terms of the law, tit. Covenant. Co. 4. 80. 5. 17. F.N.B. 145, 146. Dyer, 338. 257. And this [consent] is either express, or in deed, *i. e.* when the covenant is expressed in the deed: as when *A.* by deed doth covenant with *B.* to serve him for a year, and *B.* doth covenant with 2. Quotuplex.

(1) A covenant is not a duty, nor cause of action, till it be broken; and therefore it is not discharged by a release of all actions: and when it is broken, the action is not founded merely upon the specialty, as if it were a duty, but savours of trespass; and therefore an accord is a good plea to it; and ends in damages. *Aleyn* 39. See further as to the nature of a covenant, in *Gilb. Law of Covenants, chap.* 1 and 2 *Bl. Com.* 304. [In order to understand the doctrine of covenants, it is necessary to acquire a perfect comprehension of the distinction between a *covenant and warranty*; and, for that purpose, correct *definitions* are truly and essentially requisite. Without such definitions, it is impossible for a student to comprehend what the thing, either *covenant* or *warranty*, is; and without such knowledge, how can he hope to understand their different operations?]

A. to pay him 10*l.* for his service. Or it is implied, or in law; *i. e.* when the deed doth not express it, but the law doth make and supply it: as when one doth make a lease for years by the words "demise or grant," without any express covenant for quiet enjoying; in this case the law doth intend and make such a covenant on the part of the lessor; which is, that the lessee shall quietly hold and enjoy the thing demised against all persons, at least having title under the lessor, and at least during the lessor's life, and, (as some think,) during the whole term; and hereupon an action of covenant may be brought against him in the reversion; so that if the heir that is in by descent, put out the termor of his father, the termor may have
*P. 161. * this action against him (2). [But an agreement or stipulation negativing an obligation, and being only for indemnity, is not a covenant. It does not create any duty. It is not a negative, pregnant with an affirmative. *Bartlett* v. *Hodgson*, 1 *Term. Rep.* 42. It is a clause of discharge and indemnity, not of obligation.] A covenant is also either real; *i. e.* that whereby a man doth bind himself to pass a real thing, as lands or tenements; as a covenant to levy a fine of land, in which case the land itself is to be recovered; [this is an anomalous case, *Cruise on Fines*, p. 13;] or when it doth run in the realty so with the land, that he that hath the one hath or is subject to the other; and so a warranty is, [and is] called, a real covenant. Or it, [the covenant,] is personal; *i. e.* when it doth run in the personalty, and not with the land, but some person in particular shall have benefit by it, or be charged with it: as when a man doth covenant to do any personal thing, as build or repair a house, serve him, or the like; [and covenants in the realty, and running with the estate of the land, are at the same time as against the covenantor, his executors and administrators, and also against his heirs, if bound covenants *in personam* (3). And

[Butler's notes to Co. Lit. p. 384 a]

[3 Black. Com. 156]

(2) Where the covenant is created by law, the covenantee cannot bring an action of covenant, if he be not ousted by one, who has a title; but it is otherwise in case of an express covenant. 2 *Brownl.* 161, [too general.] The *distinction* between *implied* covenants by operation of law, and *express* covenants, is, that express covenants are taken more strictly. *Per Ld. Mansfield*, 3 *Burr.* 1639. [*Loyd* v. *Tomkins*, 1 *Term. Rep.* 671.]

(3) What shall be a real, and what a personal covenant, see *Vin Abr.* (G. 2.) *Bac. Abr. Covenant* (E.) *Com. Dig. Covenant* (A. 2.) *Gilb. Law of Covenants*, 105.

these also are some of them said to be inherent; *i. e.* such as are conversant about the land, [and knit to the estate in the land;] as that the thing demised shall be quietly enjoyed, shall be kept in reparations, shall not be aliened; or if it be to be sold, that the lessor shall have the first refusal; to pay rent, not to cut down timber trees, or do waste; to fence the [demised] coppices when they be new cut, to make further assurance, or the like. And some of them are said to be collateral; *i. e.* that are conversant about some collateral thing that doth nothing at all, or not so immediately concern the thing granted; as to pay a sum of money in gross, to build a house in another man's ground, to make a feoffment or lease of other land, to give other security to perform the covenants, or to pay the rent, or that the lessor shall distrain for the rent in some other land than that which is demised, or the like; [or are not knit to the estate, because they are entered into with a person who is a stranger to the estate;] these are collateral covenants (4). There is also a covenant to stand seised of land to uses, which is now become a kind of conveyance of land; [*i. e.* an assurance, through the medium of an use, arising from the seisin of the covenantor, and the execution of that use by the statute of 27 Hen. 8, c. 10;] for which read *Uses* at large (5).

Co. 1. 154. Lit. Bro. Sect. 304. 27 H 8. 16. Plow. 308. F. N. B. 145.

3. *The use and operation of it.*

The most frequent use of a covenant is to bind a man, [his heirs, &c.] to do something *in futuro*, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee, [and his representatives, and in some cases his assigns,] may have thereupon for his [and their] relief, [*viz.* reimbursement in damages,] an action, or writ of covenant, against the covenantor, [his heirs, executors, and administrators,] so often as there is any breach of the covenant (6). And this writ of covenant is therefore defined to be a writ lying where a man is bound by a covenant in

A writ or action of covenant. *Quid.*

(4) As to collateral covenants, see 4 *Burr.* 2446; 2 *Wils.* 27; [and *Lord Uxbridge* v. *Stoneland*, 1 *Ves.* 56; collateral covenants being, not to do any thing relative to the premises leased; and therefore, not running with the land, will bind *executors*, being representatives, but will *not* bind *assigns*.]

(5) See accordingly, and further as to the different kinds of covenants, 1 *Wood*, 354.

(6) It is a general rule in *equity*, that what is covenanted to be done, is considered as actually done. 3 *Atk*, 534.

a deed, and hath broken it. And in this case commonly the party damnified shall recover damages only for the breach; and if he have a judgment in an action brought for one breach, and after the covenantor doth break the covenant again; in this case, [provided the covenant has so stipulated,] he may bring a new action; and so for every breach. But a covenant doth sometimes also make a transmutation of [an use, and through its medium, and of the statute law, of] a property and possession, [but not necessarily or formally of the possession] of things, as in case of a covenant to stand seised of land to uses, for which see *Use*. And in case where one doth covenant that another shall have a piece of land for five years; this [agreement, unless there be a context or a reason, as a custom or a condition to be broken by such effect,] is a good lease for five years, for which see *Lease*. And in case where one doth covenant with another, that if he pay him 10*l*. such a day, he shall have all his cattle in *Dale*, or his lease for years he hath of the manor of * *Dale*; in this case it seems if he pay the money at the time he shall have the property of the goods, and of the lease for years. [This proposition proves, that an article of personalty may be granted on a condition precedent. As to leases for years, it has been doubted whether a man could grant the residue of a term, reserving part of it. *Jermyn and Orchard, Show's Parl. Cas.* 199. It seems however that a term, and consequently the residue of a term, may be granted from a day to come, or after an event; with the exception, that a grant after the death of *A*. would be void. *Sed query*.] It is said therefore that in some cases upon the writ of covenant, [the only instance is on the writ of covenant for a fine,] the party shall recover the land itself out of which he hath been ejected; [and even on this covenant, the land is not recovered by force of the covenant, but only by its means, as laying the foundation for a judicial acknowledgment of title. But see 2 *Black. Com.* p. 350.]

Use.

Lease.

Contract.

*P. 162.

4. What shall be said a good covenant in a deed,

A covenant may be in the affirmative, or in the negative (7). And it may be executed, *i. e.* that

Plow. 330. 27 H. 8. 16.

(7) As to affirmative and negative covenants, see *Vin. Abr. Covenants* (D. a.) 1 *Wood*, 356.

upon which an action of covenant may be had; and what not. 1. In respect of the manner of making it.

a thing is done already; or executory, *i. e.* that a thing shall be done, [and either at one time, or from time to time,] hereafter; and these are all good. But if it be of a thing present, as if I covenant that my horse is yours; this is void. [This covenant amounts to a gift of the horse. *Plowd. Com.* 308 a; *Com. Dig. Covenant* (A. 1.)] [a] And these covenants, being made by a deed poll, are as good and effectual, as when they are made by a deed indented, so as the party have the deed to show; for otherwise a common person cannot have an action of covenant; for it [covenant] doth not lie upon a verbal agreement; neither can it [covenant] be grounded without a writing [sealed and delivered,] except it be by a special custom, as in London (8.) [But an agreement by writing, not sealed and delivered, gives a remedy by *assumpsit*, *viz.* the promise.] [b] And there needs not, in this case, formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant (9), for a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for any thing to be or not to be done, the party to or with whom the promise or agreement is made, may have this action upon the breach of the agreement (10). [*Com. Dig. Covenant* (A. 1.)] And therefore if these words be inserted in a deed, amongst other covenants, "that the lessee shall repair, provided always that the lessor shall allow timber; or that the lessor [*read*, lessee] shall scour ditches, provided always that the lessor do carry away the earth;" these are good covenants on both sides. [c] And if a lease be made of houses by patent, to *I. S.* for twenty-one years, and therein is inserted this clause, and that the said *I. S.* and his assigns shall repair the houses when they shall be decayed; this is a good covenant. And so also it is where these

[a] F. N. B. 145. G. Co. 3. 63. Ewer's case, 8 Jac.

[b] Lit. Rep. Sect. 450. Co. 2. Lord Cromwell's case. Dyer, 57. 150. 21 H. 7. 37. 40 E. 3. 5.

[c] Adjudged Pasch. 14 Jac. B. R. Sir Thomas Bret versus Cumberland's.

(8) Or by the custom of any other place; though such custom shall be taken strictly. 1 *Leon.* 2.

(9) Any words, which show the parties concurrence to the performance of a future act, being effectual for that purpose. 1 *Leon.* 324. 1 *Ch. Ca.* 294. The word *covenant* is not necessary to make a covenant. 1 *Roll. Abr.* 518. No particular technical words are requisite towards making a covenant. 1 *Burr.* 290.

(10) And therefore if by articles of agreement it is said, *that it is intended a fine shall be levied*, this amounts to a covenant to levy it. 2 *Mod.* 91. So also in an indenture of apprenticeship, there are not inserted the formal words of a covenant, but only an agreement that such things shall be done by the parties. 1 *Roll. Abr.* 519. *Gilb. Covenant*, 14.

or the like words be inserted amongst other covenants, and that the lessee shall pay 10*s.* a year rent, or that the lessee shall not alien; these shall be said to be covenants, unless it be in such cases where there is some other means to enforce the doing of the thing. As if, in case of the rent, there be a clause of distress, re-entry, or *nomine pœnæ*; [or from the context it can be collected, that there is not any agreement]. And in all cases regularly, where words that do begin the sentence be conditional, and have the effect of a condition, and do give another remedy, there they shall not be construed to make a covenant, as in the cases of condition before. And yet, if words of condition and words of covenant be coupled together in the same sentence; as provided always, and it is covenanted, or the like; in such cases the words may be construed to make a covenant and a condition both; [*viz.* at one and the same time.]

Bro. Covenant 21. 26. & Co. & Dyer, ubi supra.

Lease. If a man make a lease for life by indenture, and therein are inserted these words, it is provided that if the lessee die within sixty * years, that then his executors and assigns shall have the land until the sixty years be ended, to be accounted from the date of the indenture; this, albeit it be not a good lease, yet it is a good covenant. [Why is not this a good lease, as an ulterior term in the lessee? The only objection is, that the executors were to take originally as lessees; but, on that point, see *Cranmer's case*, *Dyer*, 309; and *Spark* v. *Spark*, *Cro. Eliz.* 666; and *Bac. Abr. Remainder*, (A. 2.) p. 733.]

Dyer, 150. Co 1. 155.

*P. 163.

If a man make a lease for years, and warrant it to the lessee, his heirs, and assigns, during the term; or he that hath right to the land confirm the estate of the lessee for years, with warranty; in these cases, howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing. [Being annexed to a chattel interest, it is not a warranty; *infra*, p. 184.]

Bro. Covenant 38. Descent 50. 21 H. 7. 32.

If the lord grant to his tenant, that he will not distrain him in such a part of his land for his rent; this shall be taken to be a good covenant, by this word grant (11). [This is not a release, since it

Perk. Sect. 69.

(11) See more fully by what words an express covenant may be created, *Vin. Abr. Covenant* (C.) *Bac. Abr. Covenant* (A.) *Gilb. chap.* 2.

leaves to the lessor his remedy by action of debt, and also by a distress on the remaining part at least of the lands. A covenant will not operate as a release, unless it be a contract, in all cases and under all circumstances, to relinquish the debt or duty.]

See West. Symb. in his first part toto & infra. Plow. 308. 309. 27 H. 8. 16. Dyer, 13. 324. 253. 251. Fitz. Covenant 1.

2. *In respect of the matter or substance of it.*

A covenant to do any thing that for the substance and matter of it is lawful; or not to do any thing that for the matter of it is unlawful, is good: as if the grantor covenant that he is seised or possessed of a good estate of, and in, the thing he doth grant, and hath power to grant it; that the grantee shall quietly enjoy it; that it is, and shall be, free from incumbrances; that he will make further assurance, if need be; that if the grantee be evicted, [being no more than the law implies,] he shall pay no rent; that the grantee shall pay rent; that he shall discharge all dues, and save and keep harmless the grantor; that he shall not alien the thing granted; or, if he do, that the grantor shall have the first refusal thereof; that he shall not do waste; that he shall have houseboot, and hayboot; that the grantor or grantee shall repair the old housing, or build new; that he shall pay and discharge all rents and payments issuing out of the land; that he shall not fell trees; or, if he do, that he shall pay to the grantor so much in money for every tree; [and, in this case, the sum agreed on will be considered as stated, or stipulated, damages; and equity will not, as in the case of a penalty, relieve. *Rolfe* v. *Peterson*, 6 *Bro. Par. Cas.* 470; 1 *Cox's Rep.* 27; 3 *Blac. Com.* 335; 1 *Mad. Chan.* 39; *Astley* v. *Wilden*, 2 *Bos. & Puller*, 346;] that if he fell any underwood, he shall fence it; that he shall make an estate of land; that he shall be quit of any suit, service, or payment. [Does not this agreement operate as a release?] That he shall give sufficient security to *I. S.* for an 100*l.* he doth owe him; all these, and the like covenants, are good. And generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also. But if the matter required to be, or not to be done by the covenant, be for the substance thereof unlawful, then is the covenant void, and doth not bind; and therefore if one covenant to kill or rob a man, or the like, this

See Condition. Numb. 7.

See Conditions against law, Numb. 7. Dyer, 6.

Against law.

covenant is void. So if one covenant that he will maintain another in his suits, or that he will not appear in inquests, or that he will break the peace, or that he will forestal corn, or the like; these covenants are void. So if one be tenant in fee-simple of land, and he covenant that he will not alien it; this covenant is void. [The contrary seems to be law at this day. See *Collins* v. *Plumer*, 1 *P. W.* p. 104, and *Co. Lit.* 206 b.] So if a man be a tradesman, and he covenant that he will not use or exercise his trade; this restraint, if it be absolute and continual, is void; but if it be *sub modo* only, as that he shall not use his trade at one time, or in one city or town only, [or within reasonable limits,] * this covenant may be good. [*Thomas's Co. Lit.* 2 vol. p. 24.] So if a man be by covenant restrained to sow the land, which hath been used to be sowed, and this be either absolutely, or *sub modo*, *i. e.* that if he sow it he shall pay thus much an acre for it; these covenants have been held to be void. *Sed quære* how the law is now, for it seems the statute of 39 Eliz. ch. 2. is discontinued (12). If *A.* owe money to *B.*, and *B.* owe money to *C.*, and *B.* doth make a letter of attorney to *C.* to sue *A.* at his own charge, and *B.* doth covenant with *C.* that he will not release the debt to *A.*; in this case, albeit this be maintenance in *C.* to sue at his own charge, yet this is a good covenant, and not against law. So also if a dean and chapter, or the like, covenant to renew a lease contrary to the meaning of the statute of 18 Eliz. ch. 11, it seems this is a good covenant. [But *query*, as against the dean and chapter, while the same

18 Jac. B. R. Jolliffe versus Broad, Pas. 19 Jac. B. R. Tanner versus Brag.

*P. 161.

Hil. 20 Jac. Co. B. Maire versus Stapleton.

Trin. 14 Jac. Co. B. Tailor's case.

(12) This act was for "the maintenance of husbandry and tillage." It enacted, that all land converted from tillage to pasture since the 17th Nov. 1 Eliz. having been used for tillage twelve years before the conversion, should be restored to tillage before the 1st of May 1599. The act is not inserted in *Hawkins'*, *Ruffhead's*, or *Pickering's* edition of the statutes, being marked to be *expired*, but it is contained in *Rastell's*. The preamble is curious, and not unworthy attention. It recites, *that the strength and flourishing estate of this kingdom hath been always, and is greatly upheld and advanced by the maintenance of the plough and tillage, being the occasion of the increase and multiplying of people, both for service in the wars, and in times of peace; being also a principal means that people are set to work, and thereby withdrawn from idleness, drunkenness, unlawful games, and all other lewd practices and conditions of life; that by the same means of tillage and husbandry, the great parts of the subjects are preserved from extreme poverty, in a competent estate of maintenance and means to live, and the wealth of the realm is kept dispersed, and distributed in many hands where it is more ready to answer all necessary charges, for the service of the realm; and that husbandry and tillage is a cause that the realm doth more stand upon itself, without depending upon foreign countries, either for bringing in of corn in time of scarcity, or for vent and utterance of our own commodities, being in over great abundance.*

dean continues, though it be not a good covenant to bind the successors.] And if the thing to be done by a covenant be in the nature of it impossible, the covenant is void. And therefore it is, that if a man covenant to go to Rome in three days, or the like, the covenant is void. [A condition is void when it stipulates for an act which is impossible; but it should seem that if a man covenant to do an impossible act, as to go to Rome in twenty-four hours, an action may be maintained on the covenant, though the damages may be merely nominal.] So if a man covenant to make a feoffment to his wife; this covenant is void. But if a man covenant to make a good estate of land to her in fee simple, or otherwise, [because this may be done by a conveyance to uses,] or to find her maintenance, or to give her so much by the year; these are good covenants. And generally where the matter being in a condition will make the condition void, because it is against law, [*i. e.* stipulates for an act which is illegal;] there it being in a covenant will make the covenant void (13).

27 H. 8. 27. 4 H. 7. 4. Impossible.

See Condition, Numb. 7.

Dyer, 19. 115. If a lessor covenant with his lessee, that he shall and may have houseboot, hayboot, plowboot, &c. by the assignment of the bailiff of the lessor; this is a good covenant; and yet it seems it doth not restrain the power that the lessee hath by the law to take these things without assignment. But if the lessee do covenant that he will not cut any timber, or fuel, without the leave, or without the assignment of the lessor; this is a good covenant and doth restrain him; for in this and such like cases the rule is, *modus & conventio vincunt legem.* [And his covenant, in the negative, is a restriction on his right to those privileges which the law would have allowed him without a contract to the contrary.]

Mich. 36, 37 Eliz. Co. B. Adjudged Deaux versus Jefferies, 21 H. 7. 23. If an obligee covenant with the obligor, that he will not sue him upon the obligation until Easter following; this is a good covenant, but no release or suspension of the debt. [Because the covenant

(13) And therefore if a man on his marriage settles lands to himself for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and in the same deed covenants not to suffer a recovery; that covenant will not restrain him; for he may afterwards, by suffering a recovery, vest the land in himself in fee, and devise it by will; for, by the Ld. Chancellor, the covenant can not bind the land so as to defeat the will or recovery; but the covenant will bind the assets of the settlor. 1 *Pr. Wms.* 104, *Collins* v. *Plummer.* [2 *Vern.* 104. 2 *Cruise*, 235. *Inst.* 206 b. Or rather give a right to damages.]

is confined to a limited period, and does not discharge the remedy after the lapse of that time.]

If there be lord and tenant of three acres of land, white acre and two others, and the lord grant to the tenant, by deed, that he will not distrain in white acre for his rent or services; this is a good covenant, but doth not determine the seigniory, [since it is evident the rent is to continue.] Perk. Sect. 69.

If a man grant a mill within his manor, and covenant for him and his heirs, that there shall be no other mill set up within the manor; it seems this is a good covenant. Fitz. Covenant 5.

If one make a lease wherein are divers covenants to be performed on the part of the lessee, and after the lessee doth covenant, that if any of the covenants be broken, that the lessor shall enter upon the land demised, and hold it until the lessee make him * amends for the damage done by the breach of the covenant; it seems this is a good covenant, and that the lessor may take advantage thereof accordingly. [As far as it gives a right of re-entry, it is of the nature of a condition or defeasance.] Fitz. Covenant 3.

*P. 165.

If a man, seised of land in fee, covenant to stand seised of it to uses, and no estate doth rise by the covenant, [for want of blood affinity, &c.;] yet this may be good by way of covenant, and give remedy to the covenantee in an action of covenant. But with this difference. If the covenant be future, as where one doth covenant with another, that in consideration of a marriage, his lands shall descend, remain, or revert to his son and heir apparent, and to the heirs of his body, on the body of his wife; in this case the covenantee may have a writ of covenant upon the covenant. For if a covenant be present, as that a man and his heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by the law in the [particular] case; in this case no action of covenant will lie upon this covenant: for this action will never lie upon any covenant, but upon such a covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done; and not when it is for a thing present, as when *A.* doth covenant with *B.* that his black horse shall be for ever after the horse of *B.* this is no good covenant to give the horse to *B.* or to give him an action of covenant for him, but *A.* may keep him still not- Plow. 307, 308. 21 H. 7. 18. 27 H. 8. 16. Finchesley, 49.

withstanding (14). [The covenant operates as a bargain and sale; for it amounts to an immediate gift of the horse. *Plow. Com.* 308.]

Agreed, 8 Car. If one mortgage upon condition to re-enter upon payment of 100*l.* at a day, and the mortgagee doth covenant that he will not take the profits of the land until default of payment; this is a good covenant, and the mortgagee therefore may not meddle with the profits until the day of payment come, [without subjecting himself to an action for damages.]

Co. 4. 80. 5. 17. Trin. 3 Jac. B. R. Stile's case. Pasc. 7 Jac. B. R. Winscombe's case.

5. *What shall be said a good covenant in law, upon which an action of covenant may be had; and what not.*

If one make a lease for years of land by the words "demise or grant," and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the law doth supply [*read*, imply] a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title, during the term; and upon this the lessee, his executors, administrators or assigns, may have an action of covenant if he be disturbed (15). But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant. *Expressum facit cessare tacitum.* And therefore herein this is not like to the case, where a man doth make a lease for life by the words of *dedi & concessi*; or make a lease for life by other words, reserving rent, (in which cases the law doth create a warranty against all men during the life of the lessor); for if in these cases there be an express warranty in the deed, yet this doth not take away nor qualify the implied warranty; but the lessee may make use of which of them he will, if he be ousted or evicted by one that hath an elder title (16).

Warranty.

*P. 166.

6. *How a covenant in deed or law shall be taken*

* A covenant in particular (being one part of a deed) is subject to the general rules of exposition of all parts of deeds in general: as, 1. To be always

Plow. 287. See in Exposition of Deeds, before, in toto.

(14) In order to create a good covenant to stand seised to uses, it is necessary that the covenantor should be seised at the time of making the covenant; that the covenant should be by deed, and not by parol; that it should contain apt words, and a manifest intent; and that it should be made on sufficient consideration, otherwise no use will arise. See fully *post*, in the chapter on Uses. *Com. Dig. Covenant* (G.) 1 *Wood*, 647. *Vin. Abr. Uses*, (B. a.) (Z. a.)

(15) Accordingly *Cro. Jac.* 73. *Dyer*, 257 a. 2 *Leon.* 104. See further, as to action of covenant on the word *demise*, *Gilb. Covenant*, 36. *Shep. Law of Assur.* 544.

(16) See further as to covenants created by implication of law, and in what cases action of covenant may be had thereon, *Vin. Abr. Covenant* (G.) *Com. Dig. Covenant* (A. 4.) *Warranty* (A.) *Bac. Abr. Covenant* (B.)

and expounded; and how it shall be performed.

taken most strongly against the covenantor and most in advantage of the covenantee (17). 2. To be taken according to the intent of the parties (18). 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it shall be done in reasonable time, and the like (19.) [See 1 *Mod.* 175.]

Joint & several.

In cases where the covenantees have, or are to have, several interests or estates, there, when the covenant is made to and with the covenantees, *& cum quolibet eorum, aut altero eorum*; in this case these words make the covenant several: as, if one by indenture demise black acre to *A.* and white acre to *B.* and green acre to *C.* and covenant with them and either of them, or covenant with them and every of them, that he is lawful owner of all these acres; in this case the covenant is several. But if he demise to them the three acres together, and covenant in this manner; the covenant is joint and not several: [for the words, and with every of them are, in this case, only words of amplification and abundance, and do not (the Report has it), cannot sever the joint cause of action. 5 *Rep.* p. 18.] And if *A.* and *B.* do covenant jointly, and severally; in this case the covenant may be joint, or several, and the covenantors may be sued either the one way, or the other, at the election of the covenantee (20), [although they are joint-lessees. 2 *Burr.* 1190. On the subject of joint and several covenants, that eminent lawyer Sir *Vicary Gibbs*, assumed, that covenants must necessarily be joint or several, according to the interest. The language was, "Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant, on which it is founded, may be joint; and where the interest is joint, the action must be joint, although the covenant, in language, purport to be joint and several." *James* v. *Emery and another*, 5 *Price*, p. 533. With great deference, however, the cor-

Co 5. 19. Dyer, 338. Bro. Covenant, 49.

(17) As if *A.* covenants with *B.* that if *B.* marries his daughter he will pay him £ *per Annum*, without saying for how long, yet it shall be for the life of *B.* and not for one year only. 1 *Lev.* 102. See further *Bac. Abr. Covenant* (F.)

(18) See accordingly Sir *T. Raym.* 464.

(19) How a covenant shall be expounded with regard to the context, or to synonymous other words, see *Com. Dig. Covenant* (*D.*) *Vin. Abr. Covenant* (L. 4.)

(20) Words, though never so joint, shall be taken severally, where they have a distinct subject matter to work upon; *per Holt*, Ch. J. 3 *Ch. Rep.* 126. See fully as to joint and several covenants, 1 *Wood*, 357. *Gilbert Covenant*, 99. *Bac. Abr. Covenant* (D.) and case of *Eays* v. *Donnithorne*, 2 *Burr.* 1190.

rect rule is, that, by express words, clearly indicative of the intention, a covenant may be joint, or joint and several to, or with, the covenantors or covenantees, notwithstanding the interests are several. *Salk.* 393; 2 *Roll. Abr.* 419. So they may be several, although the interests are joint. *Williams's note* to 1 *Saund.* 154, 155. But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect. *Slingsbie's case*, 5 *Rep.* 19; 3 *Ch. Rep.* 126, *Duke of Northumberland* v. *Errington*; 5 *Term Rep.* 522; *Southcote* v. *Hoare*, 3 *Taunt.* 89; 1 *Wood*, 537; *Enys* v. *Donnithorne*, 2 *Burr.* 1190. The general rule proposed by Sir *Vicary Gibbs*, and to be found in several books, would establish, that there was a rule of law too powerful to be controlled by any intention, however express.]

F. N. B. 145. 1 Dyer, 328. 26 H. 8. 3.

For quiet enjoying.

If one make a lease of land to another, and covenant that he shall quietly enjoy it without the let of any person whatsoever; or without the let of any person whatsoever claiming by or under the lessor; in both these cases the covenant shall be taken to extend to such persons as have title, or claim some estate under the lessor. [It is apprehended, the former of these covenants is a warranty against all persons having title, *infra* 167, and not against those only who claim title under the lessor:] for if in the first case any person that hath no title; and in the second case, any person that shall claim under another, and hath title; or that shall claim under the lessor [without title]; claim, or enter, or otherwise disturb the lessee, this is held to be no breach of the covenant. *Sed quere* of the first case; [the third case, as it stood, was open to objection, for a claim by a person having title, would be a breach of the covenant;] for herein some conceive a difference between a covenant in deed, and a covenant in law; and that howsoever the covenant in law is extended only to evictions by title, yet that the covenant in deed shall be extended further. And, therefore, that if *A.* make a lease for years to

Mich. 7 Jac. B. R. accord in Gamble's case.

Co. 4. 80. Dyer, 328. Per Farmer, at Lent Assize, Glouc. 23 Car.

B. and doth covenant that *B.* shall quietly enjoy it during the term, without the interruption of any person or persons; that [*omit* that] if a stranger in this case, that hath no right, doth interrupt *B.* that he may have an action of covenant; as when such a promise is by word, an action of the case will lie upon it (21). [It is now settled, that a general warranty of title or enjoyment extends only to evictions by persons having title; while a covenant for enjoyment, without eviction, by persons particularly named, is a warranty against wrongful as well as rightful entries, &c. The authorities, and the *dicta* to be found in the books, on those points, must be read with great caution. To avoid the possibility of a question on the enjoyment, warranted by the covenant, it is usual to add, without any lawful let; and if the word equitable also preceded the word let, so as to make the covenant a warranty against claims of equity, it would be convenient, where it promoted the intent and understanding of the parties; for it was held, by the Lord *Dyer*, that a decree in favour of a stranger, obliging the parties to make an assurance of the lands, and thereby defeating the estate of a lessee, with a covenant for enjoyment, without lawful eviction, was not any breach of covenant. 3 *Leon.* 71.]

And if the lessor covenant with his lessee, that he hath not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case these words "against all persons" shall refer to the first, and be limited and restrained to any acts done by him, and no breach shall be allowed but in such an act (22).

Caria, Jervis versus Peade. Mich. 40, 41 El. B. R.

The covenant in law upon the words, demise or grant, also * for the quiet enjoying of the thing demised, is general against all persons that have title during the term, and extendeth to the heir after the death of the lessor, as against himself only, and shall charge the executors or administrators for any disturbance in the life of the covenantor, but not [as is the law on an express covenant by the lessor] for any disturbance afterwards; he that doth sue therefore upon this cove-

*P. 167.

Co. 5. 17. 22 H. 6. 52. Co. 4. 80. Dyer, 257.

(21) As to covenants for quiet enjoyment, see *post.* Also *Vaugh.* 118. *Dyer*, 328 a *Gilb.* 187. *Vin. Abr. Condition* (U. a.) pl. 6. 7. *Covenant* (Z.)

(22) For the construction of the words in a covenant, *notwithstanding any act done by the covenantor, &c.*, see *Vin. Abr. Covenant* (T.) *Cro. Jac.* 233, *Proctor* v. *Johnson.*

nant, must show that he was molested or evicted by one that had an elder title; [*i. e.* a rightful title. Of a covenant in law, it is therefore said, that, in point of title, it is personal to the lessor. In respect of enjoyment, it extendeth as well to the heir of the lessor (when the reversion descends to him), as to the lessor himself. But it will not bind the heir to warrant the title, or defend it; or oblige him to render damages; because he is not expressly bound by name; and, unless he be so named, he cannot be bound by express covenant.]

Co. 5. 78. If one doth covenant to enter into bond for the quiet enjoying of land, and doth not say what bond; in this case it shall be taken to be a bond of so much as the land to be enjoyed is worth.

Fitz. Covenant, 21. see before. A warranty in a lease for years shall be taken for a covenant for quiet enjoying.

7 E. 4. 6. Bro. Grant, 164. If one covenant with another to acquit him of all charges issuing out of the land; and after, by parliament, the tenth part of the value, out of the issues of all lands, are given to the king; in this case it seems the covenant shall not extend to this. But if the parliament had given the tenth part *exituum terræ*, the covenant would have extended to this as well as to rents, commons, and such like things, wherewith the land is charged. To free from incumbrances and charges.

Co. 5. 19. If *A.* covenant with *B.* to make such assurance, or such further assurance of land as the counsel learned in the law of *B.* shall advise; in this case albeit *B.* be learned in the law himself, yet he may not devise this assurance, but some other learned in the law must advise, otherwise *A.* is not bound to make it (23). [The general practice now is, to require such further assurance as the said *B.* his heirs, &c. or his or their counsel in the law, omitting learned, shall reasonably require.] To make assurances of land.

Co. 5. 19, 20. Dyer, 361. & per Just. Bridgeman. And if *A.* covenant with *B.* to make such assurance of land by a day, as *B.* or his heirs shall devise; in this case *B.* or his heirs must first devise the assurance, before *A.* is bound to do any thing; [and it must be devised before the limited day is elapsed.] And therefore if one sell land for money, and the vendee doth covenant to make

(23) As to covenants to make such assurance as counsel shall advise; to make assurance generally; and for further assurance; see fully in *Vin. Abr. Covenant* (W.) (G. a.) 1 *Wood*, 417. *Gilb. Covenant*, 209. 226. *Cro. Jac.* 251.

back to the vendor and his heirs such assurance of the land as the counsel of the vendor shall devise, within one year, provided that if the vendee make default in the assurance, then if he do not pay 20*l.* to the vendor, that then the vendee shall stand seised to the use of him and his heirs; and the vendor tender no assurance, and the 20*l.* is not paid; in this case the land is in the vendee freed from the covenant: [this proposition is questionable.] And therefore in these and such like cases, where a man is to make such assurance, as *A.* or his heirs, or his or their counsel, shall devise; *A.* or his heirs must take care that in time they have an assurance reasonably drawn and ready to be sealed, and to tender it to him that is to seal it, for until then there can be no breach of covenant. [The practice is, prior to the engrossment to leave a draft with the party, or his solicitor, and desire him to state his objections (if any) to the intended assurance.] But if *A.* be bound to make a feoffment, lease, or other assurance of land to *B.* by a day; in this case *B.* need not to demand it or tender the assurance, for *A.* at his peril must do it, otherwise he doth break his covenant. [a] And yet if in this case *B.* do get the assurance drawn, and tender it to *A.* it seems *A.* is bound to seal it, or * otherwise he doth break his covenant. † And if the case be so that *A.* is bound to make such assurance to *B.* by a day, at the costs of *B.*; in this case *A.* must do the first act, *viz.* notify to *B.* what manner of assurance he will make, that he may know what money to tender; and when the money is tendered, *A.* must see that he do make the assurance accordingly at his peril; and if he fail, in either of these, the covenant is broken.

*P. 168.

[a] Trin. 20 Jac. B. R. Steed versus Spike.

† Co. 5. 20. 22.

If *A.* be bound to make such assurance to *B.* as by the counsel learned of *B.* upon request made, shall be devised; in this case it is sufficient if the advice be given to *B.* and that he do make it known to *A.*; and it is not needful [that] it be given to *A.* immediately. [The proper and regular course is, to have a case stated, and the opinion of counsel written at the foot of it; and to produce the case and opinion to the party.] And if *A.* covenant with *B.* to make such assurance to *B.* as *I. S.* shall devise, and *I. S.* doth devise a rea-

Co. 5. 20.

Dyer, 338. Co. 2, 3.

sonable deed of bargain and sale, and he tender it to *A.* to seal; in this case *A.* is bound to seal it presently, and he shall not have time to advise with his counsel upon the deed; but if he be illiterate and cannot read the deed, he may refuse and delay to seal it until he can get somebody to read it, which he must do as soon as he can. And if one be bound by covenant to make an assurance upon request: the covenantee must request, and tender an assurance also, and he must tender such a one also as is reasonable, otherwise the covenant will not be broken by the refusal or neglect to do it, [*viz.* to execute the deed;] as if one be bound to make a feoffment to *A.* upon request; in this case *A.* must get a naked deed of feoffment drawn without warranty or covenants, [unless there be a stipulation, that the feoffment shall be with warranty, or with usual and reasonable, or certain covenants,] and tender it. And if the covenant be to make such a lease as the former; in this case the second lease must not differ from the former, [except *mutatis mutandis*;] and if it do, the party is not bound to seal it.

Experientia.

Curia Hil. 7 Jac. Co. B.

If one covenant to levy a fine at the next assises for thirteen years *extunc*; this shall be taken from the time of the fine levied, and not from the time of the covenant; [for *extunc* being *thence*, excludes all implication that the thirteen years are to be from the date of the deed.]

Adjudged in Sir Ja. Bret's case.

If one bargain and sell land to me by deed indented, and before the inrolment of the deed I do covenant with *I. S.* to convey all the land whereof I am seised, and to do this before such a day, and before the day the deed is inrolled; in this case, my covenant shall not extend to this land conveyed to me by this bargain and sale. [The assumed ground of this case was, that there was not any seisin till inrolment; but, at this day, the bargain and sale gives an immediate seisin, subject to be devested, unless there be an inrolment in due time.]

Dyer, 371.

If *A.* covenant with *B.* that in consideration of a marriage between the son of *A.* and sister of *B.* that he, at the costs of his son, and by his sufficient deed, will, before Easter day, assure land to his son; and *B.* doth covenant, that if *A.* do perform this, [his covenant,] then he will make him a general release; in this case, [because it is stipu-

lated that the assurance is to be at the cost of the son,] albeit *A.* be ready, if the son do not tender the assurance, and the conveyance is not made, *B.* is not bound to make any release; [but equity may, in some cases, afford relief.]

To repair the house.

If one covenant to keep and leave a house in the same, or as good plight, as it was at the time of the making of the lease; in this case the ordinary and natural decay of it is no breach of * the covenant; but the covenantor is hereby bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. (24), [*viz.* wind-tight and water-tight. See 7 *Taunt.* 392. 3 *Tho. Co. Lit.* 236.] Fitz. Covenant 4.

*P. 169.

For the having of houseboot, &c.

If the words of a covenant be, that the lessee shall have thorns by the assignment of the lessor, and necessary fuel also; it seems by this, that there must be an assignment of the fuel as well as of the thorns. Dyer, 19.

If the lessor covenant with his lessee, that he shall have sufficient hedgeboot by assignment of the bailiff of the lessor; in this case, and by this [stipulation], the lessee is not restrained from that liberty that the law doth give him, and therefore that he may take without assignment; but if the words be negative, that he shall not take without assignment, or that he shall take by assignment, and not otherwise, *contra* (25). [See *supra*, p. 164.] Dyer, 19. 20.

To convey lands of the value of, &c.

If *A.* doth covenant with *B.* that whereas a marriage is intended to be solemnized between *A.* and *C.* the daughter of *B.* at or before the 14th day of August next; and whereas the said *B.* hath paid to the said *A.* 1,000*l.* for portion, &c.; the said *A.* in consideration thereof, doth covenant with *B.* that he, within one year of [*viz.* from] the day of the marriage, will assure lands of the value of 400*l. per annum*; in this case, albeit the marriage be not on or before that day, yet the covenant must be performed (26). [The assurance Trin. 21 Jac. B. R. George v. Lane.

(24) See accordingly, and further, in *Gilb. Covenants*, 149. See more amply how covenants to repair shall be expounded, *post.* Also *Finch. Rep.* 86. *Lant* v. *Norris*, 1 *Burr.* 287. 1 *Wils. Rep.* pt. 1, p. 75.

(25) See accordingly *Sherewood* v. *Nonnes's case*, 1 *Leon.* 250.

(26) As to covenants to convey lands of such a value; or that they are, or shall be, of such a value, see fully in 1 *Ld. Raym.* 365. *Cro. El.* 43. 1 *Rol. Abr.* 429; and the case of *Langton* v. *North*, 2 *Chanc. Rep.* 140.

is to be made within one year from the marriage, at whatever time the marriage may take place. The recital alone speaks of the time within which the marriage is intended to be solemnized, and the recital is not made an essential part of the agreement.]

Per Justice Bridgman.

That the lessee shall make estates.

If one make a lease for years of a manor, and covenant that the lessee shall make estates for life or years, and that they shall be good; in this case, it seems, this covenant shall not be taken to enable the lessee to make estates for a longer time than his estate will bear; [for that object could not be accomplished without a power; and a power could not be created by a grant, operating under the rules of the common law.]

Dyer, 13.

That if the lessee sell, the lessor shall have the first refusal.

If the lessee covenant with the lessor, that if the lessee be minded to sell his estate, the lessor shall have the first refusal; in this case, when the lessee is minded to sell, he need do no more but [than] acquaint the lessor with his purpose [and price,] and know his mind; [it is apprehended this conclusion is not warranted by law;] and if he do not answer him presently, he may sell it to whom he will; and if the covenant be further, that the lessor shall give as much as another will, the lessee must tell him what another doth offer him, and ask him whether he will give so much; and if he refuse, or do not accept it presently, the lessee may sell to whom he will.

Co. super Lit. 304. Dyer, 371. Mich. 7 Jac. Co. B.

To do one thing for another.

If one covenant to serve me a year, and I covenant to pay him 10*l.* for it; in this case, albeit he do not serve me, yet I must pay him the 10*l.*; [but see *Thorpe* v. *Thorpe*, 1 *Ld. Raym.* 235. 662; 4 *Term. Rep.* 461. The general rules, applicable to mutual and reciprocal covenants, are collected in 3 *Newnham*, 419. *Vin. Abr. Covenant*, (F.) *Com. Dig.* (A. 2.)] But if I covenant with him to pay him 10*l.* if he serve me a year, *contra*; for in this case, [there are words of express condition, and] I am not bound to pay him the money unless he serve me a year. So if one covenant to make new pales, so as he may have the old; in this case, it seems, he is not bound to make the new pales unless he may have the old pales. So if one covenant to pay money for service, counsel, or the like; or covenant to marry one's daughter; or make an estate; and the covenant is penned conditionally, and * so as one thing is the cause of another, *P. 170.

and it is not set down by mutual and reciprocal covenants; in all these cases, if the cause, or condition, be not observed, the covenant shall not be performed.

That the lessee shall have the fee.

If one make a lease for ten years, and covenant that if the lessee pay him 10*l.* within the ten years, that he shall have the fee simple, and the lessee surrender his estate within the time; in this case, if the lessee pay the money, the lessor is bound to make the fee simple to him; [because this is to be done within the ten years, and not during the term.] But if the words of the covenant be, that if he pay him 10*l.* within the term he shall have the fee, and the lessee surrender his term, and then pay the 10*l.*; in this case the lessor is not bound to make the fee simple, for it was not paid within the term; [because the term is ended by the surrender. *Sed query*, if at this day the word term would not, in such case, be construed as of the same import as ten years; and *query* also, if in both these cases the words of covenant were not to operate as a grant in enlargement of the estate for years; and if the right of having the fee, by accession or enlargement, was not extinguished by the surrender of the term. As to the first point, see *Plowden* v. *Cartwright*, 1 *Burr. Rep.* 282; and as to the second point, see *Lord Stafford's case*, 8 *Rep.* 74; and *ch. Condition, supra.*] Co. 1. 144.

Assigns.

If one covenant to do a thing to *I. S.* or his assigns, or to *I. S.* and his assigns by a day; and before the day *I. S.* die; in this case it must be done to his assigns if he before the day name any assignee; and if he do not, it must be done to his executor or administrator, which is an assignee in law. See more in *Condition, numb.* 8. *Obligation*, 7. 27 H. 8. 2.

7. *When a covenant in deed or law shall be said to be broken; and when not; and how.*

If one be seised of land in fee, or possessed of a term of years, and he doth alien it; and supposing he hath a good estate, he doth covenant that he is lawfully seised or possessed, or that he hath a good estate, or that he is able to make such an alienation, &c. and in truth he hath not, but some other hath an estate in it before; in this case the covenant is broken as soon as it is made (27.) Dyer, 303. Co. 9. 60.

(27) And if two men, upon sale of their wives lands, covenant that they and their wives have good right to convey; if one of the women is under age it is a breach, for she has not the power to convey according to the covenant. *Nash* v. *Ashton*, *Sir T. Jones*, 195.

[This covenant was for seisin or title generally, and not with the usual qualification, notwithstanding any act done by the vendor, &c.] And if I bargain and sell land, by deed indented, to *B.*, and before the deed is inrolled, I grant the same land to *C.* and covenant that I am seised of a good estate of it in fee, and after the deed is inrolled; in this case the covenant is broken (28).

Adjudged Sir Perall Brocas' case. 32 Q.

That the covenantor is seised of a good estate, &c.

If *A.* let land to *B.* and covenant that he shall quietly enjoy it without the let of any person whatsoever, and *A.* himself, or any other person that hath any title to the land by or under him, (as if he make a lease of it, or grant a rent out of it to another;) or any other person that hath any title to the land, albeit it be not by or under *A.* as if *A.* were a disseisor, and the disseisee do enter or disturb *B.*; in all these cases the covenant is broken (29). [See *Dudley* v. *Folleot*, 3 *Term Rep.* 584. This covenant is not a warranty against the acts of wrongdoers.] And so also is the law deemed to be by some in case of covenant in deed for quiet enjoying, where a stranger or one that hath no title to the land doth enter or disturb *B.* [See *supra*, p. 166; and *query*.] But otherwise it is in case of covenant in law for quiet enjoying; for in this case, if a stranger that hath no title to the land doth enter or disturb the lessee, this is no breach of the covenant in law. And in all cases where any person hath title, the covenant is not broken until some entry or other actual disturbance be made by him upon his title. [Hence, the use of the covenants against incumbrances, and for further assurance.]

Mich. 8 Jac. Lan's case. Dyer, 328. F. N. B. 145. 26 H. 8. 3. Hil. 39 Eliz. B. R. Cornes case. Fitz. Covenant, 26. Bro. Covenant, 40.

For quiet enjoying.

If a man make a lease of land, and after make a feoffment of * the same land, and the feoffee doth disturb the lessee; in this case, it hath been said, this is a breach of the covenant for quiet enjoying. *Sed query.*

20 Jac. Bro. Covenant, 7.

*P. 171.

(28) See more fully as to covenant that grantor is seised in fee, &c. *Vin. Abr. Covenant* (Y.) *Parols* (D.) pl. 4. *Cro. Jac.* 369. 3 *Lev.* 46.

(29) Lessor covenanted, that lessee *paying* the rent, and *performing* the covenants, should quietly enjoy. The breach assigned was a disturbance by the lessor, who pleaded, that till such a time the plaintiff did quietly enjoy, but then he cut down wood, which was contrary to his covenant; and then, and not before, defendant entered, and so by plaintiff's not performing his covenant, the defendant's covenant ceases to oblige him: whereunto plaintiff demurred. The question was, whether the defendant's covenant was conditional or not? Judgment was given for the plaintiff, that the covenant was not conditional. *Hays* v. *Bickstaffe*, 2 *Mod.* 35. See further in page 163, before.

If a man purchase land to him and his wife and his heirs in fee, and then make a lease for years of it to *I. S.* and covenant for him, his executors and assigns, that the lessee, his executors and assigns, shall quietly hold and enjoy the premises without the let of the lessor, his heirs or assigns, or any other person by or through his or their means, title or procurement, and after the lessor doth die, and his wife doth enter and disturb; in this case, and by this means, the covenant is broken (30). And so it is also, if *A.* purchase land of *B.* to have and to hold to *A.* for life, the remainder to *C.* the son of *A.* in tail, and after *A.* doth make a lease of this land to *D.* for years, and doth covenant for the quiet enjoying as in the last case, and then he dieth, and then *C.* doth oust the lessee; in this case this was held to be no breach of the covenant. [Why not? Because the title of *C.* arises from the act or procurement of *A.* as well in this, as in the former, instance.] So likewise if *A.* be seised of white acre in fee, and take to wife *B.* and then make a lease of it to *C.* with such a covenant as before for the quiet enjoying, and then *A.* doth die, and after *B.* doth recover dower; by this the covenant is broken; and yet if the mother of *A.* recover dower and oust the lessee, *contra.* [Because the wife of the covenantor obtains her title by means of his act, namely, his marriage; while the mother of the covenantor becomes entitled by means of the act of the father.] So also if a tenant in tail, [under the gift of another person,] doth make a lease with such a covenant, and his issue doth disturb the lessee; this is no breach of the covenant; [for the issue claim *per formam doni*, and not as heirs of the covenantor, in the sense of claiming under him.] And yet if the lessor be the cause of the gift in tail, or procure the disturbance, this may be a breach of the covenant. And so also it is where a man is seised of land in fee, and he doth make a lease with such a covenant, and afterwards he doth die, and then his heir is in ward by reason of a tenure, and hereby the lessee is disturbed; it seems this is no breach of this covenant. [Because the lord, entitled by reason of his ward, claims paramount, and in right of his seigniory.]

Hil. 20 Jac. adjudged B. R. Butler v. Lady Swinerton.

Swan's case. M. 7 & 8 El.

Dyer, 42. 26 H. 8. 3. Fitz. Covenant, 6. 26.

(30) For she claims by the means of the baron, and she is therefore within the covenant. *Cro. Jac.* 657. *Palm.* 339. S. C.

Curia B. R. Pasc. 6 Car. Crowle's case.

If one covenant that the wife he is about to marry shall quietly enjoy all her goods, and that the covenantee shall take it [them] into his possession, and the husband doth only take the goods and keep them in his possession [for the use or enjoyment of his wife,] this is no breach of the covenant.

Adjudged Hil. 38 El. Woodruffe v. Greenwood.

If a covenant be for the quiet enjoying against all persons but the king and his successors; and the patentee of the king do disturb; this is a breach of this covenant. [To exclude all doubt, the words, "and all persons claiming by, from, or under the king and his successors," should be added.]

Adjudged Mich. 2 Car. B. R. Saunder's case. Dyer, 240.

If two make a lease, and covenant that the lessee shall enjoy the land without the let of them or any other, and one of them alone doth disturb the lessee; this is a breach of the covenant. [In cases of this sort, when the intention requires it, the covenants should be several, and each should stipulate only for his own acts, &c.]

If a lessee grant and assign all the land contained in his lease to *A.* and doth covenant with him that he hath not done any act or thing by which the grant or assignment might be impaired, but that the assignee, his executors, &c. may, [in respect of his acts, is understood,] enjoy it against all persons, and before this time the wife of the lessor had recovered and had execution of a third part of this land for her dower; in this case this * is no breach of the covenant, for the words "but that, &c." do refer to the former [qualification,] and are not absolute. *P. 172.

Adjudged [illegible] v. Row. Pasc. 13 Jac. Co. B.

If *A.* grant the bailiwick of *W.* to *B.* for life, and *B.* assign it to *C.* for three years, and after to *D.*, and *C.* doth covenant with *D.* that he will not do, or suffer to be done, any act during the said three years by which the grant made by *A.* may be forfeit, but that, after the three years ended, he may enjoy it in as ample manner as *C.* did, or might have done, without any act by *C.*, and after the three years ended, *C.* doth execute a process there, and thereby encroach upon the office; this is no[t any] breach of the covenant.

[illegible] Hil. [illegible]. Co. B. [illegible] and [illegible]'s case.

To free from charges and incumbrances.

If *A.* grant land to *B.* and his heirs, rendering 10 *l.* rent, and *B.* doth sell the land to *C.* and his heirs, and doth covenant with *C.* that from such a day he shall enjoy it discharged of all incumbrances,

and before that day a common recovery is had against *C.* in which *A.* is vouched, and this [recovery] is to the use of *C.* and his heirs, supposing hereby the rent had been gone, which is not so; [*Capel's case*, 1 *Rep.* 66 a;] in this case the covenant is broken, for this rent is an incumbrance. [The recovery is only for further assurance, and amounted to a confirmation, subject to the rent; and even if there had been an intention to have extinguished the rent, the recovery would not have had that effect.]

If a lease be made of land for years, and the lessee devise it to his wife *durante viduitate*, and after to his son, and he in reversion doth sell the fee to the woman during the widowhood, and doth covenant that the land is discharged of all former sales, rights, titles, charges; in this case the covenant is broken at the first by reason of the possibility of the son (31). [For though all the term be in the wife, and although there be a merger for a time, (3 *Prest. Convey.* p. 11,) yet the title of the son continues, and is an incumbrance.] Co. 10. 52.

If *A.* grant white acre to *B.* and covenant that *B.* shall enjoy it against all incumbrances, and *C.* doth disturb him in the taking of common there, and this is a common which is against common right, and which he hath by prescription; in this case, it seems, this is a breach of the covenant. But if it be of a common, that is of common right, *contra* (32); [for a common of common right is a charge on the land, and not an incumbrance on the estate or title.] 9 Eliz. Co. B.

To make estates and assurances.

If *A.* covenant with *B.* before Easter to make him a good sure estate of land, discharged of all former bargains, leases and incumbrances whatsoever, (leases or grants for life or years, reserving the ancient rent, during the term, only excepted,) and *A.* after this, and before the estate made, doth make a grant of all or part of the land, reserving the old rent; it seems this is no breach of the covenant. [Because the covenant refers to the time of grant, and not to the date of the covenant.] Dyer, 139.

(31) And in action of debt on bond, for performance of the covenants in the lease, brou by the administrator of the widow, against the administrator of the reversioner the gran judgment was for the plaintiff. See this case as stated by the Ch. J. in 10 Co. 52, and points resolved therein.

(32) See further as to covenants free from incumbrances, in *Vin. Abr. Covenant* (A. 1 *Wood*, 415. *Gilb. Covenant, ch.* 31.

Co. 5. 21. If one make a lease to *I. S.* for years, and covenant with him, that upon the surrender of that lease he, [*viz.* personally,] will make him a new lease; and the lessor, before *I. S.* can make any surrender, doth sell away the reversion, or make a lease to another of the land, and so disable himself, this is *ipso facto* a breach of the covenant, without any surrender made by the lessee, which in this case is not needful. For *Lex neminem cogit ad vana & inutilia peragenda.* [But equity would compel the purchaser to perform this covenant.] So if one be seised of land in fee, and covenant to make a feoffment of it to *I. S.* by* a day upon request, and the covenantor before the day doth make a feoffment of it to another, and then doth die before any request made to him; in this case the covenant is broken. [In fact, it was broken as soon as the feoffment was made.] *P. 173.

Dyer, 338. Co. 2, 3. If *A.* covenant with *B.* to make such assurance as *B.* or as the counsel learned of *B.* shall devise, and *B.* tender such an assurance to *A.* to seal, and *A.* doth refuse or delay to seal it; this is a breach of the covenant.

Bro. Covenant 3. If *A.* doth covenant with *B. C. D.* and *E.* to make them a feoffment such a day, and they come to the land at the time to take it, and *A.* doth not make the feoffment; by this [default] the covenant is broken. And so also, if *B.* and *C.* only, or one of them, doth come to the land; for it may be made to any [one or more] of them in the name of the rest. But if none of them come to the land, albeit the feoffor never come, there it seems the covenant is not broken.

Curia B. R. If *A.* covenant with *B.* before Easter next, to assure his house to him and *K.* his wife, during the life of *I. S.*; and *A.* surrender his house to the use of *B.* and such person as *K.* shall name, at the request of *B.*; in this case the covenant is broken, for this is no performance of it. [And yet the damages would be merely nominal; and probably equity would enjoin the action.]

Dyer, 324. If one covenant to repair, sustain and amend a house, and the house is burnt by the negligence of the covenantor and not repaired again; this is a breach of this covenant (33). [See 1 *Term* To repair.

(33) In the case of *Compton* v. *Allen*, *Sty.* 162. *Rolle*, Ch. J. said, "That a lessee that covenanteth to repair, ought to do it if the house be burnt, *be it by negligence, or by other*

Rep. p. 633. 770; see 1 *Tho. Co. Litt.* p. 645.] And if the lessee covenant for him, and his executors, to repair at his own costs, (the principal timber not hurt, nor in decay for lack of reparations or otherwise, in default of the lessee or his executors only except,) and he die, and afterwards the house is burnt in default of the executors; in this case the covenant is broken and the executors may be charged (34).

If one covenant to leave a wood in the same plight he finds it, and he cut down trees; in this case the covenant is broken presently, for it is now become impossible to be performed by his own act; but if in this case some of the trees be blown down with the wind, or the like, by this [act of God] the covenant is not broken, for it is now become impossible to be done, by the act of God, and in this case the covenantor is not bound to supply it (35). And so likewise of a covenant to repair houses, or if one covenant to sustain houses, or sea banks, or covenant to leave them in as good case as one doth find them, and the houses be burnt, or thrown down by tempest, or the like, or the banks be overthrown by a sudden flood, or the like accident; in this case the covenant is not broken by this accident only; but if the covenantor doth not repair and make up these things again in time convenient, the covenant will be broken; [for the covenant provides for such repairs.] And if houses be let to me for years, and I covenant to leave them in as good plight as I find them, and I throw down the houses, this is no breach of the covenant, for I may re-edify them; * and therefore no action will lie upon this covenant until the end of the term. [But see *Hill* v. *Jones*, 7 *Taunt.* p. 392.]

Fitz. Covenant, 29. Co. 5. 15. F. N. B. 145. Co. 1. 98. Perk. Sect. 738. Dyer. 33. Plow. 29. 40 E. 3. 5.

*P. 174.

If one covenant to repair a house before a day, and it happen the plague is in the house before and until the day, and thereby it is not done; in this case the covenant is not broken, for this [visitation] will excuse; but then it [the repair] must be done in convenient time afterwards, [*query*, since a time

Hil. 8 Jac. Curia.

means." See further on this point, in the case of the *Earl of Chesterfield* v. *Duke of Bolton*, *Comyns's Rep.* 627.

(34) *De bonis testatoris tantum.* See *Dyer*, 324 b.

(35) Many parts of the Touchstone have been selected by subsequent writers; but it is rather singular that the passages in the text should be repeated in 1 *Wood*, 397, and in 398 in *Gilb. Covenants*, 150, and in 473; though this book is not referred to in either of the places.

was fixed,] for otherwise the covenant will be broken.

Dyer, 198. If a lessee covenant to do all the reparations of a house demised, at his own costs and charges, and he cut trees upon some of the ground demised to amend the house; it seems this is a breach of his covenant (36).

Co. super Lit. 292. If one covenant to pay money at five several days, and he fail of payment [on] the first [or on any other] day; by this [default] the covenant is broken (37). To pay money.

40 E. 3. 5. If one take land sowed, or a stock of cattle, in lease for years, and the lessee covenant to leave it in as good plight as he doth take it; in this case he must leave it sowed again, and if any of the cattle die, he must make up the number, otherwise he doth break his covenant. To leave a stock, &c.

43 E. 3. 17. If a corporation do covenant not to take toll, and their common officer appointed for that purpose doth take it; this is a breach of the covenant. Not to take toll.

18 E. 4. 8. Kelw. 34. Trin. 36 El. B. R. Carrell v. Reade. If *A.* covenant with *B.* to build a house by a day, and *B.* doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this case the covenant is broken, for this [denial] will not excuse him, [though it may mitigate the damages.] But if he do by any actual impediment hinder him, or be the cause why the thing is not done, then the not doing of it is no breach of the covenant. And therefore if a lessee covenant to cleanse one of the ditches in the land demised, and the lessor enter upon the land itself and keep out the lessee, [from the land, as distinct from the ditch,] and he doth not cleanse the ditch by the time; by this [default] the covenant is broken: but if in this case the lessor do by force keep the lessee out of the ditch or place itself, *contra*. To build a house. To cleanse a ditch.

(36) As to the extent and construction of covenants to repair, in addition to the references before in page 165, note 1, see *Vin. Abr. Covenant* (L. 5.)

(37) An action of *covenant* lies upon the first default, but an action of *debt* will not lie till the last. See 3 *Co.* 22 a. In *Co. Lit.* 292 b, a distinction is taken between a debt due by contract or bond, and a debt due by recognizance, for if a recognizance be to pay money at five several days, after the first day of payment (and default), execution may be taken on the recognizance for the whole sum, it being in the nature of several judgments; but no action of debt will lie on the bond or contract, before the last day be past. See further as to covenants for payment of money, *Stiles*, 59. 172. A covenant to pay money, which is by deed, cannot be discharged without deed. See *Rogers* v. *Payne*, 1 *Wils.* pt. 2. p. 376. But after a cause of action hath incurred, there may be an accord and satisfaction, and this will be a bar to the action; for it is a compensation of the damages. The accord is a plea to the damages, or gist of the action, and not to the covenant.]

To have liberty to go in and out of a shop.

If *A.* and *B.* be joint-tenants of a shop, and *A.* covenant with *B.* that he and his assigns shall have free ingress and egress in and out of the shop, and *A.* doth appoint *C.* his servant to enter as servant to him, and to occupy in common with *A.* and this servant doth expel the servant of *B.*; in this case this [expulsion] is a breach of the covenant. Hil. 16 Jac. B.R. Siliard v. Loe.

To come into a house.

If *A.* covenant with *B.* that *B.* shall come four times a year into the house of *A.* without being ousted by *A.*, and *A.* when he doth see *B.* coming, doth shut the doors and windows, and doth not suffer *B.* to come in; by this [exclusion] the covenant is not broken. 3 H. 4. 8.

To marry another. Make a feoffment, &c.

Tender and refusal.

*P 175.

If *A.* covenant with *B.* to marry the daughter of *B.*, make a feoffment, or do any other act to *C.* (who is a stranger to the covenant,) and *A.* doth tender it and offer to do as much as doth lie * in his power, but the stranger doth refuse it, and thereby it is not done; yet this [refusal] doth not excuse it, but the covenant is broken. [But see *C. T. Talb.* 164.] But if the covenant be to do any such act to the covenantee himself, and the covenantor tender it and the covenantee refuse it; by this [refusal] the covenant is performed (38). [See 1 *Mod.* 300.] 33 H. 6. 16. Bro. Covenant 3. Fitz. Barre, 6a.

See more in the last question; and in *Obligation, numb.* 7, 8, 9; and in *Condition, numb.* 9, 10. Mich. 7 Jac. Co. B.

8. *Who shall or may have advantage of a covenant in deed or law, and bring a writ of covenant upon the breach of it; or not.*

Any one that is party to the deed, to whom the covenant is made, may take advantage of the covenant, but not a stranger; for if *A.* covenant with *B.* to do an act to *C.* who is no party to the deed, and he [*A.*] doth it not, *B.* and not *C.* must sue him upon this breach.

If a lease be made of land to a husband and wife for years, and the lessor doth enter upon the land and put them both out, or the one of them after the death of the other; in this case both of them, whilst they both live, and the survivor, after the death of one of them, may have this action of covenant upon the covenant in law. So if a wardship be granted to a woman by deed, and she take a husband and die; the husband shall have advantage of this covenant in law, made by the Co. 5. 17. Dyer, 257. 47 E. 3. 12.

(38) See more amply what shall be deemed a breach or performance of a covenant, *Com. Dig. Covenant* (E.) *Vin. Abr. Covenant* (L. 7.) *Gilb. Covenants*, 184. *Bac. Abr. Covenant* (H.) In what cases, and how, a court of equity will decree a performance of a covenant, see *Com. Dig. Chancery* (2 X.)

word "grant", if he be disturbed. So if one by the words, "demise or grant', lease land to a woman sole for years, who taketh a husband and dieth; in this case if the husband be disturbed he shall take advantage of this covenant in law. [So husband alone, as assignee of his wife, may take advantage of an express covenant with his wife, which runs with the estate. *Com. Dig. Covenant*, (B. 3.) And sometimes the heir shall have the benefit of a covenant, 1 *Mau. & Selw.* 355, though broken in the time of the ancestor.]

Dyer, 338. If a feoffment be made in fee, and the feoffor doth covenant to warrant the land, or otherwise, to the feoffee and his heirs; in this case the heir of the feoffee shall take advantage of this [covenant] (39). As [F. N. B. 145. 1 Man. & Selw. 355.] if *A.* covenant with *B.* and his heirs, to enfeoff *B.* and his heirs of land, and *B.* die before it be done; in this case his heirs, [though not named,] shall take advantage thereof. [2 *Lev.* 92.] And if *A. B.* and *C.* have lands in coparcenery, and they purchase other lands in fee, and they covenant, each to [and with the] other, his heirs and assigns, to make such conveyance to the heir of him that shall die first, of a third part, as he shall devise; in this case the heir, not the executor, shall take advantage of the covenant. [2 *Lev.* 92.]

Heir.

Co. 5. 17. F. N. B. 145. H. Dyer, 112. 271. Executors and administrators shall take advantage of inherent covenants, [*read*, covenants concerning personalty,] albeit they be not named (40). And therefore if *A.* covenant to do a thing to *B.* and do not name his executors or administrators, and it be not done, it seems the executors or administrators of *B.* may have an action of covenant for the not doing of it. As if one covenant with *I. S.* to pay him money at Michaelmas, and do not say to his executors, &c. and he die before the time; in this case his executor or administrator shall take advantage of this covenant, and may recover the money; [or they may maintain the action, if broken in the lifetime of *I. S.* In short,

Executors and administrators.

(39) And where the covenant relates to the inheritance, and is such as runs with the land, though the covenant be with the lessor, his executors and administrators, without naming the heir, yet the heir shall have an action of covenant for breach. 2 *Lev.* 92, *Laugher* v. *Williams*.

(40) Executor, although he is not named, yet shall have an action of covenant in all cases by the common law, because he is privy and *quodammodo* party, because he represents the person of the testator more than the heir. *Co. Lit.* 208, 209 a. See further in *Gilb. Law of Covenants*, 322.

they represent the testator, and are entitled to all damages which accrue to the testator in his life-time; and to the benefit of all covenants and duties belonging to the testator, except those duties which concern acts to be done to the testator personally, in respect of his person, and which become impossible of performance by his death, or which are to be done for creating a title, to be communicated to the heir. *Fitz. N. B.* 145 c.]

Assignee or grantees.

*P. 176.

Grantees of reversions shall have the like advantage against termors (by action only) for any covenant or agreement contained * in their lease, as the lessors, their heirs or successors might. And so also shall lessees against grantees of reversions (recoveries in value excepted) by the statute of 32 H. 8, cap. 34. And herein (as in the case of a condition before) a difference is taken between covenants that are inherent, and covenants that are collateral. For the covenants, whereof grantees by this statute shall take advantage, are inherent covenants; *i. e.* such covenants, as do concern the thing granted, and tend to the supportation of it: as where a lessee for life or years doth covenant with [the lessor and] his heirs to keep the houses demised in good reparations, or the like; [otherwise, if the covenants respect a house or lands not demised;] and after the lessor doth grant away the reversion of all, or part of the houses to *I. S.*; in this case *I. S.* shall take advantage for any breach of the covenant in his time, but not for any breach before the time the reversion was granted. But if the lessee doth covenant with his lessor and his heirs to pay him a sum of money [in gross], or make him a feoffment or the like, and then the lessor doth grant the reversion to *I. S.*; in this case *I. S.* shall not take advantage of this covenant; and yet the executors or administrators, [and in the second case, the heirs] of the lessor shall take advantage of this covenant (41).

See Condition, Numb. 12. Co. 5. 18. 9 Jac. B. R. Wilborne & Betwich's case accord.

Mich. 8 Jac. Pine's case.

[Kingdon v. Nottle, 1 Man. & Selw. 356.]

Regularly every assignee of the land, or thing demised, shall take advantage of inherent covenants: as if a covenant be, to have estovers to

Co. 5. 17.

(41) The reader will find the operation of the statute of 32 H. 8, c. 34, (which forms a material part of the doctrine of covenants), and to what persons it extends, clearly explained, and well supported by authorities, in *Bac. Abr. Covenant* (E. 6.); and in *Vin. Abr. Covenant* (K. 3.) [*Co. Lit.* 215 a. *Thomas's Co. Lit.* 2 vol, p. 89. 440.]

burn in the house demised, or to have timber to repair; or if the covenant be, that the lessor or lessee shall repair, or the like. And therefore of these assignees in deed, and in law; assignees of assignees *in infinitum* shall take advantage; and assignees of executors or administrators, tenants by statute, or elegit; or after a sale upon a *fieri facias*, a husband in the right of his wife; any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named, yet may he take advantage of it (42).

Co. 4. 80. Dyer, 257. Fitz. Covenant, 30.

If a lease for years be made to *I. S.* by the words, "demise or grant," and the lessee assign this over to *I. D.*; in this case *I. D.* may take advantage of the covenant in law, and bring an action against the lessor if he be disturbed.

Co. 3. 63. F. N. B. 145.

If a lease for years be made of land, and the lessor doth covenant with the lessee and his assigns to do, or not to do, something [which concerns the thing demised;] in this case an assignee by word, [at this day there cannot, by reason of the statute of Frauds and Penalties, 29 Car. 2, c. 3, be an assignment without writing,] or an assignee by deed, may take advantage of this covenant (43).

Co. super Lit. 385. Co. 5. 23. 18.

And, [under the rules of the common law, independently of the statute of H. 8, for the statute does not apply to these cases,] if two coparceners make partition of land, and the one of them doth covenant with the other to acquit her and her heirs of a suit that issued out of the land, and the covenantee doth alien her part to a stranger; in this case the alienee shall have the same advantage for acquittal of the land, as the covenantee had. So if *A.* be seised of the manor of *B.* whereof a chapel is parcel, and a prior, with the consent of his convent, had covenanted with *A.* and his heirs, * lords of the manor, to celebrate divine service in the chapel, and after *A.* had sold the manor; in this case the vendee or assignee of the manor, should have had the same advantage of the covenant [as] the vendor had. But if the lord had sold the chapel, the assignee of the chapel should not have taken

*P. 177.

(42) See *Moor*, 242. *Godb.* 270. *Prec. in Chan.* 39.

(43) See further in what cases an assignee shall take advantage of a covenant, *Cro. Eliz.* 373. *Cro. Car.* 137. *Br. Abr. Covenant*, pl. 45. *Com. Dig. Covenant* (B. 3.) *Vin. Abr. Covenant* (K.) *Bac. Abr. Covenant* (L. 5.)

advantage of the covenant; [because the covenant is qualified, so as to run with the ownership of the manor.] And if a covenant be, to say divine service in the chapel of a stranger; in this case the assignee of the manor, in which the chapel is, shall not take advantage of the covenant (44).

9. Who shall be bound & charged by a covenant; and against whom a writ of covenant doth lie; and where; or not.

Co. 5. 16, 17, 18.

Regularly all those that do seal and deliver the deed, and are named [as parties thereto,] and bound by the express words of the covenant, [and according to some, and the better authorities, it is requisite that in indentures, the covenantee should be named as a party in the premises; in the clause, Between, &c. 2 *Prest. on Convey.* 397;] whether the covenant be collateral or inherent, are bound by the covenant contained in the deed; and therefore [*omit* therefore] if heirs, executors, administrators or assigns, be named in the covenant, for the most part they are bound by the covenant. [The assigns cannot be bound except by inherent covenants, which run,—with the estate in the land, &c. The heirs are not bound unless named; and the heirs cannot be bound, unless the obligation commences in or with the ancestor; and therefore a covenant by a man for himself, his executors and administrators, or for his heirs, without naming himself, and though the act is to be done after his death, will not bind the heirs. The executors and administrators may be bound without being named.] And in all cases of inherent covenants also, where a man doth covenant for himself only, and doth not name his executors and administrators, or either of them, they are bound and may be charged by the covenant notwithstanding. And in some cases the law is so also for collateral covenants. [As already noticed, the executors seem to be bound in all cases, unless the act to be done is merely personal; and even then, if the covenant be broken in the lifetime of the party, an action lies against the executors to recover damages for breach of the covenant.] And in most cases of inherent covenants, that tend to the support of the thing granted, (in respect of which it is presumed the lessor took the lessee for the land,) such as have the land, albeit they be neither executors nor administrators, or

Executors, Administrators.

(44) See more fully who shall take advantage of a covenant, and who not, *Com. Dig. Covenant* (B.) 1 *Wood*, 377. *Vin. Abr. Covenant* (H.) *Gilb. Law of Covenants*, 294. 319. 323. *Bac. Abr. Covenant* (E.)

either of them, but assignees, &c. shall be charged by the covenant though they be not named, for these covenants are said to run with the land; [and even the heir may be charged as assignee, though he be not bound as heir.]

Co. super Lit. 231. Dyer, 13. Bro. Covenant 6. Det. 80.

If a feoffment or lease be made to two, or to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, or the wife doth, or doth not seal during the coverture, and he or she that doth not seal doth notwithstanding accept of the estate, and occupy the lands conveyed or demised; in these cases, as touching all inherent covenants, as for payment of rent, and the accessaries thereof, as clauses of distress, of re-entry, of *nomine pœnæ*, reparations and the like, they are bound by these covenants as much as if they do seal the deed. So if a lease be made to *A.* for years, or life, the remainder to *I. S.* in fee, and there is a rent reserved; or there be divers covenants on the part of the grantees; and *I. S.* doth never seal the deed or counterpart; yet if in this case he accept the estate after the death of *A.* he must pay the rent and perform all the covenants that are inherent. So also if there be covenants in the king's patent to be performed on the part of the patentee: as if there be this clause in the patent, "and that *I. S.* (the patentee) shall repair the house when it is decayed;" in this case the patentee is bound by this covenant, and all such like covenants. But *quære* of collateral covenants in the first cases, for therein it seems the feoffee or lessee is not bound. [*Dyer*, 13.] And yet it is said, that if an indenture * be made between *A.* of the one part, and *B.* and *C.* of the other part, and therein there is a lease made by *A.* to *B.* and *C.* on certain conditions, and *B.* and *C.* are bound to *A.* by the indenture in 20*l.* to perform the conditions, and *B.* only doth seal the deed and not *C.*; yet in this case, if *C.* accept of the estate, he is bound by the covenants; and one of them cannot be sued without the other while they are both living. *Qui sentit commodum sentire debet et onus. Et transit terra cum onere*; [but, it is apprehended, he is not bound by the obligation, though he be bound by the covenants.]

Experientia, Pasc. 14 Jac. B. R. Bret & Cumberland's case.

Co. super Lit. 231.

*P. 178.

Co. 5. 17.

If a man covenant for him and his heirs to Heir.

do any thing whatsoever; hereby his heirs are bound (45). But otherwise, except the heirs be bound by the deed by express name, an heir shall scarcely be bound or charged in any case by a deed. And therefore it is, that if the lessee for years be ousted by any other but the heir himself, no action of covenant will lie against the heir, unless there be an express covenant wherein and whereby the lessor and his heirs are bound. But if he be ousted by the heir himself, it seems an action of covenant will lie against him, [on the covenant in law.] And yet if he be ousted by an elder title from the lessor, *contra*, for in this case [of a covenant in law] the heir shall not be charged; [the heir is only chargeable in respect of the tenure, and the obligation is personal to him as reversioner.]

Bro. Covenant, 38. 32 H. 6. 32. Dyer, 257. Fitz. Covenant, 31.

Executors, Administrators.

If a man do covenant for himself only to pay money, build a house, for quiet enjoying, or the like, and he doth not say in the covenant "his executors, administrators, &c." yet hereby his executors and administrators are bound and shall be charged (46). And yet if a lessee for years covenant for himself to repair the houses demised, omitting other words; it seems in this case he is bound to repair only during his life, and the executors or administrators are not bound (47). So if a lessor covenant for himself only to discharge the lessee of all quit-rents out of the land; it seems this covenant is only personal, and shall bind the covenantor only during his life. But if in these cases these words "during the term" be added in the covenant, as if a lessee covenant for himself to repair the houses during the term, or the lessor covenant for himself to discharge the lessee of all quit-rents during the term; in these cases it seems the executors and administrators also will be charged after his death (48), [since it is evident that the covenant is for an act not personal to the lessee or lessor.]

10 H. 7. 10. Dyer, 19. 14. Bro. Covenant, 50. Dyer, 114.

If a lessee be ousted by one that hath title; it seems an action of covenant will lie for this ouster

Dyer, 267.

(45) But the heir is only chargeable [as heir] so far as he has *assets* by descent from his ancestor sufficient to answer the charge. 1 *Pr. Wms.* 777. *Finch. Rep,* 86.

(46) But upon a covenant *implied,* an action of covenant will not lie against an executor. *Moor,* 74, *Swan* v. *Scarles.*

(47) See the case of *Tilney* v. *Norris,* 1 *Ld. Raym.* 553, [*contra.*]

(48) See accordingly *Gilb. Covenants,* 331.

against the executor or administrator upon the covenant in law, if he were put out in the lifetime of the lessor, and not otherwise; for if there be tenant for life, the remainder in fee to another, and the tenant for life, by the words "demise or grant," doth make a lease for years and die, and after, he in the remainder doth enter and put out the lessee for years; in this case he [the lessee] cannot upon this covenant in law charge the executors or administrators of the lessor; [for the estate determines with the death of the lessor; so that there is an end, on the one hand, to the liability to rent, &c.; and on the other hand, to the liability to warrant the possession.] But upon an express covenant for quiet enjoying, he [the executor] may [be bound] (49).

Co. 5. 16. In some cases an assignee shall be charged though he be not * named; and in some cases shall not be charged though he be named; and in some cases he shall be charged when he is named; as when the covenant doth extend to a thing in *esse*, parcel of the demise, there the thing to be done is appurtenant and *quodammodo* annexed to the thing, and shall bind the assignee though he be not expressly named; as a covenant to repair, &c. But if the covenant be annexed to a thing not in *esse* before, but *de novo* to be erected on the thing, as to set up a new house, or the like; in this case it will not bind the assignees unless they be named in the covenant. And if the covenant be to do a thing merely collateral, [or be annexed to a *chose en action*;] in that case it will not bind the assignees, albeit they be named expressly (50). Also when a contract is personal only, [or rather respects a personal thing,] and a man doth bind himself and his assigns; his assigns shall not be bound hereby: as if one demise sheep, or other stock of cattle, or any other personal goods, for

Assignees or grantees.

*P. 179.

(49) In what cases the heir or executors shall be bound by express covenant of the testator, without naming them; and when an action will lie against them, see *Vin. Abr. Covenant* (D.) *Gilb. Covenants*, 327. *Com. Dig. Covenant* (C.) *Bac. Abr. Covenant* (E.) [Covenant not to assign without consent of lessor, see 2 *Atk.* 219, *Philpot* v. *Hoare.*]

(50) Mere collateral covenants, that run with the land, that is, which extend to something *in esse*, parcel of the demise, and affect the estate, lie between all those who are privy in tenure or contract, though not named; like debt for rent at common law. And the reason is, because usually the rent is more or less accordingly, *et qui sentit commodum sentire debet et onus.* So a collateral covenant to be done upon the land, as to build *de novo*, shall bind the assignee by express words; because he is to have the benefit of it. *Treatise of Equity*, 39. See more amply on this subject the points resolved in *Spencer's case*, 5 *Co.* 16. Also *Mo.* 399. *Cro. Eliz.* 457. *Roll. Abr. Covenant* (L.)

any time, and the lessee doth covenant for him and his assigns, at the end of the term to deliver them in as good plight as they were at the time of the demise, or such a price for them, and the lessee assign them; in this case this covenant will not bind the assignee; but the executors and administrators of the first lessee are bound hereby. So if one demise a house and land, with a stock or sum of money, for years, rendering rent, and the lessee doth covenant for him and his assignees to deliver the money at the end of the term; in this case an assignee shall not be bound by this covenant, as the executors and administrators of the lessee shall. [And the assignees of a covenantor are not, in any case, bound to the performance of his covenant, except the case fall within the provisions of the statute of 32 Hen. 8, c. 34; or except they take an estate in reversion, expectant on a particular estate to which the covenant is knit. But an assignee of part of the land, or part of the estate in the land, shall be bound by and have the benefit of covenants, *Twynam* v. *Pickard*, 2 *Barn. & Ald.* p. 105; while the assignee of part of the estate may, but the assignee of part of the lands may not, have benefit of conditions. 1 *Inst.* 202; *Doe* v. *Bateman*, 2 *Barn. & Ald.* 168; *supra*, p. 151.

Executors.

If a lessee covenant to repair the houses demised, or to discharge the lessor *de omnibus oneribus circa terram*, or the like; in these cases, and such like, albeit assignees be not named in the covenant, yet assignees, and assignees of assignees *in infinitum*, and all others that shall come to the land by the act of law, or by the act of the parties, shall be bound and charged by this covenant. Co. 5. 17. Dyer, 27. Bro. Descent, 90.

If a lessee covenant for him and his assigns to build a new house upon the land demised, within seven years, and the lessee assign it over, [within the seven years;] in this case the assignee is chargeable (51). But if a man covenant for him and his assigns to make a feoffment, obligation, or the like; in this case the assignee shall not be Co. 5. 17.

(51) If the assignment is made within the seven years, but not otherwise, [because at the expiration of the seven years the covenant has perfected its office.] Lessee covenants for him and his assigns to rebuild and finish a house within such a time, and *after the time expired*, the lessee assigned over the premises, the house not being built and finished according to the covenant: the covenant shall not bind the assignee, because it was broken *before* the assignment; *aliter* if broke *after*, as if the lessee had assigned before the term expired. *Per Holt*, Ch. J. 1 *Salk.* 199, S. P. 3 *Burr.* 1271.

charged, albeit he be named; [for there is not any tenure, &c. and to bind the assignee would be to deprive him of the benefit of the alienation to him. But in equity, the assignee is bound if he be a purchaser with notice, or without valuable consideration; and the covenant was founded on a valuable consideration.] And if the lessee covenant for himself, or for himself, his executors and administrators only, to build a new house upon the land demised, and the lessee assign over the land; in this case the assignee is not bound by this covenant, [because he is not named.]

Thin's case, 2 Chomsley, Trin. 36 El. C. B.

If a lease be made rendering rent, and if it be in arrear that the lessee, his executors and assigns shall forfeit 3*s.* 4*d.* *nomine pœnæ*, and the lessee assign the term; in this case it seems the assignee shall be charged with the *nomine pœnæ*; [for it is in the nature of a rent.]

Bro. Covenant, 31.

*And in all the cases before, where a covenant is broken, an action of covenant may be brought (52). But herein note, that howsoever in divers of the cases before, assignees are chargeable upon a covenant, yet the lessee himself is not hereby discharged [from an express covenant; nor are his heirs, executors or administrators, when there is an express covenant against them;] but the lessor or grantee of the reversion hath election to charge which of them he will. And therefore if a lessee covenant for him and his assigns to repair, and the lessee assign; in this case the lessor may have his action of covenant against either of them. And if a lessee covenant for him, his executors, administrators and assigns, to repair the houses demised, and he in reversion doth grant away his reversion, and the lessee assign his estate; in this case, albeit the grantee of the reversion have accepted the rent of the assignee of the term, yet he may still have an action of covenant against the executor of the lessee upon this covenant (53). So if a patentee

*P. 180.

Note.

Election.

Hil. 16 Jac. B. R. Curia. Bret v. Cumberland.

(52) If a covenant is to make an estate in land, a suit in equity is most proper, because a court of equity can give the thing itself, which is a higher and more adequate remedy than damages only, which is all the law gives. *Per Ld. Hardwick*, 3 *Atk.* 87, in the case of *Furnival* v. *Crew*. See that case; and further when remedy may be had in equity upon a covenant, *Com. Dig. Chancery* (2 X. 6.)

(53) But although he may bring such action against lessee, after acceptance of rent from assignee, yet he may not demand the rent of the lessor after such acceptance. *Per Jerman, Just. Sty.* 300, *Whitway* v. *Pinsent*. See the same distinction in 1 *Sid.* 402. [He may demand the rent of the lessor under the covenant, though he cannot demand it by reason of tenure; in other words, he may bring his covenant, though he cannot maintain an action of debt. And where houses, held under a lease for seven years, with covenants

covenant for him and his assigns to repair, and he assign; the king may have his action against either of them (54). [An assignee is bound from the date of the assignment, whether he enter or not, *Williams* v. *Bosanquet*, *Bing. & Brod.* 238; but only while he continues assignee; and he may at any time discharge himself from his obligation to the reversioner, but not from his covenants for indemnity, by an assignment, even to a beggar. *Buller's N. P.* 159. And by the statute law, 49 Geo. 3, c. 121, § 19, assignees under bankrupts are not bound to pay rent, or liable to covenants, till they elect to take the estate. See the statute, and *Turner* v. *Richardson*, 7 *East*, 336; *Wilkins* v. *Fry*, 1 *Meriv. Rep.* 252.]

If *A.* and *B.* do covenant for themselves jointly, without more words; the covenant is joint, and one of them cannot be charged without the other, [while both are alive; and if one of them die, the survivor or his heirs are solely chargeable at law; but in equity, and for the benefit of a surety, the principal's estate will remain liable, though there be not any remedy at law.] But if they covenant for themselves severally, the covenant is several, and they may [*read*, must] be sued apart. And if they covenant jointly and severally, then the covenant is joint and several, and theymay be sued either way, at the election of the covenantee. [See *Additions*, in p. 166.] Co. 5. 23.

10. *When a covenant shall be said to be gone and discharged; and when not; and how.*

Where the deed itself, wherein the covenants are contained, or the estate on which the covenants, as accessary to the principal, do depend, is gone and determined, there regularly the covenants are Dyer, 20. Co. 5. 23.

---

that the lessee shall repair, were assigned upon mortgage, the Court of Chancery, upon a bill filed by the lessor, inasmuch as the defendant was only a mortgagee, and never in possession, would not assist the plaintiff to oblige him to perform the covenant in specie, but left him to recover at law as far as he could, and dismissed the bill. *Spark* v. *Smith*, 2 *Vern.* 275. *Pilkington* v. *Shatter*, 2 *Vern.* 377. And it was in Lord *Mansfield's* time determined at law, that an action could not be maintained by the lessor against the mortgagee, although the mortgage was forfeited, unless he was in actual possession. *Eaton* v. *Jaques*, *Dougl. Rep.* 454. But that decision is overruled by *Stone* v. *Evans*. *Woodfall's Land. & Ten.* 103, engrafted into the text. On all *covenants in fact*, the lessor or covenantee has his election, in covenants which bind the assignee, to charge him or the covenantor himself, *even though he has accepted rent from the assignee*. *Barnard* v. *Godschall*, *Cro. Jac.* 309. Also *Cro. Jac.* 522. *Cro. Car.* 188, and 580. *Roll. Abr.* 522. But upon a *covenant in law*, after assignment of the term, and acceptance of rent from the assignee, covenant does not lie against the assignor. *Jones*, 223. 1 *Sid.* 447.]

(54) See more amply what covenants bind an assignee, and in what cases covenant lies against him. *Vin. Abr. Covenant* (L.) (M.) *Gilb. Covenant*, 333. *Bac. Abr. Covenant* (E. 3.)

gone also. And therefore if a lease for life or years be surrendered, whereby the estate is gone; or a deed become void by rasure or the like, and there be covenants contained in the deed; by these means the covenants are gone also. But this surrender doth not discharge the breach of covenant which was before the surrender. For if a parson lease his glebe for years, and after resign, whereby the lease for years doth become void, [*i. e.* determine;] in this case the covenants of the lease, as to the time before the resignation, shall be said to be in force still (55).

40 E. 3. 27. Bro. Surrender, 47. Covenant, 42. Hil. 4 Jac. B. R. Moile v. Austin.

Where a covenant is become impossible to be done by the act of God, as where one doth covenant to serve another seven years, and he die before the seven years be expired; by this [accident] the covenant is discharged (56); [besides, this covenant is personal.]

Co. 1. 98. Plow. 286.

Where there is an express covenant in a deed for quiet enjoying, the implied covenant is gone. *Expressum facit cessare tacitum.*

Co. 4. 80.

By a release of all covenants from the covenantee the covenant is discharged, so as the release be by deed; for a covenant by deed * cannot be discharged by words, [*i.e.* by an act equally solemn. The rule is, *unum quodque dissolvitur, eodem modo quo ligatur.*] And therefore if *A.* by deed covenant with *B.* to build a house by a day, and *B.* doth wish him to let it alone; this is no discharge of the covenant (57), [though it would diminish the damages.]

18 E. 4. 8. Release. *P. 181.

If the lessor accept the rent of the lessee, or his assignee, after a covenant broken; this [acceptance, if for a time after the breach, may dispense with a condition, though it] doth not discharge the breach of the covenant, but the lessor may sue for [on] it notwithstanding.

Pasc. 6 Car. B. R. Adjudged Bachelor's case.

And so we come to a *Warranty*, being a special kind of covenant, and therefore next in order to be spoken to.

---

(55) So likewise if a parson, after making a lease, becomes non-resident. *Cro. Eliz.* 78. 245.

(56) See accordingly *Gilb. on Covenants*, 472.

(57) See fully in what cases and in what manner covenants shall be said to be suspended, dispensed, discharged, or void, in *Bac. Abr. Covenant* (G.) *Gilb.* 470. 1 *Wood*, 397. 429. *Com. Dig. Covenant* (F.) *Chancery* (2 X. 3.) *Vin. Abr. Covenant* (O.)

CHAP. VIII.

Of a Warranty.

[IN ancient times the doctrine of warranty was of great importance. It was one of the best guards or defences to a title. It created a defence only, and not a title. In modern practice a warranty is rarely of advantage to a title. In the first volume of *Prest. Abstr.* p. 409, a summary view is taken of the leading points which belong to warranties, as relevant to titles. *Blackstone*'s examination of this subject as a general history of the law of warranties, and of the changes which have taken place, is well deserving of attention; but it is not in all its points correct. This chapter of *Sheppard* should then be read, and the learning should even, though obsolete in practice, be studied for the sake of its principles, and as the means of understanding various discussions which will present themselves to the student, when reading the books of Reports, and some of the elementary works. The observations of the editor will be principally directed to show in what manner, and to what extent, warranties are of importance in titles, under the practice of the present period. The statute book should also be consulted before the general learning of warranty shall be studied, since the statute law has in some cases, as under the statute *de Bigamis*, 13 Edw. 1, c. 6, (a statute very incorrectly translated,) created a warranty, or modified it; and, in various other instances, the statute law has prevented the effect of warranties, either generally, as warrants by tenants for life, (4 & 5 Ann, c. 16,) by tenants by the courtesy, or husbands seised in right of their wives, and tenants of estates of inheritance, and consequently tenants in tail (not being tenants in tail in possession,) with the qualification as to tenants by the courtesy, and husbands seised in right of their wives, that assets do not descend from the warrantor to the heir. And it may be doubted, whether the 4 & 5 Ann, c. 16, do not take away the effect of a warranty, by being tenant for life by the courtesy of England, even although assets may descend from him. In-

deed, in the 4 & 5 Ann, c. 16, there is a general provision, that all warranties by any tenant for life of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect; and likewise all collateral warranties, which shall be made after the said first day of Trinity Term, of any lands, tenements, or hereditaments, by any ancestor, who has no estate of inheritance in possession in the same, shall be void against the the heir. Let it be, at the same time, observed, that none of the statutory regulations have application to *lineal* warranties. The obvious reason is, that lineal warranties were never binding without assets. And when *Blackstone*, in p. 302, states, that in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land himself, the observation must be confined to heirs claiming the fee as distinguished from heirs under an intail. Even, at this day, an heir in tail may be bound by a warranty, with assets descending from a person who was the ancestor to the heirs in tail, as such, and created the warranty.]

Finchley, 39. Co. super Lit. 365.

A warranty is a covenant real (1), annexed to lands or tenements, [or rather to an estate of freehold or inheritance,] whereby a man [if named for that purpose, and in cases of warranty, by implication of law, though not named,] and his heirs are bound to warrant the same (2). Or it is where a man is bound to warrant the land or hereditament that another hath. [So that the warranty is knit to an estate which the warrantee hath or taketh.] And he that doth make this warranty is called the warrantor; and he to whom it is made the warrantee.

1. *Warranty. Quid.*

Warrantor. Warrantee.

Co. 1. 2. super Lit. 365. 4 61.

There are two kind of warranties: 1. A warranty in deed, or an express warranty, which is

2. *Quotuplex.*

(1) Mr. Justice *Blackstone* (very improperly, as I conceive,) describes a warranty to be a *kind of* covenant real. It is, in fact, as the text defines it, a covenant real; and being, (as I apprehend,) a *covenant real only*, is one of the chief criterions to distinguish it from a covenant, which may be either real or personal, according to the different words used in the creation of it.

(2) And either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title, which gives the party a compensation for the lands lost,] or else may be used by way of abutter; *Co. Lit.* 365 a.; [which is a defence to the possession, by rebutting the right of the person entitled.]

when the same is expressed (3), *i. e.* when a fine, or feoffment by deed, is levied, or made in fee; or a lease for life is made by deed, comprehending warranty, or which hath an express clause of warranty contained in it; as when a conusor, feoffor, or lessor doth covenant to warrant the land to the conusee, feoffee, or lessee; which is in these words: *Ego* I. S. *& heredes mei warrantizabimus & in perpetuum defendemus* W. S. *& heredibus suis tenementa predicta contra omnes homines in perpetuum* (4). [This is an actual warranty, not a covenant to warrant.] And by the statute of *Bigamis*, *dedi* is made an express warranty during the life of [the] feoffor. 2. A warranty in law, or an implied warranty; which is, when it is not expressed by the party, but *tacite* made and implied by the law; whereof see divers examples *infra*. The warranty in deed also is either lineal, which is thus described: A covenant real annexed to the land by him which [*read*, who) either was owner, or might have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land, as heir from him that made the warranty. Or else it is collateral, which is thus described: A warranty made by him that had no right or possibility of right to the land, and is collateral to the title of the land. [On warranty lineal and collateral, the distinctions which are proposed do not appear to be very precise or correct, for the same warranty may be lineal as to one person, and collateral as to another person; and therefore, whether the warranty be lineal or collateral depends rather on the person to be bound by the

Co. super Lit. 383, 384. 370. 365.

(3) By the feodal constitution, if the vassal's title to enjoy the fee was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompence. And so by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold to himself and his heirs by certain services, *the law annexed a warranty to this grant*, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied; they bearing no sort of analogy to the original feodal donation. And therefore, in such cases, it became necessary to add an *express* clause of warranty to bind the grantor and his heirs, which is a kind of covenant real, and can only be created by the verb *warrantizo*, or *warrant*. *Co. Lit.* 384. 2 *Bl. Com.* 300. See also *Fitz. Nat. Brev.* 134. *Sullivan's Lect.* 119.

(4) See Lord *Coke's* observations on the words of the warranty, *Co. Lit.* 383 b.

warranty, than on the person who creates the warranty. 1 *Prest. Abstr.* p. 410.] Also there is a warranty which doth commence by disseisin or wrong; of all which * see divers examples afterwards. And note, that all these things here are to be applied to warranties of lands, and concerning freeholds and inheritances; for there is a warranty of goods and chattels in contracts, of which we treat not here (5). [But this contract is more properly a covenant than a warranty, since it merely confers a right to recover damages.]

*P. 182.

Co. super Lit. 365. 372. 385. 384. Co. 4. 121. 10. 97.

3. The fruit and effect of it, and what use may be made of it.

The fruit and effect of the warranty in deed is, that it doth always conclude and bar the warrantor himself [personally, and his general heirs, as distinguished from his heirs in tail,] of the land so warranted for ever; so that all his present and future rights, that he hath or may have therein, are hereby extinct, [or rather bound by a species of estoppel.] And therefore if the father be disseised, and the son in his lifetime release all his right to the land to the disseisor, and make a warranty of the land in the deed, and then the father dieth, and the right of the land descendeth to the son; in this case, albeit the release doth not bar the son, yet the warranty doth bar him. And for the most part also, it doth conclude and bar the heirs of him that made the warranty, to whom the same warranty doth descend, to demand the same land against the warranty; for if it be a lineal warranty, it is a bar of an estate in fee simple, without any assets; *i. e.* without any other land descended to him in fee simple from the same ancestor that made the warranty, [to avoid circuity of action; since the lands, if recovered, would be assets to satisfy the warranty.] And with assets it is a bar of an estate in tail. And if it be a collateral warranty, it is, with or without assets, a bar [except in those cases provided for by the statute law] of an estate in fee simple or fee tail, and all possibility of right thereunto; and yet so as it doth not pass any estate or right, but only bind the right, so long as the warranty is in force; for if the warranty be avoided, [or, it is apprehended, if the person on whom the lien of the warranty

(5) See further as to the several kinds of warranties, *Bac. Abr. Warranty* (A.) *Com. Dig. Garranty* (H.) *Sull. Lect.* 120. 1 *Wood*, 335.

attaches ceases to be heir, (as in the case of an uncle excluded by the birth of a nearer heir, &c.] the right may be revived. [1 *Prest. Abstr.* p. 417, 418; and now as to estates tail, no one, except a tenant in tail in possession, can create a bar by warranty without assets. Note also, that a warranty is until judgment, on voucher, merely a bar to the person; 1 *Prest. Abstr.* p. 410; and therefore when assets are essential to the bar, an immediate heir may be bound by reason of assets, though the right of a more remote heir may be left at large. This is one of the many reasons for which a title, depending on a warranty, cannot be treated as a secure title. Also, it should seem, a title depending on collateral warranty is not positively good, and for that reason marketable. Mr. *Fearne* used to treat a title, depending on warranty, as good. That opinion should be adopted with caution.] But neither the lineal nor collateral warranty can enlarge an estate. And therefore if a lessor by deed release to his lessee for life, and warrant the land to him and his heirs; this doth not make his estate greater, neither will it bar titles of entry, or action, in cases of mortmain, consent to a ravisher, [condition on a] mortgage, or dower. And therefore if an ancestor of the lord hath title to enter upon an alienation in mortmain, and he release, or make a feoffment with warranty; this warranty will neither bar him nor his heir. So if a collateral ancestor will make a warranty, which doth after descend upon one that hath title of entry upon a condition broken; this [warranty] will not bar his entry, &c. neither will it [the collateral warranty] bar any right that shall commence after the warranty made. And the warranty, that doth commence by disseisin, doth not bind or bar any estate with or without assets. [According to Lord *Coke*, *Co. Lit.* p. 205, there is a diversity between a warranty and a feoffment; for if there be grandfather, father and son, and the father disseiseth the grandfather and make a feoffment in fee, the grandfather dieth, the father against his own feoffment shall not enter, but if he die, his son shall enter. And so note a diversity between a release, a feoffment, and a warranty: a release in that case is void; a feoffment is good against the feoffor, but not against his heirs. *Per*

Co. super Lit. 389. &c.

Lord *Kenyon*, 3 *Term Rep.* 370. A warranty is good both against himself and his heirs; and it may be added, that, in the same case, a fine may bind the conusee and his heirs by estoppel. *Helps* v. *Hereford*, 2 *Barn. & Ald.* 242.]

Co. super Lit. 365. Co. 10. 98, 99. Dyer, 42. Co. super Lit. 101.

And in cases where the lineal or collateral warranty is a bar, there, if the party be impleaded by him or his heirs that made the warranty, the party impleaded, that is tenant of the land [in fact or by voucher] may plead and show forth this warranty against him, and demand judgment, whether he, contrary to his own warranty, shall be suffered or received to demand the thing warranted; and this, in pleading, is called a rebutter (6). [Rebutter is given as a defence to the title to avoid circuity of action; since, if the demandant were to recover contrary to the warranty, the other party would recover the same lands, or lands of equal value, by force of the warranty.] And if he be impleaded or sued by another for * the land, then he to whom the warranty is made, or his heirs, may vouch; *i. e.* call in the warrantor or his heirs to warrant the land. And this is an interpleader, in the nature of an action brought by the warrantor against the warrantee, wherein he that doth vouch (called the voucher) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the action, and the voucher is as it were out of the suit. And this second tenant, the vouchee, is called the tenant by the warranty. [Another reason for vouching seems to be, to afford the warrantor and his heirs the opportunity of defending the title, if they can.] And hereupon shall issue forth to the sheriff a writ to summon the vouchee to appear, called a *Summon[ea]s ad warrantizandum*. And if the vouchee appear he must plead to the voucher; and if he show cause why he should not warrant, that [cause] must be tried; and this showing of cause is called a counterplea to the voucher; but if he plead in avoidance of the warranty, it is called a counterplea to the warranty; [as denying that he warranted, showing a release, the determination of the estate, or the title to which

Rebutter. *Quid.*

*P. 183.

Voucher. *Quid.*

Voucher.

Vouchee.

Tenant by the warranty. *Quid.*

Summons ad warrantizandum. Quid.

Counterplea to the voucher. *Quid.*

Counterplea to the warranty. *Quid.*

(6) For the derivation and explanation of rebutter, see *Co. Lit.* 303 b, 365 a. *Com. Dig. Garranty* (K. 3.) *Pleader* (K. *Vin. Abr. Voucher* (A. c. 3.)

the warranty was annexed, or that he was not heir, &c. &c.] And if he cannot gainsay the warranty, the stranger shall recover the land demanded against the voucher [*read*, vouchee]; and he shall recover as much other land [in value,] against the vouchee of the lands he hath or had at the time of the voucher. [The vouchee must take the warranty on himself; and the title must be tried as between him and the demandant; and if the demandant recover, the voucher will recover in value from the vouchee.] And this recovery of other land is called a recovery in value. And if the vouchee hath, at the time of the voucher and recovery, no lands descended to him to answer the warranty, but hath afterwards land happening to him by descent from that ancestor, then he [the voucher] may have a re-summons and recover the land that doth after happen. But if the sheriff return upon the summons, that the vouchee is summoned, and he doth make default, then he [the voucher] shall have a *Magnum cape ad valentiam*; when, if he make default again, the judgment shall be given against the voucher, and he shall recover over in value against the vouchee; and if the vouchee appear, and then make default, the voucher shall have a *Parvum cape ad valentiam*; and then, if he make default, judgment shall be given as before. But if the sheriff return upon the summons, he hath nothing whereby he may be summoned, then may the voucher have a writ called *Sequatur sub suo periculo*; whereupon shall go an *Alias* and *Pluries*; and if the like return be made, the demandant shall have judgment against the first tenant, but he [the tenant] cannot recover in value against the vouchee. And if the case be so, that the vouchee had a warranty from some other for the land, he may dearraigne; *i. e.* maintain the warranty over, and shall recover in value over also against his voucher in the same manner as before, [unless the title be maintained by the second vouchee. Formerly there might have been a voucher upon voucher *ad infinitum*, but there is now a limit by the statute of 3 Ed. 1, c. 40; and a voucher, beyond the limited number, is called a voucher beyond the degrees.]

Recovery in value. *Quid.*

Sequatur sub suo periculo. Quid.

Dearraignment *del Garranty. Quid.*

Or the warrantee, to whom the warranty is made, or his heirs, may, at any time before they

F. N. B. 134. Co. super Lit. 102.

be impleaded for the land, if they will, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor or his heirs; and hereby all the land, the heir of the warrantor hath by descent from the ancestor that made the warranty at the time of this writ brought, shall * be bound and charged with the warranty, into whose hands soever it go afterwards; so that if the land warranted be after recovered from the warrantee, he shall recover so much land over again of the other land of the heir of the warrantor, or of the warrantor himself if he be living. [This is a very cogent reason against the use of warranty in modern practice; since the judgment, in a *warrantia chartæ*, would prevent a title from being marketable; or at least would, on the sale of the lands bound by the *warrantia chartæ*, render it necessary to investigate the title to the lands on which the warranty has attached.] And albeit the warrantee or his heirs do recover in this writ, yet he may after upon occasion, vouch the warrantor or his heirs notwithstanding; [for by vouching he has the advantage of any defence the vouchee can make; as a release, &c. So also he may have execution of other lands than those bound by the *warrantia chartæ*.] And herein observe: it is good policy if a man suspect any thing, to bring this writ of *warrantia chartæ* betimes; because it binds all the land of the warrantor from the time of the writ brought, and not any of his other lands he had before that time and that are now aliened (7).

Warrantia chartæ. Quid.

*P. 184.

Co. super Lit. 383, 384. Co. 4. 81.

The words *dedi & concessi*, or *dedi* only, in a feoffment do make a warranty, when an estate of frank-tenement or inheritance doth pass by the deed. But the word *concessi* only, or *demisi & concessi*, do not make such a warranty. And by force of the statute of *Bigamis, ch.* 6, *dedi* is made an express warranty during the life of the feoffor. [That statute is infinitely more intelligible, from the language in which it was penned (Latin), than from the English translation.]

4. *What words and clauses in a deed will make a warranty; or not.*

Lit. Sect. 723. Co. 5. 17, 18.

The word *warrantizo*, or warrant, is the only apt and effectual word to make an express war-

(7) Upon what warranty this writ lies, by whom it may be had, and when, and how it was to be brought, see *Vin. Abr.* tit. *Warrantia Chartæ*; *Bro. Abr.* same title; *Fitz. Nat. Brev.* 134, with the notes to the last edition; and *Com. Dig. Pleader* (3 N.)

ranty, or a warranty in deed, and therefore this word only is used in fines. And the words *defendo*, or *acquieto*, albeit they be commonly used in deeds, yet of themselves, without the other, will not make a warranty (8). [The word warrant is one of the few words which cannot be expressed by any circumlocution.]

If a man by deed doth grant to warrant land to *I. S.* and his heirs, and the warrantor doth not bind his heirs to the warranty; or doth not warrant to *I. S.* and his heirs, but to *I. S.* only; or doth warrant to *I. S.* and his assigns, and not to *I. S.* and his heirs; or doth bind himself and his heirs to warrant the land, but doth not say how long, nor against whom; these are good warranties, but how they shall be taken, [and as to their obligation on the heirs of the warrantor, and in favor of the warrantee,] see afterwards (9). Dyer, 42. Co. super Lit. 383.

5. To what things a warranty may be annexed and extended; and to what not; and how.

A warranty in deed may be annexed to estates of inheritance or freehold; and that not only of corporal things which pass by livery, as houses, lands, and the like; but also of incorpor[e]al things which lie in grant, as advowsons, rents, commons, estovers, and the like, which issue out of lands or tenements; and that not only to inheritances in *esse*, but also to such as are newly created; as a man (some say) may grant a rent, &c. *de novo* out of land for life, in tail, or in fee, with warranty. So a warranty in law may extend to a rent newly created; and therefore if such a rent be granted in exchange for an acre of land, this exchange and warranty thereunto annexed is [*read*, are] good. But a [formal and proper] warranty may not be annexed to an estate, or lease, for years, albeit it be a lease of 1,000 years, nor to any other chattel; and therefore in all actions, the which lessee for Co. super Lit. 366. 389.

(8) See *Mad. Form. Angl.* 77, in p. 43; and for the forms of warranties, the references in the index of that book, under the word *Warranty*.

(9) See accordingly, 1 *Wood*, 335; and further what words, or clauses, make a warranty, *Com. Dig. Garranty* (A.) *Bac. Abr. Warranty* (C.) Warranties, (says the learned author of the Commentaries, in 2 vol. 304,) have, in modern practice, been totally superseded by covenants; because, if the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant, which makes such a covenant a better security than any warranty

years may have as trespass, &c. a warranty cannot be pleaded in bar (10), [by way of rebutter.]

Co. super Lit. 372. 385. Lit. Sect. 738. 745. 706.

*A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, &c.; also a warranty may be made by and upon releases and confirmations made to the tenant of the land, albeit he that makes the release or confirmation hath no right to the land, &c. And yet some say, that by a release or confirmation, where there is no estate created, or transmutation of the possession, a warranty cannot be made to the assignee. But if *A.* be seised of land in fee, and *B.* doth release to him, or doth confirm his estate in fee, with warranty to him, his heirs, and assigns; in this case all men agree this warranty to be good. And so also it seems it is in the case last before, and that both the party, himself, and the assignee, may vouch, [rebut, &c. (11). But every warranty, to be effectual against an adverse title, must be annexed to a seisin which is wrongful, and arising from discontinuance or devesting; or discontinued by the operation of the warranty. *Doe* v. *Whitehead*, 2 *Burr.* 704. *Seymour's case*, 10 *Rep.* 95.] *P. 185. [In what assurances.]

Co. super Lit. 384. 386.

[While every express warranty must be by deed,] a warranty in law may be good in its creation, albeit it be made without deed; for if a man by his last will and testament devise lands to another man for life, or in tail, rendering rent, [to the heir, it is apprehended; for if the rent be given by the will to another person, there will not be any warranty in law;] to this estate there is a warranty in law annexed (12). *6. What shall be a good warranty in law; and how it shall bar and bind.*

Co. super Lit. 384. F. N. B. 134.

The words *dedi & concessi*, or *dedi* only in a feoffment, make a good warranty in law. But the word *concessi* only, in fine or feoffment, doth not

Co. 4. 80.

make a warranty in law. And albeit there be an express warranty in the deed, yet this [express warranty] doth not take away the implied warranty of the law. [See p. 181.] And this warranty in law, by *dedi & concessi*, or by *dedi* only, is a general

(10) But a purchaser of goods and chattels may have satisfaction from the vendor if he sells them as his own, and the title proves deficient, though there is no express warranty for that purpose. *Cro. Jac.* 474. 1 *Roll. Abr.* 90. See fully as to warranty of goods and chattels, in *Bac. Abr.* tit. *Actions on the case* (E.); and *Style's Prac. Reg.* 656.

(11) See further as to what things, and in what manner, warranties may be annexed, in *Bac. Abr. Warranty* (B.) *Vin. Abr. Voucher* (B. 6.) *Com. Dig. Garranty* (E.)

(12) Warranties in law are so called, because in judgment of law they amount to a warranty, without the verb *warrantizo*. *Co. Lit.* 384 a.

warranty, [*viz.* against eviction by all persons,] during the life of the feoffor.

Partition. Exchange.

Every partition and exchange implieth in it, and hath annexed to it, a special warranty in law (13): how it shall bar, and be extended, see in *Exchange*. Co. super Lit. 102. 384.

Every tenure by homage ancestrel, *i. e.* where a tenant and his ancestors have held land of a lord and his ancestors, time out of mind by homage, hath a warranty in law annexed to it, by which the lord is bound to warrant it to the tenant and his heirs [in respect of the services.] Co. 4. 80.

If one make a gift in tail, or lease for life of land, by deed, or without deed, reserving a rent; or of a rent-service by deed; in these cases there is annexed an implied warranty against the donor or lessor, his heirs and assigns. Co. super Lit. 384.

When dower is assigned to a woman, there is a warranty in law included; which is, that the tenant in dower, being impleaded, shall vouch and recover in value a third part [*read*, an equivalent out] of the two parts whereof she is dowable. Co. super Lit. 384.

And this warranty in law is of the nature of a lineal warranty, and shall bind as a lineal warranty only, for it doth never bar any collateral title. And hence it is, that this warranty and assets in some cases is [*read*, are] a good bar; as if tenant in tail exchange for other lands which are descended to the issue, and he hath accepted of them; or if not, that other lands are descended to him. But if tenant in tail of lands make a gift in tail, or lease for life, rendering rent, and * die; in this case this [warranty] is [in itself] no bar. And yet if other assets in fee simple descend, this warranty in law and assets is [*read*, are] a good bar (14). [Also if the issue in tail accept the rent, they are bound by the grant during their time, and it is apprehended the warranty in law attaches.] Co. super Lit. 384.

*P. 186.

7. What shall be said a good warranty in deed; or not; and how it shall bar & bind.

To every good warranty in deed, that must bar and bind, these things are requisite: 1. That the person that doth warrant be a person able: for if an infant make a feoffment in fee of land, [in person], and thereby doth bind him and his heirs to warrant the land; in this case, albeit the feoff- Co. super Lit. 367.

Infant.

(13) See accordingly 2 *Roll. Abr.* 739.

(14) See more amply in what cases the *law* will create a warranty, *Vin. Abr. Voucher* (A. 2.) *Bac. Abr. Warranty* (E.)

ment be only voidable, yet the warranty is void.

Lit. Sect. 703. Co. super Lit. 386. 2. That the warranty be made by deed, [and every deed must be] in writing, [sealed and delivered:] for if a man make a feoffment by word, [or now by mere writing without deed,] and by word [or mere writing] bind him and his heirs to warrant the land; this is not a good warranty. So if a man give lands to another by his last will, and thereby bind him and his heirs to warrant it; this warranty, albeit the will be in writing, [sealed and delivered, or published,] is void (15).

Co. 10. 96. & super Lit. 384. 3. That there be some estate to which the warranty is annexed, that may support it: for if one covenant to warrant land to another and make him no estate, or make him an estate that is not good, [*viz.* that is avoided or determined,] and covenant to warrant the thing granted;

Co. super Lit. 378. 26 H. 8. 9. in these cases the warranty is void, [or, if not void, ceases with the estate.]

4. That the estate, to which the warranty is annexed, be such an estate as is able to support it; and therefore that it be a lease [*read*, an estate] for life at the least: for if one make a lease for years of land, and bind himself and his heirs to warrant the land; this is no good warranty, neither will it have the effect of a warranty; but this may amount to a covenant, on which an action of covenant may be brought.

Co. super Lit. 12. Lit. fol. 161. Sect. 735. 5. That the warranty descend upon him that is heir of the whole blood, by the common law to him that made the warranty, and not upon another: for if tenant in tail in borough English (where by custom the youngest son is to inherit) discontinue the tail, and have issue two sons, and the uncle release to the discontinuee with warranty, and dieth; this is no good warranty to bind the younger son, [because he is not the heir at the common law, *infra*, p. 200.](16). So if in this case tenant in tail discontinue the tail with warranty, &c. having two sons, and die seised of other lands in the same borough in fee simple, to the value of the lands in tail; the younger son is not barred by this warranty; [and yet the lands descended to him are assets, and he is liable to an action of covenant, and even to be

(15) Because a will in writing is no deed, and therefore an *express* warranty cannot be created by will; but a warranty *in law* may be created by will, and may bind the heir, though it never bound the ancestor. *Co. Lit.* 386 a.

(16) Because a warranty cannot go according to the nature of the tenements by the custom, &c. but only according to the form of the common law. *Lit. sect.* 735. [*Robins. Gavelk.* 124. This derivation applies to the right to the benefit of the warranty. *Sed query* if law!!]

vouched, p. 200.] So if one give his land to the eldest son, and the heirs males of his body, the remainder to the second son, &c. and the eldest son doth alien with warranty, having issue a daughter, and die; this is no good warranty to bar the second son, [because the daughter is the general heir.] So if tenant in tail have issue two daughters by divers venters and die, and they enter, and a stranger doth disseise them, and one of them doth release all her right, and bind her and her heirs to warrant it; in this case the warranty is not good to bar the sister, [for the sister is of the half-blood, and therefore not heir;] but if they had been by one venter, *contra*, [because one is heir to the other.] So if two brothers be by demy [*read*, different] venters, and the eldest doth release with warranty to the disseisor of the uncle, and dieth without issue, and the younger dieth; this is no good warranty to bar the younger brother; for a warranty [to be binding] must * evermore descend upon him that is heir at the common law to him that made it; [and the younger brother being of the half-blood, is not heir to his brother.] 6. That he that is heir do continue to be so, and that neither the descent of the title, nor the warranty, be interrupted: for if one bind him and his heirs to warranty, and after [he] is attainted of treason or felony, and die; this warranty doth not bind [those who would have been] his heirs, [for he has not any heirs. The attainder corrupts the blood, and suspends at least the relation of ancestor and heir.] So if tenant in tail be disseised, and after release to the disseisor with warranty, and after the tenant in tail is attainted of felony, and hath issue and die; this warranty will not bind the issue; [for although the issue may take as heirs *per formam doni*, there is not any relation between them and their parent in the character of heir and ancestor.] 7. That the estate of freehold, that is to be barred, be put to a right [of entry or action] before, or at the time of the warranty made; and that he to whom the warranty doth descend, have then but a right to the land: for a warranty will not bar any estate of freehold or inheritance in *esse* in possession, reversion, or remainder, that is not displaced, and put to a right before, or at the time of the warranty made; though after, [and] at the time of the descent of the warranty, the estate of freehold or inheritance

Lit. fo. 161.

Lit. Sect. 737.

Co. super Lit. 387.
Lit. Sect. 718.

*P. 187.

Lit. Sect. 745. 746.

Co. 10. 96, 97. super Lit. 388. 21 H. 7.

be displaced and devested. And therefore if there be father and son, and the son hath a rent-service, suit to a mill, rent-charge, rent-seck, common of pasture, or other profit apprender out of land of the father, [being incorporeal hereditaments, which do not admit of an adverse seisin, by discontinuance or disseisin,] and the father maketh a feoffment in fee with warranty, and dieth, this [warranty] shall not bar the son of the rent, common, &c. [for a man cannot be disseised of a rent, &c. except at his election, and disseisin at election is merely a supposition for the sake of the remedy by assise.] And albeit the son, after the feoffment with warranty, and before the death of the father, had been disseised, and so, being out of possession, the warranty had descended upon him, yet this warranty should not bind him. So if my collateral ancestor release to my tenant for life, with warranty, and die, and this warranty descend upon me; this [warranty] shall not bind my reversion or remainder, [for my reversion or remainder was never put to a right; but if the tenant for life had made a feoffment in fee, and the collateral ancestor had released to the feoffee with warranty, this warranty would, at the common law, have been binding on the heir.] But if in the case before, the son be disseised of the rent, &c. and affirm himself to be disseised by the bringing of an assise, (for otherwise he shall not be said to be out of possession, [*i. e.* seisin,] of a rent, or the like,) and after the father doth release with warranty and die; in this case the collateral warranty shall bind and bar the son of his rent, &c. And if in the last case, [*amit*, in the last case (17 a)], my tenant for life be disseised, and my ancestor doth release to the disseisor with warranty, and die; this is a good warranty to bar and bind me, [because the warranty is knit to the estate acquired by disseisin.] 8. That the warranty doth take [*viz.* be capable of] effect in [the] lifetime of the ancestor, and that he be bound by it: for the heir shall never be bound by an express warranty, but where the ancestor was bound by the same warranty; and therefore an [express] warranty made by will, is void. [So if the ancestor bind his heirs without binding himself,

Lit. Sect. 734.

(17 a) [This sentence is in the original miscollocated. It should have been in the place of the editor's note of contrast.]

the warranty is void. 1 *Inst.* 386 a.] 9. That the heir claim in the same right that the ancestor doth: for if one be a successor only in case of a corporation, he shall not be bound by the warranty of a natural ancestor (17), [although in fact he be the heir; for he claims as the successor, and not as heir.] 10. That the heir that is to be barred by the warranty, [and having independently of the warranty a right of entry,] be of full age at the time of the fall of the warranty: for if my ancestor make a feoffment, or a release with warranty, and at this time, [a fact which is immaterial,] I am within age, * and after he die, and the warranty descend upon me within age, this warranty shall not bind me, [*viz.* preclude me of my entry;] but if I become of age after the warranty of my ancestor, and before his death, in this case the warranty may bar me. And in the first case it will bar me also while it is in force; but I may by my entry avoid it. [The true reading of this passage is, there is a warranty, and it may be pleaded in bar to an action by the heir; but, unless there be a discontinuance, or the entry be tolled by descent, the heir may by his entry defeat the estate, and consequently the warranty annexed to the estate.] And the same law is of a woman covert. And yet if the entry of an infant, or a woman covert, be not lawful, when the warranty doth descend; in this case the warranty shall bind them as well as any other; for such warranty cannot be avoided but [except] by entry and avoiding the estate. And where the husband is within age at the time of the descent of a warranty to his wife, and the entry of the wife is taken away, there the warranty shall bind the wife.

Co. super Lit. 370.

Lit. Sect. 726. Co. 1. 67. 140. super Lit. 380.

*P. 188.

If lands be given to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of that heir male, [thus making the heir male purchaser,] and *A.* having issue *B.* makes a feoffment of the land with warranty to *I. S.* this is a good warranty and a bar to the issue. [Besides, the remainder to the heir male was contingent, and was barred by the feoffment;] for a man may be barred of his right by a warranty which he could never avoid: as, where lessee for life is disseised, and a collateral ancestor of the lessor doth release to the disseisor with warranty and die, and this doth descend upon the lessor; by this he is barred.

Co. 1. 66. 44 Ed. 3. 30. 44 Ass. pl. 35.

(17) The warranty of the predecessor doth not bind the successor, 2 *Inst.* 155.

Lit. Sect. 738. Co. super Lit. 387. A warranty made [*viz.* limited] for life, or in tail, is good, and shall bind for so long only; [so it may be confined to one or more of several estates,] as if tenant in tail of land let it for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of the tenant for life, [with warranty,] and die, and the tenant in tail hath issue; this is a bar to the issue during the life of the tenant for life, [for the warranty was confined to the life estate.] And in this case, upon a voucher, the recovery in value shall be put [*omit*, put] for life only.

Co. 10. 96. If one make a gift in tail, and grant to warrant the land given according to the gift; this warranty is good no longer than the estate doth last. And no warranty that a donor can make, in this case, can bar him of the land, if the donee die without issue, and the estate determine. [Suppose the estate tail to be converted into a fee simple by means of a recovery, will the warranty be annexed to the fee simple? On principle, it is apprehended not; because the title to the estate tail is, strictly speaking, unaffected by the recovery; *sed query.*]

Co. 8. 52. super Lit. 373. And where a warranty doth bar, [as an estoppel of title,] it is entire, and doth extend to all the land, and to all persons, upon whom it doth descend, and is a bar of all the right that every one of them hath in the land; so that if they have all right jointly or severally, or one only hath all the right and the rest none, he that hath the right is barred. And therefore if lands be given to *A.* and the heirs of his body, and for want of such issue to *E.* his sister and the heirs of her body, and *A.* doth make a feoffment with warranty, and die without issue, having two sisters *E.* and *S.* this [collateral warranty] is a bar to *E.* for the whole, albeit the warranty descend on her and another.

Co. 5. 79. If there be tenant for life, the remainder to his son and heir apparent in tail, and the father doth make a feoffment in fee with * warranty, and dieth; in this case this is [*read*, was, at the common law,] a good warranty, and will bar the son, albeit it be made of purpose to bar him. [But in consequence of the statute of 4 & 5 Ann, c. 16, this warranty will not be a bar.] But if *P. 189.

by agreement and covin between him and *A.* and *B.* he make a lease to *A.* who makes a feoffment in fee to *B.* to whom the father doth release with warranty, thinking by a collateral warranty to bar his son; this is no bar, for this warranty began by disseisin: and *if*, in the first case, the son doth enter in the lifetime of the father upon the land, [so as to restore his seisin,] he doth avoid the warranty. [For at that time the warranty had not attached; and it has already been observed, that when the estate to which a warranty is annexed is defeated, the warranty is also defeated. *Litt.* § 741. But though the father had survived, and the warranty had descended, still it is apprehended the warranty, as commencing by disseisin, would not have barred the son.]

If the father be tenant for life, the remainder to the next heir male of the father, and to the heirs males of the body of such next heir male, [thus making the heir male a purchaser,] and the father makes a feoffment to *I. S.* with warranty, and dieth; it seems this warranty is a good bar to the heir; and in this case the heir cannot enter in the lifetime of his father, for he cannot be heir male unto his father until his father's death. [Besides, the estate of the heir male was destroyed as a contingent remainder.] Co. 1. 66.

If tenant for life make a feoffment with warranty, or be disseised, and release with warranty, and he in reversion, being heir to the tenant for life, doth not enter, but suffer the lessee for life to die, and thereby the warranty to fall and descend upon him; in this case, this warranty generally is a bar without any assets. [The statute of 4 & 5 Ann, c. 16, has taken away the bar of these warranties of tenants for life, even though there are assets by descent.] But if he that doth so alien, &c. be tenant by the curtesy, this is no bar to the heir, without assets in fee simple from the tenant by the curtesy, and then it is a bar for so much, [*viz.* to the value.] And if the heir, for want of this assets at the time, doth recover the land from his mother, and after assets doth descend from the father; in this case the tenant shall recover the same land of the mother again. [This sentence is unintelligible; the former branch of the proposition is, in all probability, omitted.] And if she that Co. super Lit. 366. 365. Co. 1. 67. Stat. Glouc. ch. 6. Lit. Sect. 724, 725.

Stat. 11 H. 7. chap. 20. Lit. Sect. 727. Co. super Lit. 365.

doth so alien, &c. be tenant for life of the inheritance, or purchase of her deceased husband, or given unto her by any of the ancestors of her husband, or by any other person seised to the use of her husband, or of any of his ancestors; in this case her alienation, release, or confirmation with warranty, shall not bind the heir, whether he have assets or not; [nor shall it create a discontinuance. These conclusions flow from the enactment of the statute of 11 Hen. 7, c. 20.] But if a man con-

Co. 3. 58.

vey lands to the use of himself, *B.* his wife, and the heirs of his body, and they have issue *C.* and the father dieth, and *C.* disseiseth his mother, or getteth a feoffment from a disseisor, and then suffereth a recovery with a single voucher, and after the mother doth release to the recoveror with warranty; in this case the warranty is a bar to the issue, and not void by the statute of 11 H. 7. [Because this is, as it were, an alienation with the consent of the issue expressed by the recovery. In this case, a recovery with double voucher, or rather a recovery in which the tenant in tail had been vouched and vouched over, would have barred the intail. When it is said, a recovery with double voucher bars all estates tail of which the party was ever seised, the expression must be understood of recoveries in which the tenant in tail is vouched, and vouches over. If the father be tenant in tail, and make a bargain and sale in fee, and then a writ of entry is brought against the father, who vouches the son and heir apparent, who vouches over, this is a recovery with double voucher, and yet it does not bar the estate tail, because, though tenant in tail was named tenant to the writ of entry, he was not at the time seised by force of the intail.]

Co. super Lit. 366. 381. Stat. Glouc. ch. 6. Lit. Sect. 392.

If the husband, that is seised of lands in the right of his wife, levy a fine, or maketh a feoffment in fee with warranty, and the wife dieth, and then the husband dieth; this warranty, [though a collateral warranty,] shall not, [by reason of the enactment of the statute of Gloucester,] bind the heir of the wife, without assets of other lands in fee simple from the father [to the value,] albeit he be not tenant by the curtesy, but it is before her death that he doth make the estate and the warranty. But a fine, [with proclamations,] levied by the hus-

band and wife, in this case, is a good bar to the heir. [But in the case of a feoffment, &c. by the husband, seised in fee in right of his wife, it is apprehended the fee passes, subject to be defeated by the entry of the wife or her heirs, though this feoffment does not, as formerly, create a discontinuance. 2 *Prest. Abstr.* p. 49. 304.]

*P. 190. Fine.

* If tenant in tail, that is in of another estate, *i. e.* either by disseisin, or by the feoffment of a disseisor, doth suffer a common recovery, and a collateral ancestor of the tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a feoffment to uses executed by the statute of 27 H. 8. and after the collateral ancestor dieth; in this case, albeit the estate of the land be transferred in the post, [*viz.* the line of title be disturbed, at least in fiction of law,] before the descent of the warranty, yet it [the warranty] shall bind; [by reason of the statute of Uses, which treats the recovery and uses as parts of the same assurance, and as a conveyance.] So if he to whom the warranty is made suffer a common recovery, and after the ancestor dieth. But if tenant in dower enfeoff a villain with warranty, and the lord of the villain enter into the land before the descent of the warranty, and after the woman dieth; this warranty shall not bind the right of the heir. [For the lord, claiming in right of his villain, is in the post, and though he may rebut, he cannot vouch, by reason of the warranty.] So if a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dieth without issue, and the lord by escheat doth enter, and after the ancestor dieth; this warranty shall not bind. [Because the lord by escheat is in the post in right of his seigniory, and by way of reverter, and not seised of the estate to which the warranty was annexed.] Co. 3. 62. 22 Ass. pl. 37. 29 Ass. pl. 34.

A collateral warranty may descend upon an issue in tail before the right descend, and yet be good, with this difference, that the right be in *esse* in some of the ancestors of the heir at the time of the descent of the warranty; as if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth all his right, &c. to the disseisor with warranty, and dieth without issue, and the tenant in tail hath issue and dieth; in this case the issue Lit. Sect. 7 H. Co. super Lit. 388.

is barred, [if they be the heirs of the warrantor.] But otherwise it is where the right is not in *esse* in the heir, or any of his ancestors, at the time of the fall of the warranty; as if lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffee [*read*, feoffor] doth purchase the seigniory, and after the tenant doth cease; in this case the lord shall have a *cessavit*; for a warranty doth never bar any right that doth commence after the warranty (18). [The seigniory would have been extinct if the feoffee had purchased the same.]

Lit. Sect. 703, 711.

8. *What shall be said a lineal warranty; and how such a warranty shall bar.*

If the case be so, that if no such warranty had been made by the father or other ancestor, the right of the lands or tenements so warranted, had or might have descended or come from the same ancestor, and that from and by him that made the same warranty: such a warranty is a lineal warranty (19). [1 *Prest. Abstr.* p. 410.] As if a man be seised in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath issue and die, and the warranty doth descend upon the issue; this is a lineal warranty; for that, if none such [warranty] had been, the right of the land had descended to him as heir to his father, and he must have made his descent by him. And if there be grandfather, father and son, and the grandfather be disseised, and the father release to the disseisor, being in possession with warranty, &c. and dieth, and after the grandfather dieth; this is a lineal warranty to the son; and albeit in this case the warranty descend *before the right, yet it [the warranty] is a good bar. And if there be two brothers, and the father is disseised, and the eldest brother doth release with warranty, and die without issue, and after the father dieth, and the warranty doth descend to the

Co. super Lit. 371.

Lit. Sect. 707.

*P. 191.

(18) See accordingly in 1 *Wood*, 335 to 338; and further, what shall be said a good warranty in deed, and who shall be bound by it, in *Com. Dig. Garranty* (B.) *Vin. Abr. Voucher* (B. 2.) *Bac. Abr. Warranty* (D.)

(19) Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land, warranted either from or through the ancestor who made the warranty; as, where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather with warranty, this was lineal to the younger son. 2 *Bl. Com.* 301. Warranty lineal is where a man, seised in fee or in tail, makes a feoffment to another, and binds him and his heirs to warranty, and hath issue a son, and dieth, and the warranty descends to the son. *Curson's Law of Estates Tail*, 269.

younger son; this is a lineal warranty to him. And if lands be given to *A.* for life, the remainder to his right heirs, [thus vesting the fee in *A.*] and he doth make a feoffment with warranty, and die; this is but a lineal warranty. And if two parceners be, and the eldest enter into all the land to her own use, and then doth make a feoffment with warranty, and dieth without issue; this as to her own part is a lineal warranty, but as to her sister's part is a collateral warranty. And in every case where one doth demand an estate tail, if any ancestor of the issue in tail, whether he had possession of the land or not, hath made a warranty, and if the issue, that were to bring a writ of *formedon*, may or might have, by possibility of some matter that might have been done, conveyed to himself a title by force of the gift by him that made the warranty; this is a lineal warranty. [The warranty is said to be lineal or collateral in respect of the person on whom it descends. It is a lineal warranty if it descend on a person next in the regular line of succession to the estate; and a collateral warranty, if the right comes in one line, and the warranty in another line, or collaterally. So that a warranty, which is lineal as to an eldest son, may be collateral to the second son and his heirs, if it descend on him in the life of the eldest son, or of any of his descendants. 1 *Prest. Abstr.* p. 417.] As if a man be seised of land of an estate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath issue and dieth; this warranty, descending upon the issue, is a lineal warranty (20). And if lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath issue a son and a daughter, and dieth; this warranty is lineal to the son, and if the son die without issue male, it is a lineal warranty from the father to the daughter. [In the meantime the warranty is, as against the daughter, a collateral warranty.] But [*read*, and so] if the brother in his lifetime release to the dis-

Co. 1. 66, 67.

Co. 8. 52. New terms of the law, tit. Warranty.

Lit. Sect. 719.

(20) *Lineal* warranty is that which is made by tenant in tail; *collateral*, that which is made by a stranger to the intail. See further in *Sull.* sect. 165. [This proposition is not sufficiently definite.]

continuee, &c. with warranty, &c. and after dieth without issue; this is a collateral warranty to the
Lit. Sect. 714. daughter. If lands be given to the husband and wife, and the heirs of their two bodies engendered, and they have issue, and the husband discontinue, and die; and after the wife doth release with warranty, and die; this is a lineal warranty [to her
Co. super Lit. 375. heirs, being her descendants, &c.] And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband doth release with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the issue for all the land; [for as to the estate tail, the husband and wife were joint-tenants, and not tenants by moie-
Lit. Sect. 718. ties.] And if tenant in tail have issue three sons and discontinue, and the middle brother doth release with warranty, and die without issue, and after the father dieth, and after the elder brother dieth without issue, so that the warranty doth descend to the younger brother; this is [become] a lineal warranty to him. [But if the elder brother, or any of his issue, had been living, the warranty would, as to the younger brother, have been collateral.] And if a father give land to his eldest son and the heirs males of his body, &c. the remainder to the second son, &c. if the eldest son alien in fee with warranty, &c. and hath issue female, and dieth without issue male; this is a lineal warranty * to the second son. [It is apprehended not; besides, as the daughter is living, the warranty doth not descend on the second son. All Littleton has said is, that this is not a collateral warranty to the second son, but not denying that if the elder son had died without issue male or female, the warranty would have been collateral to the
Lit. Sect. 711, 712. Dect. & Stud. 152, 153. Co. 8. 52. second son.] And in all these cases of a lineal warranty, if the right of the estate to be barred be the right of an estate in fee simple, it is a bar [with or] without any assets; for the rule is, that as to him that demandeth fee simple by any of his an cestors, he shall be barred and bound by a lineal warranty that doth descend upon him, unless he be restrained [*read*, exempted] by some statute. But it [a lineal warranty] doth not bind the right of an estate in fee tail without assets; for in that case the rule is, that as to him that demandeth fee

*P. 192

tail by writ of *formedon* in the descender, he shall not be barred by a lineal warranty, unless he hath assets by descent in fee simple of other land from the same ancestor that made the warranty; and then it is a bar for so much only [in value] as doth descend to him, [and] no more. And yet, if the issue in tail do alien the assets descended, and die; in this case the issue of that issue is not barred by this warranty and assets. But if the issue, to whom the warranty doth descend, bring his writ of *formedon*, and is barred by judgment, by reason of the warranty and assets; in this case, albeit he alien the assets afterwards, yet the estate tail is barred for ever (21). [So that, except in the case of a judgment in a *formedon*, the bar is merely personal; consequently a title, depending on a lineal warranty with assets, is not a complete title; since the issue of the person barred may claim, notwithstanding the bar to the ancestor; and in the case of a collateral warranty, the bar may be suspended by attainder, &c. 1 *Prest. Abstr.* p. 417, 418.]

Co. super Lit. 393.

9. What shall be said a collateral warranty; and how such a warranty shall bar.

If tenant for life do alien in fee with warranty, or be disseised, and release to the disseisor with warranty and die, and the warranty descend on him in reversion or remainder; this is a collateral warranty (22.) [But, at this day, the warranty of a tenant for life will not bar, with or without assets. 4 & 5 Ann, c. 16.] So if the lessee for life be disseised, and a collateral ancestor of him in reversion release with warranty, and die, and the warranty descend on him in reversion; this is a collateral warranty: for that is collateral which is collateral to the title of the land. And if a man

Co. 1. 67. 21 H. 7. 10. Lit. Sect. 725.

Lit. Sect. 707. Doct. & Stud. 152.

(21) See further what may be deemed a lineal warranty, and how it shall bind, in *Bac. Abr. Warranty* (F.) *Com. Dig. Garranty* (H.) *Vin. Abr. Voucher* (W. b.) to (A. c.)

(22) Collateral warranty was, where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as, where a younger brother released to his father's disseisor with warranty, this was collateral to his elder brother. 2 *Bl. Com.* 302. No reason can be given for a collateral warranty. *Per cur.* 4 *Mod.* 211. But *Holt*, Ch. J. said, that the true reason of collateral warranty was, the security of purchasers, and for their encouragement; as also, for the establishing and settling the estates of such as were in by title, or descent cast; and this was the only security such persons could have at common law. And because the estates of such persons as are in by title, are much favoured in law, these covenants that were for strengthening of them were favoured likewise. And in those days, there was no need of a lineal warranty; but, however, the force of that is taken away by the statute of *Donis*; and common recovery is not upon the supposition of recompence in value, and never was within the statute, but always as much out of it as if it were so mentioned by express words. And this, he said, was my Lord *Hale's* opinion. 12 *Mod.* 512. See further, as to the reason and doctrine of collateral warranty, in *Sull. Lect.* 121. 164. 2 *Inst.* 335. *Wright's Ten.* 168.

seised of lands in fee have issue two sons, and the father dieth, and the younger son doth enter, and doth alien the land with warranty, and die without issue; this is now a collateral warranty that is
21 H. 7. 10. descended on the elder brother. And if a son be disseised of his own land, and bring an assise, and after the father doth release to the disseisor with warranty, and dieth; this warranty, that doth descend to the son, is a collateral warranty; [for the warranty is knit to the fee acquired by disseisin, and not to the fee under the old title prior to the
Lit. Sect. 704. disseisin.] And if a father disseise his son of the land he hath of his own purchase, without any intent to alien afterwards and to bar his son, and afterwards he doth make a feoffment with warranty, and die before the entry of his son, so that the warranty doth descend [on the son;] this is a
Lit. Sect. 707. collateral warranty. If there be father and two sons, and the father is disseised, and the younger son doth release with warranty to the disseisor, and die without issue, and then the father dieth; in this case the warranty, now descended [on the elder son or his issue,] is a collateral warranty. If a
Co. super Lit. 388. lease be made for life to the father, the remainder to his next heir, [as a purchaser, as in *Archer's case*, 1 *Rep.* p. 66 b,] and the father is disseised, and doth release with warranty, and dieth; this is a collateral warranty to the heir. And if the husband discontinue * the right of his wife, and [an] *P. 193. ancestor collateral to the wife, to whom she is heir, doth release with warranty, and die, and after the husband dieth; this is a collateral warranty and a
Co. 10. 96. Lit Sect. 709. Plow. 294. Kelw. 78. bar to her. And in every case, where a man doth demand an estate tail by a writ of *formedon*, if any ancestor of the issue in tail, which hath, or hath not possession, [*read* seisin,] maketh a warranty, and the issue that is demandant cannot, by any possibility that may be done, convey to him a title by force of the gift, [as the next or immediate heir,] from and by him that made the warranty; this is a collateral warranty: as if tenant in tail discontinue the tail and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in tail; this is a collateral warranty. So if such a discontinuee make a feoffment in fee, or be disseised, and the

uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on the issue; this is a collateral warranty. [But the warranty of an uncle may be lineal, if he be the elder branch of the family, and the right of intail descends from or through him.] If a tenant in tail have three sons, and discontinue the tail in fee, and the middle brother doth release to the discontinuee with warranty, and after the tenant in tail dieth; this is a collateral warranty to the elder brother, [but a lineal warranty to the younger brother if it descend on him; so that the same warranty may be collateral as to one person, and lineal as to another person; or rather, a collateral warranty at one time, and a lineal warranty at another time.] If one have issue three sons, and giveth land to the eldest, and the heirs of his body; and for want of such issue, to the middle [son] and the heirs of his body; the remainder to the third [son], and the heirs of his body; and the eldest [son] doth discontinue the tail in fee with warranty, and die without issue; this [warranty] is collateral to the middle son: [because the second brother has a title collateral to that of the elder brother, since they had distinct estates tail; and a warranty may be, as to the same person, lineal in respect of one estate, and collateral in respect of another estate; as if a gift be made to *A.* for life, remainder to his first and other sons successively in tail, remainder to the father in tail; in this instance, the warranty will be lineal in respect of the father's estate tail, though it be collateral as to the son's estate tail.] In the same manner it is, in case where the middle son hath the same land by force of the same remainder, because his elder brother made no discontinuance, but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue; this is a collateral warranty to the youngest son. And in this case, if any of the sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty; this is a collateral warranty to that son upon whom the warranty doth descend. If lands be given to *A.* and the heirs of his body, and for want of such issue to *E.* his sister, and the heirs

Lit. Sect. 708.

Lit. Sect. 716.

Co. 8. 52. Lit Sect. 713.

of her body, and *A.* doth make a feoffment with warranty, and die without issue, having two sisters, *E.* and *S.* [or having *E.* his only sister]; this is a collateral warranty to *E.* If lands be given to a man and the heirs of his body begotten, who taketh a wife, and hath issue a son by her, and the husband doth discontinue the tail [for an estate] in fee, and dieth, and after the wife doth release to the discontinuee with warranty, and dieth, and the warranty doth descend to the son; this is [a] collateral [warranty] to him, [although he be the lineal heir to his mother; because his title depends on the descent from his father, while the warranty descended from his mother.] If tenant in tail discontinue the tail [for an estate] in fee, and the discontinuee is disseised, and the brother of the tenant in tail doth release to the disseisor with warranty in fee, and dieth without * issue, and the tenant in tail hath issue and dieth; this is [a] collateral [warranty] as to the issue. If tenant in tail have issue two daughters, and die, and the elder enter into all to her own use, and thereof make a feoffment in fee with warranty, and die without issue; this warranty, as to the other sister's part, is collateral, but not as to her own [share; for, as to her own part, it is lineal.] If the husband and wife, tenants in special tail, have issue a daughter, and the wife die, and the husband by a second wife have issue another daughter, and discontinueth in fee, and dieth, and a collateral ancestor of the daughters release to the discontinuee with warranty, and dieth, and the warranty descend upon both the daughters; this is a collateral warranty to them. [But if the father had warranted, the warranty would have been lineal as to the daughter, being the heir in tail.] If lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the father die, and the brother release with warranty, and die without issue; this is [a] collateral [warranty] to the daughter. If tenant in tail make a lease for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of tenant for life with warranty, and die, and after the tenant in tail die, having issue; this is a good binding collateral warranty during the estate for life. And in all these, and such like cases of a collateral warranty,

Lit. Sect. 711.

*P. 194.

Co. super Lit. 373.

Lit. Sect. 738.

Lit. Sect. 712. Co. super Lit. 374. Co. 10. 96. Stat. of Glouc. ch. 3.

whether the right be the right of an estate tail, or the right of an estate in fee simple that is to be barred, it is a bar without any assets; for in this case the rule is, that a collateral warranty is a bar to him that demandeth fee simple, and also to him that demandeth fee tail, without any other descent of lands in fee simple; so that the heir, on whom the same warranty is descended, can never have the land so warranted, whilst the warranty doth continue in force, but is bound thereby, except it be in some special cases, restrained by act of parliament; as where the husband alone during his wife's life, or after her death, being tenant by the curtesy, make a feoffment by fine, or deed, of his wife's land, which she hath by descent or purchase, with warranty; this [warranty] will not bar her heir without assets of other lands in fee simple descended from the same ancestor that made the warranty. Or where a wife after her husband's death, shall alone, or with her succeeding husband alien, release, confirm, or discontinue with warranty, the land she holdeth in dower, or in tail, of the gift of her former husband, or any of his ancestors; this warranty is voidable, and will not bind with assets (23).

Co. super Lit. 365. Stat. 11 H. 7. chap. 20.

10. *What shall be said a warranty that doth begin by disseisin; and what such a warranty doth work.*

If the son purchase land, &c. and after let it to his father, or any other ancestor for years, or at will, and he by his deed doth enfeoff a stranger, [thus making a disseisin,] and that with warranty, and after dieth, whereby the warranty

Lit. Sect. 699, 700, 701, 702. Finch, 82. Co. super Lit. 367.

(23) Such warranty is by the statute 11 H. 7, c. 20, made absolutely *void*. And by the stat. 4 Ann, c. 16, § 21, it is enacted, "That all warranties which shall be made after the "first day of Trinity Term 1705, by any tenant for life, of any lands, tenements, or here-"ditaments, the same descending or coming to any person in reversion or remainder, shall "be void and of no effect; and likewise all collateral warranties which shall be made after "the said Trinity Term, of any lands, tenements, or hereditaments, by any ancestor who "has no estate of inheritance in possession in the same, shall be void against his heir." It is a common mistake, that *all collateral warranties are taken away by the statute* 4 & 5 Ann, c. 16, whereas that statute only makes void all warranties by tenant for life, and all collateral warranties made by any ancestor, *not having an estate of inheritance in possession*: so that if *A.* be tenant in tail, remainder to *B.* his next brother (which is a very common case, arising almost on every marriage settlement), and *A.* being in possession makes a feoffment, or levies a fine with warranty from him and his heirs, and die without issue, this is a collateral warranty, (for *B.*'s title is by way of remainder, to which his elder brother is collateral), which shall bar *B.* notwithstanding the statute, though no assets descend; *et sic de similibus*. *Robinson on Gavelk.* 125. As to the operation of the statute of Ann, see *Hawk. Abr. Co. Lit.* 7th edit. 468. 476; and further, as to collateral warranty, and in what cases it shall bar, in *Com. Dig. Garranty* (H. 2.) (H. 5.) *Bac. Abr. Warranty* (H.) *Vin. Abr. Voucher* (U. b. 3.)

doth descend upon the heir; this warranty doth commence by disseisin. [Here note, that a tenant for years, or at will, may devest the freehold from the reversioner, and thus create a disseisin. It is on this ground, that tenant for years should make a feoffment before he levies a fine, when he is imprudently desirous of acquiring the inheritance.] So if tenant by elegit, statute merchant, guardian in chivalry, or socage, or because of * nurture, make a feoffment with warranty, and this warranty doth descend on his heir; this warranty doth commence by disseisin. So if one that hath no right at all enter into my land, and make a feoffment to another with warranty. So if one coparcener enter into the whole land, and make a feoffment in fee with warranty; this warranty as to the one moiety, [but not as to the moiety of the feoffor,] doth begin by disseisin. So if father and son purchase lands to them jointly, &c. and the father alien the whole to another with warranty, &c. and after the father dieth; this warranty, as to the one moiety [of the son,] doth begin by disseisin. But if the purchase be to them two, and the heirs of the son, it is otherwise; for if the son enter in the lifetime of the father, the warranty is avoided for all, but if he do not enter, then as to the father's moiety it is a collateral warranty, [for he had the freehold; and as to the other moiety, it is a warranty commencing by disseisin.] And if the purchase be to the father and son, and the heirs of the father, and the father alien with warranty, &c. in this case the warranty is good for the whole.

*P. 195.

Co. 5. 80. super Lit. 366, 367.

If the father be tenant for life, the remainder to his son and heir in fee, and the father by covin and consent, of purpose to bar the heir by a collateral warranty, maketh a lease for years, to the end that the lessee should make a feoffment in fee, that the father may release to the feoffee with warranty, and all this is done accordingly, [so that the lessee is the feoffor and disseisor,] and the father dieth, and the warranty doth descend to the son; in this case, the warranty shall be said to begin by disseisin. But if the father, in this case, make a feoffment in fee with warranty, and die; this, [by reason of his seisin for life,] is a good warranty to bind the son, albeit it is done of purpose to bar him, [because he had a freehold prior to the feoff-

ment.] So if one brother make a gift in tail to another, and the uncle doth disseise the donee, and enfeoffeth another with warranty, the uncle dieth, and the warranty descendeth on the donor, and then the donee dieth without issue; this warranty doth begin by disseisin. So if the father and son and a third person be joint-tenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the son dieth; in this case, as to the part of the third person and to the part of [the] son, the warranty shall be said to begin by disseisin. But releases [with warranty] at this day, [but see the statute law in note to p. 194,] by a tenant for life, to a disseisor, or any other, without covin, albeit it be to the intent to bar him in reversion, shall bar him; for intent, without covin and disseisin, shall not avoid a warranty; and examples of warranties, that do begin by disseisin, have these qualities: 1. That for the most part the disseisin is done immediately to the heir [to the person who is the heir] that is bound by the warranty (24). 2. The warranty and disseisin are *simul* and *semel*. And yet if a man disseise another, with intent to make a feoffment with warranty, albeit the feoffment be made twenty years after the disseisin, yet it shall be said to be a warranty that doth begin by disseisin. But in all these cases of warranties, that do begin by disseisin, this is the rule, that * they are altogether void and without force as to all others but to the parties themselves that do make them, [and persons claiming under them merely and simply by descent in fee;] and therefore they do not bar or bind any others at all of their right that have any. And the same law is of a warranty that doth begin by abatement, [*viz.* a disseisin between the death of an ancestor, and the actual seisin by the heir,] or intrusion, [*viz.* a disseisin between the death of the tenant of an estate for life, and actual seisin in the tenant of the reversioner or remainder-

*P. 196.

(24) And yet if the father be tenant for life, the remainder to the son in fee; the father, by covin and consent, makes a lease for years, to the end that the lessee shall make a feoffment in fee, to whom the father shall release with warranty; and all is executed accordingly; the father dies; this warranty shall not bind, albeit the disseisin was not done immediately to the son; for the feoffment of the lessee is a disseisin to the father, who is *particeps criminis*. *Co. Lit.* 366 b. See accordingly, and further, in *Vin. Abr. Voucher* (B. 4) pl. 7, in margin, where cases are collected to support this point of doctrine.

man;] that is, when an abatement or intrusion is made of purpose to make a feoffment in fee with warranty. And so also it is where the tenant dieth without heir, [so that there is an escheat,] and an ancestor of the lord doth enter before entry of the lord, and make a feoffment in fee with warranty; in this case this [warranty] shall not bind the lord, because it doth begin by wrong (25).

11. *How a warranty shall be taken.*

All warranties in general are favourably taken in law, because they are part of men's assurances. Every warranty in law, [as distinguished from a warranty in fact,] is taken for, and hath the effect of a lineal warranty.

Co. 4. 81. 5. 17. The warranty that is made by *dedi & concessi*, or *dedi* only in a feoffment, is, and shall be taken for, a general warranty against all persons; to the feoffee and his heirs, during the life of the feoffor only, albeit there be no service reserved by the deed nor heir named, [for fealty is incident to such grant;] but it shall not extend to the assignee of the feoffee. And if there be any service reserved on the deed, then it shall extend against the heir also.

Co. 4. 81. super Lit. 384. The warranty in law that is made upon a gift in tail, or lease for life, rendering rent, is a special warranty against the donor and lessor, and his heirs and assigns; so that the donee or lessee may vouch the grantor after the grant of the reversion, or the grantee of the reversion after the attornment of the tenant, at his election.

Co. 4. 121. super Lit. 384. The warranty in law that is made upon an exchange, is special in divers respects; for it extendeth reciprocally to, and against, the heirs of both parties; and it doth extend only to the same land that is given in exchange, and none other; and no use can be made of it but by voucher, for no *warrantia chartæ* doth lie upon it. So also the warranty, that is made in dower, is taken to extend only to the other two parts of the land.

Co. super Lit. 384. The warranty in law, that is made upon the tenure of homage ancestrel, extendeth reciprocally to the heirs, and against the heirs, of both parties.

Co. 5. 59. If a feoffment be made of land to three jointly,

(25) See more amply what shall be deemed warranty, which commences by disseisin, abatement, or intrusion, and their operation, in *Bac. Abr. Warranty* (K.) *Com. Dig. Garranty* (I. c.)

and the feoffors do warrant the land to the feoffees, and every of them; this warranty shall be joint and not several. But if the estate be several, as if one grant white acre to *A.* and black acre to *B.* and grant to warrant the land to them, and either of them; in this case the warranty shall be several. [See *Covenants*, p. 166. But covenants and warranties are not of necessity governed by the same rules.]

If a man of full age, and an infant join in a feoffment with warranty; this shall be taken for a good warranty as to the whole, for him that is of full age, and void for the infant; and not void in part, [*viz.* for one moiety;] and good in part, [*viz.* for the other moiety.] Co. super Lit. 367.

If a man make a feoffment in fee, and bind his heirs but not himself * to warranty; in this case, and by this [warranty], his heirs shall not be bound; and it seems also, that it will not bind the warrantor himself. But if a man bind himself to warrant, and not his heirs, by the feoffment; in this case the feoffor himself is bound to the warranty, but not his heirs; for it is a maxim of law, that the heir shall never be bound to any express warranty, but where the ancestor was bound by the same warranty. [But the ancestor may be bound for his time, without binding the heirs.] If one make a feoffment to *B.* and his heirs, and thereby doth grant to warrant the land, and doth not say to *B.* and his heirs; yet this warranty shall [by construction] be taken to extend to them. But if the feoffor doth grant to warrant the land to *B.* and doth not say to his heirs, this [warranty] shall not extend to his heirs, [for *expressum facit cessare tacitum.*] And if, in this case, the warranty be to *B.* and his assigns, it shall not extend to his heirs, neither shall the assignees take advantage of it after the death of *B.*; [for it is a warranty only to him and his assigns during his life.] And if the warranty be to *B.* and his heirs, and not to his assigns also; this shall not extend to his assigns. If one make a feoffment to *A. habendum* to him and his heirs, and bind himself and his heirs to warrant the land *in formâ prædictâ*; in this case the warranty shall extend to the feoffee and his heirs (26). Co. super Lit. 386.

*P. 197.

Co. super Lit. 47. 385. Dyer, 42. Kelw. 108. Co. 6. 69.

(26) In the case of *Williamson* v. *Codrington*, in 1 *Ves.* 511, Sir *W. C.* made a voluntary settlement of a plantation in America, with a clause, whereby *he obliged himself, his heirs*

Co. 1. 1. If one grant to warrant land to another and his heirs, and doth not say against what persons, this shall be taken for a general warranty against all men. [To restrict the warranty as to time, or to persons, there must be apt words.]

If one make an estate and grant to warrant the land, but doth not say how long, this shall be taken for as long as the estate to which the warranty is knit doth last.

Dyer, 328. If a warranty be made against any special persons, it shall extend to them and no further; and it shall extend in all cases for and to all titles and entries upon title; and it shall not in any such cases, [without express words,] extend to tortious and unlawful entries.

Co. super Lit. 365. If a man be seised of a rent-seck issuing out of the manor of *Dale*, and he take a wife, and the husband doth release to the terre-tenant, and warranteth *tenementa prædicta*, and dieth; this warranty shall extend to the rent, as well as to the land; and therefore if the wife sue for her thirds of the rent, the terre-tenant may vouch the heir.

Co. super Lit. 365, 369. And regularly the warranty doth extend to all things issuing out of the land, *viz.* to warrant it in the same manner and plight as it was in the hands of the feoffor, and he shall vouch as of lands discharged. And therefore if grantee of a rent grant it to the tenant of the land on condition, and the tenant doth make a feoffment of the land with warranty; in this case the warranty shall not extend to the rent, albeit the feoffment be made of the land discharged of the rent; [because the terre-tenant held the land as discharged, subject to a condition annexed to the rent, by which the

---

executors and administrators, to warrant and for ever defend the plantation, negroes, cattle, stock, &c. The word *warrant*, when properly applied, has to be sure a particular sense. but has in general a further sense; therefore, it is not necessary to understand *warranty* in a deed or covenant barely as a warranty of the title to the realty, but it shall be taken *secundum subjectam materiam*. Here are chattels to be warranted in this deed, some of which are personal things, as cattle, horses, &c. though negroes in some instances are considered as annexed to the plantation. Then there are words binding his executors and administrators, which must be rejected, if to be construed as a mere real warranty of the land. This clause therefore is inconsistent with that narrow construction, nor is it penned like a real warranty, which is, "I do for myself and my heirs warrant such land;" here the words are, "I do oblige," &c. which amounts to the same as "I covenant," &c. for many other words in a deed will amount to a covenant besides the word *covenant*, as "I oblige, &c." This then is barely a covenant for himself, his heirs, executors, and administrators, to warrant; which word must be construed in a larger sense than warranty in a strict legal sense, as large as *defend*. That construction a court of law or equity must put upon it. *Per Lord Hardwicke*, 1 *Ves.* 516.

rent might be revived.] And if a woman have a rent-charge in fee, and she doth intermarry with the tenant of the land, and a stranger doth release to the tenant of the land with warranty; this warranty shall not extend to bar any action to be brought after the death of the wife for the rent.

*P. 198. But if in this case the * tenant make a feoffment in fee with warranty and dieth, the feoffee in a *cui in vita* brought by the wife, shall vouch as of lands discharged at the time of the warranty made. So if tenant in tail of a rent-charge purchase the land and make a feoffment with warranty, and the issue bring a *formedon* of the rent, the tenant shall not vouch, &c. (27).

12. *Who may take advantage of a warranty; and how and against whom it may be taken.*

Assigns.

All those that are parties to the warranty, *i. e.* such as are named in the deed regularly, shall take advantage of the warranty: as if one doth warrant land to another, his heirs, and assigns; in this case both the heirs and the assigns may take advantage of it, and they both may vouch or rebut, or have a *warrantia chartæ*, so as they come in in privity of estate, for otherwise the heirs or assigns cannot vouch or have a *warrantia chartæ*; and yet they may rebut, notwithstanding, in divers cases. But those that are not named, for the most part, shall not take advantage of the warranty: and therefore if land be warranted to *I. S.* and not to him and his heirs, or to him and his assigns, or to him, his heirs, and assigns; in these cases neither the heir nor the assignee may vouch or have a *warrantia chartæ*; and yet in some cases where it is so, [*i. e.* the warranty is in such form,] the assignee or tenant of the land may rebut. Co. super Lit. 365. b. 17.

The warranty annexed to an exchange, a partition, by *dedi*, and by homage ancestrel, doth always go in privity; and therefore an assignee in these cases can take no advantage of it. [This point as to exchanges is very important to titles, and will in many cases supersede the necessity on the part of a vendor, of doing more than showing that the privity is determined, instead of showing the title to the lands given as well as to the lands received in exchange. See *Prest. Abstr.* p. 87. 161. 301. and qualify the propositions.] And yet in the Co. super Lit. 384.

(27) See further as to the operation of warranties, what rights and titles are barred by them, and how they shall be expounded and taken, in *Vin. Abr. Voucher* (B. 7.) *Bac. Abr. Warranty* (P.) *Com. Dig. Garranty* (F.)

cases of exchange and *dedi* an assignee may rebut. But the assignee of a lessee for life may take advantage of the warranty in law annexed to his estate.

Co. 5. 17. super Lit. 384, 385.

If one grant to warrant land to another, his heirs and assigns; in this case the heirs or assigns, heir of the assignee, or assignee of the heirs of the feoffee, or assignees of assignees *in infinitum*, shall take advantage of the warranty. And therefore if one enfeoff *I. S.* to have and to hold to him, his heirs and assigns, and warrant the land to him, his heirs and assigns, and *A.* doth enfeoff *B.* and his heirs, and *B.* dieth; in this case the heir of *B.* shall vouch as assignee to *A.* And if one enfeoff *A.* and *B. habendum* to them and their heirs, and warrant the land to them, their heirs and assigns, and *A.* die, and *B.* doth survive and die, and his heir enfeoff *C.*; in this case *C.* shall take advantage of this warranty as assignee. If one enfeoff *A.* with warranty to him, his heirs and assigns, and *A.* doth enfeoff *B.* and *B.* doth re-enfeoff *A.*; in this case neither *A.* nor his assigns shall ever take any advantage of this warranty; [for the warranty is at home and extinguished.] And yet if *B.* enfeoff the heir of *A.* he may take advantage of the warranty.

If one make a feoffment by deed with warranty to the feoffee, his heirs and assigns, and the feoffee doth make a feoffment over to another by word without deed; in this case the second feoffee shall * have all the advantage of this warranty, for an assignee by word shall have the same advantage that an assignee by deed shall have; [because the warranty is annexed to the estate, and passes with the same; and may pass without deed, though it could not be created without deed.] *P. 199.

If a feoffment be made with warranty to a man and his heirs and assigns, and he make a gift in tail, the remainder in fee, and the donee make a feoffment in fee, [being a discontinuance and change of the seisin;] this feoffee shall not vouch as assignee, [because his title is founded on a discontinuance, which puts an end to the privity of title;] but he must vouch his donor upon the warranty in law; and yet he may rebut.

If lands be given to two brethren in fee simple, with warranty to the eldest and his heirs, and the eldest dies without issue; in this case, albeit the

other brother be his heir, yet he shall have no advantage at all by the warranty, because he comes in above the warranty; [by survivorship, and not as heir.] But generally all that claim under the warranty shall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a feoffment to two, their heirs and assigns, and one of them doth make a feoffment in fee, this feoffee in this case shall not take advantage as assignee; [because there is a subdivision of the tenancy, and the duty would be multiplied if each tenant could vouch under the warranty; but it is apprehended each tenant may rebut. And yet if one of two feoffees release the warranty, (see *infra*, p. 202,) the release will not bind his companion.]

An assignee of part of the land shall take advantage of a warranty; as if a man make a feoffment of two acres with warranty to him, his heirs and assigns, and the feoffee doth make a feoffment of one acre of it to another; in this case the second feoffee shall take advantage of the warranty as assignee. And therefore herein there is a difference between the whole estate in part, and part of the estate in the whole or in any part: for if a man have a warranty to him, his heirs and assigns, and he make a lease for life, or gift in tail; in these cases the lessee or donee shall not take advantage of the warranty as assignee; but they [such persons] may vouch the lessor, or donor, upon the warranty in law; [or they may vouch the reversioner on the aid prayer, and he may vouch by force of the warranty.] But if a lease for life be made, the remainder in fee; such a lessee may vouch as assignee upon the first warranty. [Because the immediate privity is between the tenant for life and the warrantor; while in the case of a lease for life, the reversion remains in the lessor, and the immediate privity is between him and the warrantor.] If the father have a feoffment made to him and his heirs with warranty, and he make a feoffment to his son and heir with warranty; in this case the son may take advantage of the first warranty after his father's death, [as heir; though he cannot, during his life, take advantage of the warranty, except as assignee, and by rebutter.] If a man enfeoff a woman with warranty, and they intermarry and are impleaded, and upon the default of the hus-

Co. super Lit. 385.

Co. super Lit. 384.

Co. super Lit. 390.

band the wife is received; in this case she may vouch her husband. *Et sic e converso.* If a woman enfeoff a man with warranty, and they intermarry and are impleaded; the husband in this case shall vouch himself and the wife. [And yet in covenant, under the like circumstances, no action would lie on the covenant during coverture.]

16 H. 8. 3. 22 Ass. pl. 37. 29 Ass. 34. Co. 3. 62, 63.

He that comes into the land merely by act of law in the post, as the lord by escheat, or the like, shall never take advantage of a warranty; and therefore if tenant in dower enfeoff a villain with warranty, and the lord of the villain enter; or a feoffment be to a bastard with warranty, and he die without issue, and the lord enter by escheat; in these cases the lord shall never take advantage of these warranties; [because, in point of donation, the estate to which the warranty was annexed is determined.] But otherwise it is where a * man comes to the land by limitation of use, or a common recovery, which is by the act of the party, [as a common assurance:] for if tenant in tail, being in of another estate, *i. e.* by disseisin, or feoffment of a disseisor, suffer a common recovery, and a collateral ancestor of the tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a feoffment to uses which are executed by the statute of 27 H. 8; and after the collateral ancestor dieth; in this case the terre-tenants may take advantage of the warranty by way of rebutter, albeit the estate be transferred in the post. So if he to whom the warranty is made suffer a common recovery, and after the ancestor dieth; the recoveror may take advantage of this warranty by way of rebutter: for any man that hath the possession of land, albeit he have no deed to show how he came by the possession of it, or how he is assignee, may rebut the demandant, and so bar him, and defend his own possession; and therefore the tenant by the courtesy, donee in tail that is in of another estate, [as by discontinuance,] an assignee by force of a warranty made to a man and his heirs, or feoffee of a donee in tail, may rebut and bar the demandant by the warranty. *P. 200.

Co. super Lit. 366. 3 Ed. 3. 13. 9 H. 7. 2.

If one enfeoff another of an acre of ground with warranty, and hath issue two sons, and dieth seised of another acre of land of the nature of borough English; in this case, albeit the warranty descend

upon the eldest son only, yet both the sons may be vouched. And so also it is of heirs in gavelkind; the eldest shall be vouched as heir to the warranty, and the rest in respect of the inheritance (28.) And in like sort the heir at the common law, and the heir of the part of the mother shall be vouched; or the heir at the common law may be vouched alone, at the election of the tenant. And in like sort the heir at the common law shall be vouched with the heir in borough English. And so also a bastard [*eigne*] shall be vouched with a *mulier* (29.) And if a man die seised of certain lands in fee, having issue a son and a daughter by one venter, and a son by another, and the eldest son entereth and dieth, and the land doth descend to the sister; in this case the warranty doth descend on the son, and he may be vouched as heir; and the sister also may be vouched as heir to the land. [But the benefit of the warranty shall in all cases belong to the heir to the estate. *Co. Litt.* 376. 2 *Prest. Abstr.* 218.]

If two make a feoffment with warranty, and the one die, the survivor shall not be charged alone with the warranty, but the heir of him that is dead shall be charged also. And if two be bound to warrant land, and both of them die; the heirs of both of them ought to be vouched, and shall be equally charged. [But under joint covenants the survivor or his heirs, and not the heir of the deceased, can be sued.] And if the heir be vouched in the ward of three several persons, the one of them only shall not be charged, but they shall be charged equally.

Co. 3. 14. super Lit. 386. 16 H. 7. 13. 48 Ed. 3. 5.

If a woman, an heir of the disseisor, enfeoff me with warranty, and after she is married to the disseisee; in this case I may take advantage of * this

Co. super Lit. 365.

*P. 201.

(28) Concerning warranties annexed to gavelkind lands, it is said generally in several books, that every warranty which descends, descends to him that is heir by the common law. *Co. Lit.* 12 a, 376 a. *Hob.* 31. *Cro. Jac.* 218. But for the better understanding this rule with the proper restrictions, Mr. *Robinson*, in his treatise on gavelkind, p. 123, considers the authorities which treat more distinctly of this matter, under three heads; first, Whether the younger sons, heirs in gavelkind, may take advantage of a warranty annexed to their estate: 2. Whether they shall be barred or rebutted by the warranty of their ancestor: 3. Whether they may be vouched by reason of such warranty.

(29) The bastard may be vouched alone without the *mulier*, because the bastard is heir in appearance, and shall not disable himself. *Co. Lit.* 376 b. Where a man has bastard *eigne & mulier puisne* and the bastard enters, a man shall vouch the *mulier* as heir at the common law, and show how the bastard has entered into certain land of the father who made the warranty, and vouch him by the possession. *Br. Abr. Voucher*, pl. 119, cites 19. See further *Vin. Abr. Voucher* (U.)

warranty against the disseisee, and rebut him upon it, if he sue me for the land. So if the husband and wife sue me for the land of his wife, and I have a warranty of a collateral ancestor of the husband's descended to him; in this case I may make use of this [warranty] to bar the husband and wife (30.)

Co. super Lit. 392, 393.

13. *When a warranty shall be said to be defeated, determined or avoided; and how; or not.*

A warranty lineal or collateral may be defeated, determined, or avoided, in all or in part. And this is sometimes by matter in law, and sometimes by matter in deed.

Co. 10. 96. 1, 2, 3. 62. Lit. Sect. 741. Co. super Lit. 392.

If the estate to which the warranty is annexed be gone, [determined or defeated,] the warranty annexed thereunto is gone also. And therefore if an estate tail to which a warranty is annexed be spent, the warranty is determined. [But see p. 199.] And if a man make a gift in tail with warranty, and after the donee doth make a feoffment, and die without issue, the warranty is gone. [And yet there is a discontinuance, under which there is a fee under a new seisin.] So if tenant in tail discontinue the tail, and the discontinuee be disseised, or make a feoffment on condition, and a collateral ancestor of the issue release to the disseisor or feoffee on condition, with warranty, and after the discontinuee doth enter upon the disseisor, or on the feoffee for the condition broken; in these cases the warranty made by the collateral ancestor is gone. [Because the estate to which the warranty was annexed, is defeated by the condition.] So if a seigniory be granted with warranty, and the tenancy escheat, so that the seigniory is extinct; hereby also the warranty is defeated. [Because the seigniory is extinguished in the tenancy. Sometimes the tenancy will be extinguished in the seigniory, as when lands escheat to the lord, or are purchased by him, and then the warranty annexed to the tenancy will be extinguished.] So if a collateral ancestor heretofore had released with warranty, and then had entered into religion, this warranty had bound; [because he was *civiliter mortuus*, so that there was a descent from him. This is an instance of a temporary descent;] but

(30) See accordingly and further who may take advantage of a warranty, against whom, and in what manner, in *Bac. Abr. Warranty* (N.) *Com. Dig. Garranty* (C.) (K.) *Vin. Abr. Voucher* (I.)

if after he had been dearraigned, [so that the heir ceased to be heir,] the warranty had been defeated.

If the father make a feoffment to his son and heir apparent with warranty, and die, so that the warranty doth descend upon the son; hereby the warranty is gone. [Because it comes to the person liable to the warranty, and this may be called a release in law. It is like the release of a debt by appointing the debtor executor, or one of two executors; and it is observable, though it be a release at law, inasmuch as the executor cannot sue himself, yet it is not any discharge in equity as against legatees, creditors, &c.] And yet if a feoffment be made to a man and his heirs, and he dieth leaving issue daughters; in this case the warranty shall be divided, and is not determined; because they take by act of law. It is otherwise when there is a division by the act of the party; *supra*, p. 199.] Co super Lit. 384. Bro. Garranty, 27.

If tenant in tail doth make a feoffment to his uncle, and after the uncle doth make a feoffment in fee with warranty, &c. to another, and after the feoffee of the uncle doth re-enfeoff again the uncle, and after the uncle doth enfeoff a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth; hereby the warranty made to the first feoffee is defeated; [by the conveyance of the estate to the uncle, who was bound by the warranty.] So if the uncle make the warranty to the feoffee, his heirs and assigns, and take back an estate in fee, and after doth enfeoff another; [for all the benefit of the warranty was in the person liable by force of the warranty.] But if one make a feoffment with warranty to the feoffee, his heirs and assigns, and the feoffee doth re-enfeoff the feoffor and his wife, or the feoffor and a stranger; in these cases the warranty is not defeated, but doth continue still, [for the sake of the wife and the stranger.] So if two do make a feoffment with warranty to one, his heirs and assigns, and the feoffee doth re-enfeoff one of the feoffors; in this case the warranty is not gone. And if in the first case the feoffee make an estate to his uncle in tail, or for * life, saving the reversion; or a lease for life, the remainder over, &c.; in this case the warranty is only suspended [during the particular estate; *viz.* while the benefit of the warranty, and Lit. Sect. 743. Co. super Lit. 390. Lit. Sect. 744.

*P. 202.

the lien of the warranty, meet in the same person.]

Co. super Lit. 391. If one make a feoffment or release with warranty, and after is attainted of treason or felony, [because he has not any heir,] hereby the warranty is gone; and albeit he do afterwards obtain his pardon, yet the warranty is not revived. [If he have issue subsequent to the pardon, and they are his heirs, or if his blood be restored, the lien of the warranty may, it is apprehended, revive.]

Co. 6. 12. If a feoffment with warranty be made to two or more, and they, being joint-tenants, do after by deed make partition; by this the warranty is determined (31,) [because they have destroyed one of the unities of their title.] So if two joint-tenants be, and one of them disseise the other, and he that is disseised doth recover in an assise, and hath judgment to hold in severalty; hereby the warranty is determined. So if *A.* and *B.* be joint-tenants of white acre for life, and *A.* by fine doth grant to *B. totum & quicquid habet in tenementis*; hereby the warranty is gone. [Because he *grants*, and does not release; *sed query.*] But if a partition be made by judgment upon a writ, by force of the statute of 13 H. 8, this doth not defeat the warranty fallen to them; but it shall be divided between them, and they shall all of them take advantage of it.

Adjudged Hil. 22 Jac. B. R. Eustace and Shole's case.

Co. super Lit. 385. If one enfeoff three with warranty to them and their heirs, and one of them release to one of the other two; hereby the warranty is gone for that part. [Because he holds as tenant in common for this part.] But if one of them release to the other two; in this case the warranty is not gone but doth continue, and they may vouch upon it. [Because the title under the joint-tenancy still continues.]

Co. super Lit. 385. If one enfeoff two men and their heirs with warranty, and one of them doth make a feoffment in fee; hereby the warranty is not determined [as to both,] but the other may take advantage of it notwithstanding; [for the act of one shall not prejudice the other.]

Co. super Lit. 393. 392. Lit. Sect. 748. If the party that hath the warranty, or [all] the Release.

(31) S. P. in *Hob. Rep.* 25, *Roll* v. *Osborn*; and S. C. cited *per cur.* in the cases of *Hawkins* v. *Cardy* in 1 *Ld. Raym.* 360, and 1 *Salk.* 65.

estate to which the warranty is annexed, release to him that is bound to warrant all warranties, or all covenants real, or all demands; by either of these releases the warranty is gone. So also, if by a defeasance, made between the parties, it be agreed the warranty shall be void, by this defeasance the warranty may be avoided also; [for it amounts to a release.] Or if it be so agreed, that the warrantee or his heirs, &c. shall not vouch, or have a *warrantia chartæ*; by this the warranty is avoided in part, [so as to preclude these particular remedies; but it leaves to the party the right of rebutter. But if the right of rebutter were included, the warranty would be extinguished, since every advantage is gone. But if the warranty and defeasance be in the same instrument, the defeasance taking away all remedy would be repugnant.]

Defeasance.

If tenant in tail doth enfeoff his uncle, who doth enfeoff another in fee with warranty; if in this case the feoffee release the warranty to his uncle, hereby the warranty is extinct; [because the benefit of the warranty is in the feoffee by the alienation.] But if a gift in tail be made with warranty, in this case a release made by the tenant in tail of this warranty, will not extinguish it; [for the issue, claiming *per formam doni*, are not bound by the release of the tenant in tail.]

Co. super Lit. 391.

If the parties, between whom the warranty is, intermarry; hereby the warranty is suspended during the coverture, in some cases.

Co. super Lit. 390.

If tenant in tail doth make a feoffment in fee with warranty, and disseiseth the discontinuee, and dieth seised; this doth suspend the warranty. [But in some cases there may be a voucher or rebutter, for the purpose of taking advantage of another warranty.]

Co. super Lit. 330.

If two make a feoffment in fee, and warrant the land to the * feoffee and his heirs, and the feoffee doth release the warranty to one of the feoffors; this [release] doth not determine the warranty of the other as to the moiety; [*viz.* the extent to which he was liable. In this respect also there is a difference between a warranty and a covenant; for a release to one of two joint covenantors is a release to both covenantors. *Infra*, 253.] So if one doth enfeoff two with warranty, and the one of them doth release the warranty; this doth not

Co. super Lit. 393.

*P. 203.

extinguish the warranty for the other moiety, but it doth continue still [for his moiety. But under the like circumstances, in case of a covenant, the release of one of the covenantees, being a joint interest, would release the covenant altogether. *Infra*, 253.]

A warranty also may lose its force by taking benefit, or making use thereof; for after a man hath once taken advantage thereof, in some cases he can make no further use of it; of which read *Co. super Lit.* 393 (32.)

And now, having done with deeds in general, and some of the parts thereof in special, we are in order, to come to some special kinds of deeds; wherein we will first begin with a deed of feoffment.

CHAP. IX.

Of a Feoffment.

New terms of the law. Co. super Lit. 9. Lit. Sect. 57.

FEOFFAMENTUM, i.e. *Donatio feodi*, strictly and properly is the gift or grant of any honours, castles, manors, messuages, lands, houses, or other corporeal immoveable things of like nature, which be hereditable to another in fee simple, *i. e.* to him and his heirs for ever, [or for a determinable fee not being a fee tail,] by the delivery of seisin and possession of the thing given. And from hence comes the word *enfeoff*; for by this word and the words *give* and *grant* (as the most apt words for that purpose) is this kind of conveyance most commonly made (1). Hence also it is, that he that makes this feoffment is called the feoffor; and he to whom it is made, the feoffee. Also it is

1. *Feoffment, Quid.*

Enfeoff.

Feoffor.

Feoffee.

(32) See further in what cases a warranty shall be suspended, determined, defeated or avoided, in *Bac. Abr. Warranty* (O.) *Com. Dig. Garranty* (I. 3.) 2 *Roll. Abr.* 740. *Vin Abr. Voucher* (C. 6.)

(1) *Feoffment* is derived of the word of art *feodum, quia est donatio feodi*, for the ancient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment. *Co. Lit.* 9 a. A feoffment originally signified the grant of a feud or fee, that was the original and proper notation of the word; nevertheless, by custom, it came afterwards to signify a grant (with livery of seisin) of a free inheritance, to a man and his heirs; respect being had rather to the perpetuity of the estate granted, than to the *feodal* tenure. *Mad. Form. Angl. Dissert.* p. 4. [2 *Inst.* 210. Bargain and sale, and livery, adjudged a *good feoffment*, though there were no other words in the conveyance than *bargain and sell*. See *Bonicombe* v. *Parker's case*, 1 *Leon.* 25. *Post*, 219.]

sometimes, but improperly, called a feoffment when an estate of freehold only doth pass. [When an estate tail only is created, then the conveyance is properly termed a gift; and when an estate of freehold only is granted, the assurance is denominated a lease.]

2. *Quotuplex.*

This kind of conveyance, albeit it may be made in most cases by word without any writing, yet is most commonly done by writing; and this writing is then called a deed or charter of feoffment; but hence is the division of a feoffment by word, or a feoffment by writing. [And sometimes even at the common law a deed was requisite. The statute of Frauds and Perjuries, 29 Car. 2, c. 3, now renders it absolutely necessary that in all cases there should be at least a writing; but a deed is not necessary under that statute; and even where a deed constitutes part of the transaction, the livery is the operative and essential part of the assurance, *Freeman* v. *West*, 2 *Wils.* 165; and no estate passes till livery of seisin is made. 1 *Prest. Est. ch. Freehold*, p. 224.] The ancient forms and examples of these deeds are very brief; and yet they [generally, though not of necessity,] had these parts contained in them. 1. The premises. 2. The *habendum*. 3. The *tenendum*. 4. The *reddendum*. 5. The clause of warranty. 6. The *in cujus rei testimonium*. 7. The date. 8. The clause of *hiis testibus*. *Hæc fuit candida illius ætatis fides & simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt* (2).

See West. Sym. 1 part. Sect. 235. Co. super Lit. 6.

3. *The nature & operation of it.*

And this manner of conveyance, as it is the most ancient kind of conveyance, so is it the best and most excellent of all others, and in some respects doth excel the conveyance by fine or recovery; for it is of that nature and efficacy, by reason also [*omit* also] of the livery of * seisin evermore inseparably incident to it, that it cleareth all disseisins, abatements, intrusions, and other wrongful and defeasible titles, and reduceth the estate clearly to the [feoffor, and through him to the] feoffee, when the entry of the feoffor is lawful; which [*i. e.* this] neither fine (3), recovery, nor

*P. 204.

Co. super Lit. 49. 9. Co. 1. 111, 112. Plow. 554. 9 H. 7. 24. 39 H. 6. 43. Co. super Lit. 237. Perk. Sect. 210. 24 E. 3. 70. Co. 1. 121. Co. 6. 70. Bro. scire facias, 88. Plow. 423, 424.

(2) For various precedents of feoffments, see *Mad. Form. Angl.* 174 to 216.

(3) A feoffment differs materially from a fine; for, in notoriety of fact, the feoffment is supposed to be made openly upon the land, and the feoffee is immediately put into the possession, but a fine has nothing public except the proclamations; and therefore, by the act

bargain and sale by deed indented and inrolled will do, when the feoffor is out of possession, [*viz.* disseised; nor will the seisin be reduced when there is a right of action only, as distinguished from a right of entry. It is the entry preparatory to the feoffment, and not the feoffment as an assurance, which reduces the seisin (4). And it [the feoffment] passeth the present estate of the feoffor; and not only so, but barreth and excludeth him of all present and future right, and possibility of right, to the thing which is so conveyed; insomuch, that if one have divers estates, all of them pass by his feoffment; and if he have any interest, rent, common, or the like into [*read* in, to,] or out of the land, it is extinguished and gone by the feoffment. And further, it barreth the feoffor of all collateral benefits touching the land; as condition, power of revocation, [any other power which confers a benefit; *Weale* v. *Lower*, *Pollex.* p. 55; benefit of] writs of error, attaint, and the like; insomuch, that if a man make an estate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land; by this [feoffment] he is barred for ever of taking advantage of the condition, or power of revocation. It destroyeth contingent uses [in the feoffor, and contingent remainders in strangers, if supported only by an estate of freehold or of inheritance in the feoffor. It also] gives away a future use [in the feoffor] inclusively; [it] gives away a seigniory inclusively; and gives away a right of action. [It may bind the expectancy of an heir, as a title against him personally; *Co. Litt.* p. 352, a b; *Helps* v. *Hereford*, 2 *Barn. & Ald.* p. 244;] for both the feoffment, and livery of seisin incident thereunto, are much favoured in law, and shall be construed most strongly against the feoffor, and in advantage of the feoffee. And besides all this, (because it is so solemnly and publicly made, being a notorious and public act,

---

of 4 Hen. 7, *non claim runs only from the proclamations*. *Per Willes*, C. J. in *Smith* v. *Packhurst*, 3 *Atk.* 140.

(4) To make a feoffment good and valid, nothing is wanting but *possession*, and where the feoffor has possession, though it be ever so *bare* and *naked*, yet a freehold or fee simple passes by it, by reason of the livery. *Arg.* in 1 *Burr.* 92, referring to *Poph.* 39; *Lit.* § 595. 599. 611. 618. *Co. Lit.* 366 b. 377 a. [That a feoffment may be made by a person who has a reversion in fee expectant on a term for years, by the consent of the termor, *infra*, p. 201.]

within the local jurisdiction, and as it were *coram pares curiæ,)* it is of all other conveyances most observed, [*i. e.* under public observation,] and therefore best remembered and proved (5). [Proclamations of fines are only another mode of giving that notoriety of change of seisin which anciently was accomplished by livery of seisin; and the enrolment of bargains and sales was prescribed by statute, and for the like object.]

4. Who may make or take a feoffment; and what shall be said a good feoffment; or not; and what things are requisite thereunto.

If the feoffment be made by deed, then must the deed be so made, written, read, sealed and delivered, as all other deeds that are well made must be. For which see *Deed, supra, chap.* 4, *numb.* 5. [But the livery may be formal and good, though the writing be informal or defective, as not sealed or delivered; and the livery may be proved, though the charter of feoffment be lost. *Per Lord Hardwicke.*]

See Grant, Numb. 4. Co. super Lit. 2. 42, 43.

1. In respect of the persons thereunto, and the quality of their estate.

And in every good feoffment that is made there must be a feoffor, *i. e.* a person able to grant the thing passed by the feoffment; a feoffee, *i. e.* a person capable of it and able to take it; and a thing grantable; and it must be granted in that [*viz.* such] manner as [the] law requireth. [If *A.* tenant for life, with remainder or reversion to *B.* in fee or in tail, join in a feoffment without deed: in construction of law, it is the feoffment of *B.* and the surrender of *A.*, for the estate of *B.* cannot by any construction pass without deed, unless there be ground for an implication that the particular estate is surrendered. But suppose that, under the same circumstances, the feoffment had been by deed, it would have been the feoffment of *A.* and the grant and confirmation of *B.*, since the feoffment with the deed will admit of a construction under which the estate of *B.* will pass merely by the deed, as a grant and confirmation. *Treport's case*, 6 *Rep.* 15; *supra*, 81. Supposing *B.* to have had an estate tail, no discontinuance would have been created; because *B.* had not an estate tail in possession. *Bredon's case*, 1 *Rep.* 76.] And for this therefore observe, that whosoever is disabled by the common law to take, is disabled also to make a feoffment, gift,

Perk. Sect. 182, 183. 185. Bro. Feoffment, 2. 7, 8, 9. 17. 39 H. 6. 43. 21 H. 7. 7.

(5) See accordingly 2 *Bl. Com.* 310; and further as to the origin, nature, and operation of a feoffment, *Spel. Gloss.* 510. *Wright's Ten.* 22. 48. 2 *Inst.* 110. 119. *Dalrymple on Feuds*, 202. The conveyance by feoffment is now very little in use: see note at the end of this chapter.

grant, or lease. And many also, that have capacity to take by such conveyances have no ability to grant them: as men attainted of treason, felony, or in a premunire, aliens born, the king's villains, ideots, madmen, a man deaf, blind, and dumb from his nativity, a feme covert, an infant, and a man by duress; for the feoffments, gifts, &c. of such persons may be avoided (6). [This paragraph must be read with caution and with many qualifications. Aliens may make a grant which will be effectual as against all persons, except the crown. Persons attainted may grant, and the grants will be good as against all persons, except those entitled to the benefit of forfeitures. See *infra, Grant.* The feoffments of persons deaf, dumb, and blind, and of madmen, are mere nullities.] But such persons as have committed treason or felony, if attainder do not follow, [and even after attainder for felony, then against the lord claiming by escheat, as distinguished from the lord claiming the benefit of forfeiture. See *ch. Grant*, for the qualifications and distinctions,] such as are attaint of heresy, a leper removed by the king's writ from the society of men, bastards, such as are deaf, dumb, or blind, that have understanding and sound memory, albeit they cannot express their intentions otherwise than by signs, those that are drunken, the villains of a common person before entry, &c. also * excommunicate persons, and outlawed persons, albeit the king take the profits of their lands; all these may make feoffments, gifts, &c. and all these have capacity to take by such conveyances.

Aliens. Idiots. Feme covert. Infant.

[1 Prest. Conv. 257.]

Attaint persons.

*P. 205.

Outlawed persons.

Perk. Sect. 185, 186.

A woman that hath a husband, alone and by herself without her husband, cannot make a feoffment of her own land, and if she do so it is void, albeit her husband agree to it (7); [and yet a fine, if levied by her as a feme sole, would be effectual, unless the fine were avoided by the husband during the coverture. *Supra, ch. Fines.*]

Feme covert.

Fitz. Faits and Feoffments, 29.

Neither the head alone, nor any one or more of the members of a corporation aggregate of

Corporation.

(6) See before in page 54, and the references in note 2 thereunto.

(7) A feoffment by a *feme covert* without her husband is void, for she cannot make a livery, *Adm. Join.* 138; *Lat.* 41; though it be in *execution of a trust*, for it ought to be done by her and her husband. *Jones*, 137. 8. *Semb. cont.* by the other judges in the case of a trust. *Jones*, 137. *Lat.* 40. *Com. Dig. Baron & Feme* (P. 1.)

many, alone may [*read*, may alone] make a feoffment of any of the land belonging to their corporation, [as a conveyance by the corporation;] but all of them together may make a feoffment. And if any [one] of them be seised of land in his own right, and in his natural capacity, he may make a feoffment of this land as another man may do; yea he may make a feoffment of this land to the same corporation whereof he is a head or member, and so give and take also in a divers capacity. [Or rather the corporation by its corporate name, and by a corporate act, may, through the medium of their attorney duly appointed, make a feoffment. It is not necessary that all the members should be present, unless it be required by the constitution of the corporation, that all the members should be present at the time of performing the corporate act. In correction of the text, it is to be observed, that a grant cannot be made to or by a corporation while there is a vacancy in its head, except that the corporation is, even during the vacancy capable of a grant of a remainder, and that remainder may vest in case, and only in case, the corporation shall be complete by its head, while the particular estate shall be continuing. *Butler's Fearne*, 250. Also no grant can be made to the corporation, by the head thereof, as the dean or mayor; nor can the head of a corporation, as the dean or mayor, take by a grant of the corporation. *Jenk. Cent.* 200; *Bro. Corporations*, pl. 4. An individual, being a member, and not the head, of a corporation, may be the grantor to or a grantee or lessee of the corporation. 12 *Mod.* 683. And a feoffment by an individual, being the member of a corporation, may be effectual as a tortious and wrongful alienation, though it would be ineffectual as a conveyance by the corporation.] (8).

Perk. Sect. 205. 224, 225.

[Bro. Corporations, pl. 66.]

Ecclesiastical persons.

[In consequence of the regulations by the statute law,] ecclesiastical persons cannot make feoffments, gifts, &c. of their ecclesiastical lands for longer time than three lives, or twenty-one years; [or even for these terms, unless the leases are conformable to the statutes of Hen. 8, and 13 Eliz. c. 10; and see *Bacon on leases*, 39. But under certain

Co. super Lit. 43.

(8) But in this case the circuity of conveying to a third person, to enfeoff the corporation, would be preferrable. *E. H.*

restrictions ecclesiastical persons may exchange lands by the statute of 17 Geo. 3, c. 53, § 11;] for all feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by dean and chapter, or by any of the colleges or halls in either of the universities or elsewhere, or by deans and chapters, masters or guardians of any hospitals, parsons, vicars, or any other having spiritual or ecclesiastical living, are avoidable (9).

Husband & wife.

Perk. Sect. 194. A man cannot make a feoffment to his own wife after the marriage is consummate, [on account of the legal unity of their persons. *Wingate's Maxims*, 210; 1 *Prest. Abstr.* 332.] But after a contract made, and carnal knowledge had, [*i. e.* notwithstanding pre-contract,] he may make a feoffment to her, and such a feoffment will be good (10). [And he may make a feoffment to her use, or create a trust for her benefit. So he may devise land to her by his will, or to her use, or execute a power of appointment in her favour, with or without the intervention of trustees.]

Joint-tenants. Tenants in common.

Perk. Sect. 197. Fitz. Faits and Feoffments, 96. One joint-tenant cannot make a feoffment [as such] of his part of the land to his companion, for a man cannot give a possession to him that hath it before; [but he may release to his companion, and an intended deed of feoffment by one joint-tenant to another would operate as a release. A feoffment by deed may operate as a confirmation; and a charter of feoffment, being a deed and without livery, may be construed a release. *Clayt.* 32; *Ballard* v. *Sitwell*, 12 *Vin. Abr.* 248. It may likewise operate as a grant. On mature consideration of all the cases, applying to the learning on this head, *viz.* by what words a conveyance may be made, this conclusion may be formed, that there are words proper to be used in every distinct species of conveyance; but any words, expressive of the intention of the party to pass his estate, shall be so construed as to import

(9) If they exceed three lives or twenty-one years, under the statute of 13 Eliz. c. 10. See further, *post*, in the chapter on Leases.

(10) Though a husband cannot convey to his wife *immediately*, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use. And according to some books, by custom of a particular place, as of York, the wife may take by *immediate* conveyance from her husband. See note 1. to *Co. Lit.* 3 a. 13th edition, and *Co. Lit.* 112 a.

that mode of assurance which is adapted to the circumstances of the title of the person to whom the conveyance is made. Where the words of a conveyance may have the effect of one assurance or another, the person to whom it is made may elect in what manner it shall operate; and therefore, in pleading the deed, containing the assurance, he must plead it, not in the terms of the words of the conveyance, but according to the manner in which he proposes to use it.] And hence it is also, that the lessor cannot make a feoffment to his lessee for life, years, or at will. [And therefore a feoffment by deed; from tenant for life, to his lessee for years, operates as a grant or a feoffment, and therefore does not divest the estate of the land, so as to destroy a contingent remainder expectant on the estate for life. *Magennis* v. *M'Callough*, *Gilb. Eq. Rep.* 235.] And yet perhaps a feoffment in this case, if it be in writing, [*viz.* by deed,] may work as a confirmation. But one tenant in common, or one coparcener, may make a feoffment of his part of the land to his companion (11), [or to a stranger; and a joint-tenant may enfeoff a stranger of his share. If there be three joint-tenants, and one of them release to the other two, these two persons are still joint-tenants; but if one of them release to another (being one of two or more of his companions,) then as to the share so released, the releasee will be tenant in common with himself and the other joint-tenants, and the remaining shares will be held in joint-tenancy.]

Disseisor and disseisee.

If a man make a feoffment of another's land it is a disseisin, but a good feoffment against all men but the disseisee himself. And if four join in a feoffment of land, and three of them have nothing in the land, and the fourth hath all the estate; this is a good feoffment; [and it operates, it is appre-

Bro. Feoffment, 4. Perk. Sect. 222.

(11) The proper conveyance by one joint-tenant to another, and what will most effectually sever the joint-tenancy, [make him sole tenant,] is a release; for one joint-tenant cannot *enfeoff* his companion, because they are both already seised *per mie & per tout*; and this manner of conveyance, passing by livery, cannot operate so as to give him what he already has; but tenants in common have several distinct freeholds, and may *enfeoff* each other; but cannot release to each other [by way of release, though they may convey to each other by lease and release;] for a release supposeth the party to have the thing in demand. Co. *Lit.* 193. 200 b.

hended, as the feoffment of the four, and the confirmation of the rightful owner.]

Park. Sect. 197. Co. super Lit. 48, 49.

A disseisor cannot make a feoffment of the land to the disseisee, but it will be void, for the disseisee will be remitted. [This is not strictly a remitter; it is merely a restoration of the possession to the person entitled to the same. When the disseisee enters to receive livery, his entry revives his seisin.] But a disseisee may make a deed of feoffment and a letter of attorney to enter and give livery, and if the attorney do so this will be a good feoffment; [for the entry by the attorney, on behalf of the disseisee, restores the possession and seisin to the disseisee, and then the feoffment may be made with effect. This proposition supposes a right of entry to remain in the feoffee, for if the right of entry be converted into a right of action, there cannot be any lawful entry, or, as a consequence, any revival of the ancient and rightful seisin.]

Fitz. Faits and Feoffments, 21.

Prerogative.

No feoffment or livery of seisin can be made to the king, for he doth always give and take by matter of record (12).

Co. super Lit. 49. 21 H. 7. 7. See infra, at Numb. 9. Grant, 5.

2. *In respect of the matter whereof it is made.*

A feoffment may be made, at this day, of any thing which doth * lie in livery, by whatsoever tenure it be held, notwithstanding the statute of *Magna Charta, cap.* 32. But in some cases, [abrogated by the statute of 12 Ch. 2, c. 24; 1 *Prest. Abstr.* 228;] where a man doth alien his land held of the king, he must have the king's licence beforehand to do it, or else he must pay a fine to the king afterwards for not having a licence. But of such things whereof no livery of seisin can be made, no feoffment can be made: as of rents, commons, tithes, advowsons and the like, which are incorporeal hereditaments; and yet things which are appendant, &c. though incorporeal, may pass with the principal by means of a feoffment.]

*P. 206.

Co. super Lit. 190.

One may make a feoffment of a moiety, third, fourth, or fifth part of his manor or other land, and that by the name of a moiety, third, or fourth part (13), [whether he hath that share only, or a larger share, or even the entirety.]

Co. super Lit. 48.

[Upper chamber.]

A feoffment may be made of an upper chamber

(12) See more amply who may make a feoffment, and to whom, in 4 *Co.* 125. 8 *Co.* 42 b. *Bac. Abr. Feoffment* (D.) 1 *Wood*, 499. *Vin. Abr. Feoffment* (E.)

(13) Feoffment by tenant in common is good, of his moiety, though undivided. *Br. Abr. Feoffment*, pl. 75.

over another man's house beneath; [1 *Inst.* 48; 10 *Vin. Abr.* 202; for this chamber is a corporeal inheritance.]

[Lot meadow.] If there be a meadow of one hundred acres, which time out of mind hath been divided amongst divers persons, and each person hath a certain number of acres, but in no certain place, the custom being to allot each person his number one year in one place, and [in] another [year] in another [place,] *alternis vicibus*; in this case either of these persons may make a feoffment of his part, by the name of so many acres lying in such a meadow, without any bounding or describing of it. [1 *Prest. Est.* p. 218. 255. 259.] Co. super Lit. 4. 48.

If parceners have made partition of their land, that the one shall have it from Easter to Lammas to her and her heirs; and the other shall have it from Lammas to Easter to her and her heirs; or that the one shall have it one year, and the other the other year *alternis vicibus*; or if they have two manors descended, and they agree that the one shall have the one manor one year, and the other the other manor the same year, and the next year that he that had the one shall have the other *alternis vicibus* for ever; in these cases the parceners may, either of them, make a feoffment of this land or manor (14). And for the mode of making livery, see 1 *Inst.* 48 b; and 1 *Prest. on Est. ch. Freehold,* p. 223.] Co. super Lit. 4. 48.

3. In respect of the presence or possession of other persons on the land at the time of the feoffment made.

If there be any lease for life or years in being of that land or thing whereof the feoffment is made, and he that hath this lease for life or years, or in his absence his bailiff or servant, keeping in the house or land whereof the feoffment is to be made, doth give leave and agree that livery of seisin shall be given upon the house or land by the lessor himself or by his attorney, and for this cause doth leave the possession of the house or land, and thereupon livery of seisin is made; this is a good feoffment and a good livery of seisin, and yet it doth not prejudice the estate of the lessee. And if the lessor make a feoffment of the land to a stranger by assent or licence of the lessee, the lessee then being on the land; this is a good feoffment. [1 *Inst.* 48 b; *Dyer,* 33 a.] In like manner as it is, Co. 2. 32. Dyer, 340. 18. Perk. Sect. 221. 21 H. 7. 7. Perk. Sect. 220. 46 E. 3. 25. Bro. Feoffments de Terre, 68. Co. super Lit. 48, 49. 52.

(14) See further of what things a feoffment may be made, *Com. Dig. Feoffment* (A. 2.) *Vin. Abr. Feoffment* (C.)

where the lessor doth enfeoff a stranger to which the termor doth agree, saving his term; and if the lessor make such an entry upon the lessee for life or years, as to put him out of possession of the house or land, and then he doth make a feoffment and livery of seisin of it; or if the lessor in the absence of the lessee [and] his wife, servants and children, enter upon the thing in lease, and make * a feoffment and livery of seisin thereof; in these cases there is as [*read*, a] good feoffment to pass the reversion, for in these cases when the lessee for years doth re-enter, the law doth adjudge this to be an attornment in law; [and yet in *Dyer*, 33, it is said, the rent is extinguished.] But if a lessor will enter upon his lessee and against his will, (the lessee being still in possession of the land), make a feoffment of the land, and give livery, this [livery] is void and can never take effect as a feoffment. And therefore if there be a conveyance made of a house and land thereunto belonging in lease, [under one lease,] and the feoffor comes into part of the land without the leave of the lessee, and there make livery of seisin of that part in the name of all the rest of the land, (the lessee himself, his wife, child, or servant being then upon any other part of the land, and especially if they be in the house), this is no good feoffment for any part of the land, but void for the whole. [But if there be several leases, possession of part held under one lease is not possession of the other part. 1 *Inst.* 48 b.] And yet if the lessee for years make an underlease of part of the land to another, and the feoffor doth make a feoffment of this part, and give livery of seisin upon this part; in this case the possession of the first lessee in the residue will not hurt the feoffment or livery for this part, but it is a good feoffment; [*cæteris paribus*, namely, if the under-lessee be consenting, or the possession be vacant.] Also, if the lessee give the lessor leave to make livery, and depart and leave a servant of the lessee upon the land; [or even if consenting to the livery he continue the possession; *Dyer*, 18 b.; 2 *Roll. Abr.* 4 b;] in this case, it seems, his presence upon the land whilst the livery is made will not hurt. And so if the lessee leave the possession and leave nothing

*P. 207.

Attornment.

Veynor's case, Trin. Jac. B. R.

Co. super Lit. 48.

upon the land but his cattle; they will not keep his possession, nor prejudice the livery of seisin, though he did not consent to the livery (15).]

If a lease be made of one acre to one, and another acre to another, and the lessor make a feoffment of both these acres, and make livery in one of them in the name of both acres; this is no good feoffment for the other acre; for by this livery he [the lessee of the other acre] is not put out of possession of that acre. [This will be a great impediment to the attempt to introduce feoffments into general practice; since there must be as many liveries as there are tenants of different tenements.] So if one make a feoffment of two manors, the one in possession and the other in lease, and give livery of seisin of the manor in possession in the name of both the manors; this is no[t a] good feoffment for the other manor, neither will it pass by this feoffment [as a feoffment. But if livery had been made of the manor in lease with consent of the tenant, and in the name of both manors, this livery would have been effectual for both manors.] So if one make a lease for years of a house, and after make a feoffment in fee of the house and of a close adjoining, and give livery of seisin of the house, the termor's wife and children being then in the house, [and the livery is without the consent of the tenant;] in this case this is no good livery, neither to pass the house nor the close; [for want of possession of the lands in lease, since in construction of law the possession remained in the lessee; and, as a consequence, the livery was actually void, and therefore did not pass the close; though actual livery of the close, on the close, would have been effectual.] 21 H. 7. 7. Dyer, 18.

Forfeiture.

If lessee for life, or years, make a feoffment of the land, the lessor being then upon the land and not contradicting it; it seems this is a good feoffment, and that the presence of the lessor upon the land, especially if he do not contradict it, will not hinder the virtue of the feoffment as against the feoffor and all others; but the lessor may enter Perk. Sect. 222. Dyer, 362.

(15) Lord *Coke*'s words are, "if the lessee be absent, and hath neither wife nor servant (though he hath cattle) upon the grounds," the livery of seisin shall be good, *Co. Lit.* 48 b; but if lessee consents, though he be upon the ground, livery is good. *Tr. 40th Eliz. Shephard and Gray.* See further in note 8. to 13th edition, *Co. Lit.* 48 b.

afterwards for the forfeiture, notwithstanding, if he please. [As the lessee is in possession the feoffment is good, notwithstanding the lessor contradicts the livery; indeed, unless the feoffment was good, no right of entry for a forfeiture would accrue. See *Perk.* § 222. All therefore what Perkins means to assert is, that the feoffment remains good only for an instant, since the contradiction of the lessor amounts to an assertion of his right to enter for the forfeiture, and by disclaiming the tenancy, vests the possession of the land in himself.]

Perk. Sect. 223. If the husband alone make a feoffment of the land he hath in the * right of his wife, or that he hath jointly with his wife, his wife being then upon the land and disagreeing to it; in this case the feoffment is good [and binding] against the feoffor and all others, but the wife; who, notwithstanding her presence and disagreement, [or even though she agreed, for her agreement is void,] may after his death avoid it [by action at the common law, and now, since the statute of Hen. 8, by entry; so her heir may enter after her death. It must be remembered that the husband is seised in right of his wife, and that his conveyance or grant, at least his feoffment, passes the fee, subject only to be avoided by the entry or claim of the wife. For the same reason, the lease of the husband of lands of his wife doth not determine by his death. It continues till avoided by the entry of the wife or her heirs. However, in *Doug.* p. 329, it was held, that the husband and wife were seised in right of the wife.] Husband & wife. *P. 208.

Perk. Sect. 220. If one joint-tenant make a feoffment of the whole land, his companion being then upon the land; by this [feoffment] there doth pass no more but [*viz.* than] a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety (16); [for as to the other moiety, he has not the possession; therefore, as to that moiety, the livery is void. When the other joint-tenant is not on the land, the feoffment will amount to a disseisin.] Joint-tenant.

Perk. Sect. 219. If a man enter into my land by wrong, and make a feoffment of it to a stranger, I being then upon the land; this feoffment is void, for in this case the law doth adjudge me to be always in, and

(16) *Ante*, p. 205.

never out of, the possession. [The general rule is, that when two persons are in possession, and one alone is entitled to the possession, the law adjudges him alone to be in possession who is entitled to the same.]

Prerogative.

If the king have any possession of the land by wardship or otherwise, the owner of the land can make no feoffment of it. And therefore if the king be entitled to land by wardship, or primer seisin, after office found, after the death of an ancestor of one of his tenants; in this case, it is said, the feoffment of the heir is void and passeth nothing, for the king is still in possession. And if it be before office found it will be all one, for the office shall relate to the death of the ancestor. And yet in these cases the feoffment is good against the heir himself, and all others, besides the king. If the heir, before office found, enter and make a feoffment, and then the king doth pardon the feoffee; in this case the feoffment is good. And yet such a feoffment, after office with a pardon, is, [for want of possession,] void. And the like law is if the entry be before office, and the pardon [*read*, feoffment, and *query*,] after the office; for this is void also. But if a man be outlawed for debt or trespass, and thereupon the king hath the profits of the lands; in this case the owner, [being in possession,] may make a feoffment of this land notwithstanding.

Perk. Sect. 219. Bro. Feoffment, 3. 17. 21 H. 7. 7. 2 H. 6. 5. 1 H. 7. 5. Stamf. prer. Regis, 40.

Outlawed persons.

4. In respect of the manner of making of it.

Reversion.

Divers persons cannot make a feoffment, but it must [except it] be by deed, as corporations, and such like. [This proposition is not intended to be applied to individual persons, but to collective bodies only. Joint-tenants, for instance, may jointly or severally make livery without any deed:] also divers things cannot be granted by a feoffment, but the feoffment must be by deed, for a feoffment cannot be made of a reversion of land; but it must be by deed. [*Query*, if the livery does not inclusively carry the reversion, though it cannot, without deed, carry the services; and it should seem several estates, &c. may be granted by feoffment, without any deed, so as there be, in conformity with the statute of Frauds and Perjuries, a writing.] But a lease may be made of land to one for life, the remainder to another in fee, and this may be done without any [deed or] writing; [and, at the com-

Fitz. Faits and Feoffments, 32. See Grant, Numb. 4.

Lit. Sect. 60. super Lit. 190. mon law,] by word only (17.) Also a feoffment may be made of the moiety, third, or fourth part of a manor, or of a piece of land, without deed. And yet, if one be seised of a manor, whereunto an advowson is appendant, and he make a feoffment of three acres, parcel of the manor, together with the advowson to two men, *habendum* the one moiety, with the advowson to one of them, and the other moiety to the other; in this case the feoffment cannot be well made, unless it be by deed, [so as to pass the advowson.]

Lit. Sect. 250. If a lease be made for five years, on condition that if the lessee pay to the lessor, within the two first years, 10*l.*, then that he shall * have the land to him and his heirs, or otherwise but for five years; in this case, if livery of seisin be made to the lessee before his entry, this is a good feoffment. *Et sic de similibus.* [And in that case the lessee has the fee immediately; but if no livery be made, then he has a term to be enlarged, on a contingency or condition, into a fee.

*P. 209.

Lit. Sect. 59. 66. Co. super Lit. 52. Doct. & Stud. 13. Every feoffment, also, whether it be made by deed or without deed, must be made with livery of seisin; and this livery of seisin must be made according to the rules of livery and seisin hereinafter laid down, for this is of the essence of a feoffment; and a feoffment is not accounted perfect until livery of seisin be made, for until then the feoffee, [though he enter,] hath only an estate at will in the land, and the feoffor may put him out when he will. And if either of the parties die before the livery of seisin be made, the feoffment is void; and no warrant of attorney, to make livery, can be executed after the death of the feoffor or feoffee, [for the authority is revoked by death;] neither is

Livery of seisin.

Equity.

(17) By the statute of 29 Car. 2, c. 3, § 3, it is enacted, "That no leases, estates or "interests, either of freehold, or terms of years, or any uncertain interest, not being copy-"hold or customary interest, of, in, to or out of any messuages, manors, lands, tenements, "or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note "in writing, signed by the party so assigning, granting or surrendering the same, or their "agents thereunto lawfully authorised, by writing, or by act and operation of law." And by the same statute it is enacted, "That all leases, estates, interests of freehold, or terms of "years, or any uncertain interest, of, in, to or out of any messuages, manors, &c. made "or created by livery and seisin only, or by parol, and not put in writing, and signed by the "parties so making or creating the same, or their agents thereunto lawfully authorised by "writing, shall have the force and effect of leases or estates at will only, and shall not, "either in law or equity, be deemed or taken to have any other or greater force or effect; "any consideration for making any such parol leases or estates, or any former law or usage "to the contrary notwithstanding."

there any remedy in this case, to get the assurance to be made perfect, but in a court of equity (18), [unless there be a deed, and the deed may operate as a grant.] But in case where there are many feoffees, [who are to be joint-tenants,] there the death of one or some of them will not hinder the livery, but it may be made to him or them that do survive. [But if the feoffees are to be tenants in common, the livery will be void as to the shares of those persons who die before livery. The like observation, *mutatis mutandis*, is applicable to several feoffors by attorney:] we must see therefore, in the next place, what this livery of seisin is.

5. Livery of seisin. Quid.

Livery of seisin, or giving of possession, is a [feudal] solemnity, or overt [*viz.* open and notorious] ceremony, required by law, and used for the passing of [the immediate freehold of] lands or tenements corporeal, as an evidence or testimonial of the willing departing by him that makes the livery, from the thing whereof livery is made, and the willing acceptance thereof by the other party (19). And this is as ancient as a feoffment; for no feoffment is made without livery of seisin, albeit livery of seisin be sometimes made upon other conveyances, [as a gift in tail and a lease for life.] And it was first invented, [even before writing was in general use,] as an open and notorious act to this end; and that by this means the

New terms of the law.

West. 2 part, Symb. Sect. 251. Co. super Lit. 48.

(18) In the case of *Jackson* v. *Jackson*, heard in November 1730, a deed of lands in two different counties, by way of feoffment; livery and seisin of the lands in one county only indorsed. The deed was made in 1657. Lord Chancellor *King* declared the plaintiff had a good foundation to apply to a court of equity, as he had not his evidences to try his title at law: that were he to try the matter (at law), he should presume, and so direct, that livery was executed according to the deed, after that length of time; but that, however, a court of equity would aid a defect of that kind. *Fitz. Gibb. Rep.* 146. S. C. in select *Cases in Chancery*, 81. See also *Bokenham* v. *Bokenham*, 1 *Chan. Ca.* 240. And where such a defective conveyance is aided, it shall be discharged of mesne incumbrances by the party, [except against purchasers for a valuable consideration, without notice;] as, if a mortgage wants livery, and thereupon the heir confesses judgments to another, the mortgagee shall be released and discharged from the judgments, [for a judgment creditor is not considered as a purchaser for a valuable consideration, within the rule respecting notice.] *Burgh* v. *Burgh*, *Rep. in Chan. Temp. Finch*, 28. The assistance and relief, afforded by a court of equity, in aid of a defective conveyance, is very extensive; it will remedy not only mistakes in form or upon the face of the deed, but will supply the material part or essence of a conveyance, as livery to a feoffment, a surrender of a copyhold, &c. In what cases, and in what manner, equity will supply defective conveyances, see in *Com. Dig. Chancery* (2 T.) *Copyhold* (P. 2.) *Eq. Ca. Abr. Deeds* (D.) *Vin. Abr. Faits* (T. a.)

(19) *Seisin* is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Per Ld. Mansfield*, 1 *Burr.* 107. For the original intent and manner of transferring lands by livery of seisin, see *Spel. Gloss.* 510. *Mad. Form. Angl. Dissert.* 9.

country might take notice how lands do pass from man to man, and who is owner thereof; that such as have title thereunto may know against whom to bring their actions, [1 *Prest. Est.* p. 224;] and that others may know that have cause, of whom to take leases, and of whom to require wardships, &c. And by this means, if the title come in question, the jury, [since the livery is made within the county,] can the better tell in whom the right is (20). And of this livery of seisin there are two kinds: 1. A livery in deed. 2. A livery in law, called a livery within view. The livery in deed is, when the feoffor, donor, &c. by himself, or another, [*viz.* by an attorney duly appointed, and such appointment must be by deed,] taketh the ring of the door of the house, or a turf, or twig of the land, and delivereth the same upon the land unto the feoffee, donee, &c. in the name of seisin of the house, or seisin of the land. And this is done sometimes by the parties themselves if they be present, and sometimes in their absence by their attornies or procurators. The livery in law is, where the feoffor saith to the feoffee, being in view of the land, I give you yonder house to you and your heirs, go enter into the same, and take possession thereof accordingly, or the like (21), [and he doth enter accordingly.]

Co. super Lit. 48.

6. *Quotuplex.*

Bro. Estates, 4. Plow. 28, 29.

Because this manner of conveyance by feoffment is so ancient, * therefore this ceremony (being inseparably incident to a feoffment) is much favoured in law: and therefore it is expounded and taken strongly against him that doth make it, and beneficially for him to whom it is made. And for this cause, it worketh not only to transmit [transfer] the present estate, but also to bar all present and future rights and possibilities. [So where there is a limitation to two, and the survivor of them, and his heirs, a feoffment will pass the life estate, and occasion a forfeiture of that estate, and extinguish the contingent remainder; for as an estoppel, in extinguishing contingent interests

7. *The nature and operation of it.*

*P. 210.

(20) The disuse of livery of seisin, and the want of sufficient notoriety thereby occasioned, is very frequently regretted by Mr. J. *Blackstone*. See 2 vol. *Com.* 337. See also *Bac. Law Tracts*, 154.

(21) In what cases livery may be made within the view, see *Vin. Abr. Feoffment* (M.); and further as to the different kinds of livery, in *Bac. Abr. Feoffment* (A.) *Com. Dig. Feoffment* (B.)

and possibilities of estate, a fine and a feoffment are of equal effect.] If therefore one make a lease for life to *I. S.* the remainder to the right heirs of *I. D.* (which *I. D.* is then living) and give livery of seisin according to the deed; in this case, albeit he in remainder be not capable of this remainder, yet by the livery it shall pass out of the feoffor, and shall be in abeyance during the life of *I. S.* [So is the current of authorities; but Mr. Fearne, (*Butler's Fearne*, p. 285,) is inclined to think the fee remained in the feoffor till it can vest under the remainder. This point is examined in 2 *Prest. Abr.* p. 90, 105. 3 *Ib.* 88.] So if a feoffment be made to one [*read*, two] *& heredibus*, without the word "*suis*," and livery of seisin be made on this of the deed; this livery perhaps may make the estate good (22); [3 *Prest. Abstr.* p. 87. provided the livery be to the two and their heirs, and not by reference to the charter, as according to the form and effect of the charter; but, at this day, as there must be a writing, and such writing is of the essence of the assurance, the omission of the word heirs, or of words tantamount, or perhaps of words, perhaps of appropriation, would be fatal. Suppose the livery to be to a man and his heirs, and the charter of feoffment to omit the word heirs, but to express that the livery was made to the feoffee in fee, will this be sufficient? It is apprehended it will not. If the writing expressed that livery was made to the party and his heirs, without containing any formal grant to him and his heirs, this writing would, it is presumed, be sufficient.]

8. Where and in what cases it is requisite; or not.

Livery of seisin is needful, and must be had and made in all cases where any estate of fee simple, fee tail, or for a man's own or another man's life, is made or granted by writing, or word, in the country of any lands or tenements corporeal, where the person granting them, has the land in possession (23). And so also where one doth make a lease of land to another for years, the remainder to a stranger

Co. 5. 92. Lit. Sect. 70. Co. 6. 26. Doct. & Stud. 13. Co. super Lit. 49.

(22) As to the operation of livery to pass a future interest, where the feoffor is out of possession, and in what cases several parcels will pass by one livery, or where several parties may take by a livery to one, see *Bac. Abr. Feoffment* (B.)

(23) For at common law no estate of freehold in lands could pass without livery of seisin; and therefore it is a rule, that no freehold can be created to commence in *futuro*, for the livery of seisin must operate immediately, or not at all. 5 *Co.* 94. [*Co. Lit.* 216 a. 217 a. *Sulliv. Lect.* 58.]

in fee simple, fee tail, or for life; in these cases livery of seisin must be had and made to the lessee for years, or else nothing will pass to him in remainder; and yet the lease for years will be good.

Co. super Lit. 216. And so also where a lease for years is made, upon condition that if such a thing happen the lessee shall have the fee simple; in this case the lessee must have livery of seisin before his entry, otherwise the estate will not increase. [This is not quite correct. To give him the fee immediately, there must be livery; but if livery be not made prior to entry, he will have a term immediately, and the fee will arise on the contingency, provided there be a *deed*.]

Plow. 214. 219. And so also if the king make a [King.] feoffment of the land he hath in the right of the Duchy of Lancaster, that is not within the county Palatine; in this case livery of seisin must be made as in the case of a subject. [This proves that the king may have land in his natural capacity.] And in all these cases, where livery of seisin is requisite, and it is not made, there doth pass [to the intended freeholder] no estate by the conveyance, but [except] an estate at will at the most.

Co. s. 23. Lit. Sect. 59. Co. super Lit. 49. But livery of seisin is not needful or requisite to be had and made in cases where any estate or [*read*, of] fee simple, fee tail, or for life, is made or granted of any lands by matter of record: as, by the king's letters patents, fine, recovery, deed indented and inrolled, and the like. Nor is it needful where any such estate is created by way of covenant and raising of use, [or] by way of exchange, endowment *ad ostium ecclesiæ*, or *ex assensu patris*. Nor is it needful where any such estate is passed or granted [or restored] by way of surrender, devise, release, or confirmation, or by way of increase; or, [as in the example of fees on condition,] executory grant; as [*read*, or] when the fee simple is granted to the lessee for life or years in possession; [or having an estate immediately preceding the estate to be transferred; or capable of enlargement. See 2 *Prest. Convey.* p. 211. 245. 271.] Neither is it requisite, or can be made, [except as to the reversion or remainder of lands, and with such consent as aforesaid,] where any incorporeal hereditaments, as reversions, rents, commons, or the like, are granted in fee simple,

fee tail, or for life: for in some of these cases there is an attornment to be made that doth
*P. 211. * supply a livery; [and the necessity of attornment is now superseded by the statute of 4 & 5 Ann, c. 16.] Neither is it requisite, in some cases, where an estate of freehold is made of a corporeal thing; as if a house or land belong to an office, and the office be granted by deed; in this case the house or land doth pass as incident thereunto. So if a house or chamber belong to a corody; in this case, by the grant of the corody, the house or chamber passeth without any livery of seisin. Neither is it requisite upon a lease for years; for if a man make a lease for 1,000 years, this lease is perfect by the delivery of the deed, without any livery of seisin. Neither is it needful where one doth grant to me and my heirs all the trees growing on his ground; for these will pass [even for an estate in fee,] without any livery of seisin at all (24); [and the grantee may have merely an inheritance in the trees, as a privilege or enjoyment. This is an incorporeal hereditament; and a man may have the inheritance of the lands as of copyhold tenure, and the inheritance of the trees, on the same lands, as of freehold tenure.]

Co. 8. 127. 11. 49.

9. How it may be & must be made; and what shall be said a good livery of seisin; or not. 1. In respect of the persons that make it, and to whom it is made; and the quality of their estate. Woman covert. Infant.

Livery of seisin may and must be made either by the party himself that maketh the estate, or if it be a livery in deed, it may, in his absence, be made by his attorney, sufficiently authorized by writing, [*viz.* deed. An attorney cannot make livery in view; at least, unless he has an express authority; and *query* if he might make such livery even under an express authority.] And he that may make an estate, to the perfection whereof livery is requisite, may himself, and in his own right, make livery thereupon, and [*read*, or] in the right of another, and as attorney to another; so divers, that cannot make any [valid] estate, may notwithstanding make livery of seisin. And therefore the husband, albeit he may not make a feoffment in fee, or lease for life, &c. of land to his wife, yet he may, as an attorney, make livery of seisin to her upon a conveyance made by another. And so also may the wife [make livery] upon a conveyance made to the husband or her, [*omit*, or

Perk. Sect. 134. Co. super Lit. 48, 49. 52.

(24) See more amply in what cases livery of seisin is requisite, in *Vin. Abr. Feoffment* (B.)

her.] And so also monks, infants, aliens, and such like persons, disabled to make feoffments, &c. may notwithstanding make livery of seisin, as attornies, upon conveyances made by others. And
Co. super Lit. 48, 49. so likewise may he in remainder in fee make livery to the lessee for years. *Et sic de similibus.* [The rule, that *nemo potest actum in se agere*, or the rule *nemo potest esse agens et patiens*, does not apply to these cases of livery: the act is done *alieno jure*, and for another person, and in his name.] And this livery of seisin may and must be made to the party himself that taketh the estate, or in his absence to his attorney or procurator sufficiently authorized [by deed;] and in this case any one may be an attorney to take, that may be an attorney to give, livery. If a feoffment be made to
Dyer, 35. Co. super Lit. 49. 359. Co. 5. 95. divers by deed, [as joint-tenants,] and livery of seisin is made to one or some of them; this is a good livery to execute the estate to them all. But if a feoffment be made to divers without deed, and livery of seisin is made to one or some of them, in the name of all the rest, [in their absence;] in this case the feoffment is good to execute the estate in him or them to whom the livery is made, and void as to the rest, [being absent.] If
Co. super Lit. 217. a lease for years be made to *A.* and *B.* without deed, the remainder to *D.* in fee, and livery of seisin is made to *A.* or *B.*; in this case this is a good livery to make the remainder to pass to *D.* But if a lease be made for years to *A.* the remainder to the right heirs of *I. S.* in fee, *I. S.* being then living, and livery of seisin is given to *A.*, this remainder is void, for *nemo est heres viventis*; [and there is not any person in whom the immediate freehold may vest; and there is not any particular estate of freehold, preceding this limitation, to support it. 1 *Prest. Est.* p. 217. 243.] One joint-tenant cannot make livery of seisin to his companion, as a tenant in common may. And [it is
Perk. 49. 10 E. 4. 3. [1 Inst. 217. 1 Rep. 136. 2 Rep. 67. said] a lessor cannot * make livery of seisin to his lessee for life or years. See before, *numb.* 4. [But see *supra*, p. 204, where it is said he may, and the acceptance of livery will operate as a virtual surrender of the estate for life or years.] *P. 212.

Co. super Lit. 52. In all cases where this ceremony is requisite, whether it be done by the parties themselves in person, or their deputies, it must be done and

2. *In respect of the time when it is made.*

made, 1. in the lifetime of the feoffor, donor or lessor, and in the lifetime of the feoffee, donee or lessee; for if either of them die, it cannot be done afterwards; neither can a warrant of attorney be made to deliver seisin after the death of the feoffor, &c. [as proceeding from the feoffor.] But if there be more feoffees, donees or lessees than one, [and they are to be joint-tenants,] in such cases, albeit all of them die but one, the livery of seisin may be made to that one that doth survive, and it will be good to him to execute [vest] the estate in all the land. [As to this point, there is a difference where the feoffors are, and also where the feoffees are to be, tenants in common, and where they are or are to be joint-tenants. Where the feoffors are joint-tenants, there, notwithstanding the death of one of them, yet, as the part of the person dying survives to the others, the entirety of the parcels may pass from the survivors. It is otherwise when they are tenants in common, for in that case the part of the person dying will, on his death, devolve to his heirs: and the feoffment of the survivors will not pass his share, for it is not in them. So where the feoffees are to be joint-tenants, notwithstanding the death of one of them before livery, the entirety of the parcels will pass to the survivors; but where they are to be tenants in common, the livery will be void as to the persons dying before livery is made, and as to the shares intended for them. The heir cannot take, since he is not the grantee.] And so it is if there be a warrant of attorney made by a corporation aggregate, as a mayor and commonalty, dean and chapter, or the like, to give livery of seisin; in this case the death of the mayor, &c. will not determine the authority, [because the corporation continues;] and therefore, in that case, the livery of seisin may be made after his death. [But *query* if livery may not be made during the vacancy of a mayor. In that case, according to some books, the ability and also the capacity of the corporation is suspended.] 2. If it be a lease for years, with a remainder over in fee, the livery must be made to the lessee for years before his entry, or at the time when he doth enter for that purpose; [namely, before he enters by virtue of the term, so as to have the term divided from the inheritance, and consequently leave a reversion

Co. super Lit. 49. 216. Perk. Sect. 109

A caveat.

in the intended feoffor;] for afterwards it cannot be made. *Quod semel meum est, amplius meum esse non potest.* *Quere* also, whether the law be not so in all other cases; and let men take heed they do not (as commonly they do) enter into the land before they have livery of seisin made thereof unto them. [But an entry generally will, it is apprehended, be deemed evidence of an entry only to receive livery.] And yet it seems the livery of seisin is good, when it is made afterwards, by *Co.* 2. 55. 3. It must not be made before the estate [of freehold can] begin; for if a lease be made for years, to begin at Michaelmas, with a remainder over, and the livery of seisin is made before Michaelmas, this livery of seisin is void; for if a livery work at all, it must work presently; and so it cannot in this case, because it is before the estate doth begin. [And if the livery operated, it would pass a freehold in *futuro*, contrary to a principle of law; *Prest. on Est. ch. Freehold*; for as the term is future, and the remainder is expectant thereon, the freehold must necessarily be future; but livery of seisin after Michaelmas would be good.]

Co. super Lit. 217. [Infra, p. 283.]

Co. super Lit. 48. Perk. Sect. 227, 228. Doct. & Stud. 2. Lit. Sect. 61. 418. Perk. Sect. 226. Fitz. Feoffments & Fails, 111.

3. *In respect of the place or thing wherein it is made.*

If an estate be made of divers pieces of land in divers villages in the same county, in this case the making of livery of seisin of and in any part thereof, in the name of all the rest, or of one parcel according to the deed, albeit he doth not say in the name of, &c. sufficeth for all, if all the pieces be in the grantor's possession, and out of lease. But if the pieces of land lie in divers counties, [for the jury of one county has no conusance of livery in another county,] or in the same county, and they be in lease, [under different leases,] or out of the possession of the feoffor, *contra*; for in that case the making of livery in one part, in the name of all the rest, is not sufficient for the rest; for in this case it is requisite that livery of seisin be made upon and in some of the lands in both counties; and upon every parcel of land that is out of possession, [or in the occupation of a distinct occupier,] or at least in some parcel of the land in the occupation of every several tenant. And yet if one part of a manor be in one county, and the other part in another county, in view of that part; in this case, it seems, livery of seisin in the one part in the one

county, in view of the other part in the other
*P. 213. county, is good and sufficeth for all *. So if the scite of a manor lie in one county, and the rest of the manor in another county; in this case the making of livery in the scite of the manor is sufficient for the whole manor; [because a manor is an entire thing. See *Vin. Abr. Venue.*] If a feoffment Perk. Sect. 228. be made of the manor of *Dale* in *Sale*, [read, *Dale*,] the which manor doth extend in *Dale* and *Sale*, and livery of seisin is made accordingly in *Dale* only, and not in *Sale* also; by this feoffment there doth pass no more of the manor but [than] that which is in *Dale* only (25); [for the feoffment is of that part only which is in *Dale*. And generally speaking, (*Perk.* § 228,) it is true, that where divers parcels of land lie in several counties, livery must be made in each county of the lands lying in that county; but in the case of a manor, comprising divers parcels of land lying in several counties, the feoffment will, though this point is not quite clear, (*Hale on* 1 *Inst.* 56 b.) be good to pass the parcels lying in the one and in the other county, though livery of seisin be made in one of the counties only. The reason of this difference is obvious. The particular circumstances of this case give the decision, and it forms an exception to the general rule. *Bac. Abr. Feoffment* (B. 3.)

The history of the rule, and the reason of the exception, may be thus stated.

For the notoriety of trial it was part of the system of our law, that all actions for the recovery of lands should be brought in the proper county, or in the several counties in which the lands, that were the subject of the action, were situate: and that the *pares curiæ*, before whom all questions concerning the lands were to be tried, might have knowledge of all transactions which passed, affecting the title of the lands, no lands in possession were allowed to be transferred from one person to another except by corporeal investiture,

(25) If a manor extends into two counties, livery in that part of the manor, which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin. *Hal. MSS.* But Mr. Perkins holds, *that livery of parcel of such a manor in one county, will pass the parcel in the other county.* *Perk. Sect.* 227. However, he admits that if one be disseised of two acres in different counties, entry into one acre in one of the counties, though made in the name of both acres, will not extend to the acre in the other county. *Perk. Sect.* 229. Note 2, to *Co. Lit.* 50 a, 13th edition. See further in *Bac. Abr. Feoffment* (D. a.) pl. 4.

or an actual livery of seisin; and therefore such livery was necessarily and consequently required to be made within the limits of the county; and where there were divers parcels of land, in different counties, then in each county. For this reason also, where divers parcels of lands, lying in several counties, were the subject of a claim, a separate action must be brought for the lands in each county. But it was a rule, in the law of actions, that where the cause of action arose partly in one county and party in another county, the action might be brought in one county, or in the other county, at the election of the person bringing the action, and the *venue* will be in *confinio comitatus*. *Vin. Abr. Trial* (K. a.)

Where there are several parcels of land lying in several counties, and not being parts of an entire subject; as a manor or rectory; in such case, as has been before observed, a distinct action must be brought in each county for the lands in that county, though they be parts of one farm. The title to each parcel of land is several, and the knowledge of the grounds on which the action is brought are, in intendment of law, best known to the suitors of the court of that county in which the lands lie. However, as a manor, though it include divers parcels of land, is an entire thing; and as the manor may be the subject of one action, that action may be brought in either of the counties; therefore the law does not require that livery of seisin should be made in more than one of the counties; it being sufficient that the inhabitants of one county should have knowledge of the transaction.] If I be seised of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of seisin in that acre, whereof I am seised in fee, in the name of both acres; in this case, it seems, this sufficeth to pass both the acres. [No doubt exists on this point; and the feoffment would be a forfeiture of the acre held for life.] But if I be seised of one acre in fee, and possessed of another acre for years, and I make a feoffment of both acres, and livery of seisin in that acre only, whereof I am seised in fee, in the name of both the acres, *contra*; for this is as if I make a feoffment of land whereof I am seised, and of other land whereof I am not

9 H. 7. 25. per Frowicke.

Vin. Abr. Faits and Feoffments, 2.

seised, &c. [For he cannot make a feoffment without delivering the seisin upon those identical lands, and such livery of seisin would be a forfeiture.] If I be seised of two acres of land, and let one of them for years, and then make an estate of both of them to another, and make livery of seisin in that I have in possession, in the name of both the acres; this [livery] will not serve to pass the other acre, [for want of possession;] but livery must be made in that acre also, [and consequently possession taken of it. But one livery would be sufficient, if made on the lands in the occupation of the lessee, and with his consent. *Supra*, p. 207.] And accordingly it was agreed in a case in the King's Bench, Hil. 38 Eliz. which was, that a man was seised in fee of a manor and other lands called groves, and he made a feoffment of it (groves being then in lease for years), and a letter of attorney to give livery, and the attorney made livery of the manor in the name of the rest, the lessee being still in possession of groves; in this case it was agreed that this was no good feoffment for groves. [But if the groves were parcel of the manor, the reversion would pass as parcel of the manor: but the services would not, at common law, have passed without attornment. *Vin. Abr. Manor* (K.) 2 *Roll. Abr.* (A. 2,) p. 3.]

Montague v. Jefferies.

When a feoffment is made of a house and land, the livery of seisin is most aptly to be made of and in the house in the name of the rest, and at the door of the house, &c. And when a feoffment is made of a rectory or parsonage, the livery of seisin may be made in the parsonage house; or, if there be no house, it may be made upon the glebe; or, if there be neither, it may be made at the ring of the church door. [For a rectory consists of glebe as well as tithes, and lies in livery. 1 *Lord Raym.* 193. Tithes alone are certainly an incorporeal hereditament; but when tithes are parcel of a rectory, the rectory is the principal, and draws to itself the accessory. As a rectory is a corporeal hereditament, it cannot pass without livery of seisin; but the advowson of a rectory is an incorporeal hereditament.]

See infra.

4. In respect of the presence or possession of others.

In the making of every livery of seisin it is requisite that all persons, that have any lawful estate and possession in the thing whereof livery is

See before, Num. 4.

to be made, as lessees for life, years, and such like, join in the making thereof, or be removed thence; [or, as to lessees for years, consent to the livery;] for every livery ought to bring an immediate possession to the feoffee, donee, &c. [The consent of lessor for life, retaining seisin, would not support or sanction the livery.]

Dyer, 362. If lessee for years make a feoffment, and a warrant of attorney to give livery of seisin, and the attorney make livery of seisin, the lessor being present upon the land, and not contradicting it; it seems this is a good livery of seisin, [though a forfeiture; and the lessor becomes immediately seised. *Supra*, p. 213.]

Bro. Feoffments, 24. The presence of the feoffor, donor, &c. upon the land, after he hath delivered seisin to the feoffee, donee, &c. albeit he stay upon the * land a while, and do not depart and leave the feoffee, &c. in possession, will not hurt the livery. See more, *supra*, *numb.* 4. [If his continuing in possession had any effect, it would amount to a disseisin; and a disseisin would not be intended. A licence to occupy would rather be presumed.] *P. 214.

Co super Lit. 49. Livery of seisin may be made of any corporeal thing, as manors, [rectories,] houses, lands, meadows, pastures, woods, chambers, or the like. And these things therefore are said to lie in livery. But of incorporeal things, as rents, advowsons, commons, estovers, and such like things, livery cannot be made. And these things therefore are said to lie in grant and not in livery. And therefore when a livery is made of these *nil operatur*. See more above, *numb.* 4, (26). [Reversions and remainders of lands are also incorporeal hereditaments: the land may pass by livery if the possession be obtained, or the livery be with the consent of a tenant for years, as distinguished from the consent of a tenant for life continuing his seisin. Entry on a tenant at will is a determination of the tenancy.] *5. In respect of the matter whereof it is to be made,*

Co. 9. 137. super Lit. 49. 1 Inst. 48 b. Vin. Abr. Feoffment (A. 2.)] To every good livery of seisin is requisite either such an act as the law doth adjudge to be a livery, or apt words that do amount unto it; for a livery may be good by words without any act or deed at all; but it cannot be good by an act or deed without any words at all; howbeit that livery that *6. In respect of the manner and order of making it; and how livery of seisin is to be made.*

(26) And further in *Vin. Abr. Feoffment* (C.) *Com. Dig. Feoffment* (A. 2.)

hath an act or ceremony in it is the best, because it taketh the deepest impression in the [memory of the] witnesses.

The most usual, formal, and orderly manner of making of livery of seisin is thus, that the feoffor, donor, &c. and the feoffee, donee, &c. if they be present; or, in their absence, their attornies or servants that have authority; do come to the door, backside or garden, if it be a house, if not, then to some part of the land where seisin is to be delivered, and there, in the presence of many good witnesses, do show the cause of their meeting, and openly and plainly do read the deed, or declare the contents thereof, and of the letter of attorney, if there be any. And then the feoffor, &c. or his attorney (if it be a house) do take the ring, latch, or hasp of the door (all the people, men, women and children being out of the house,) [or they who have the legal possession for years giving consent to the livery;] or (if it be of a piece of ground) do take a clod of the ground, or a bough or twig of a tree, or bush, growing thereupon; and (all the people being out of the ground, [or they who have the legal possession for years consenting to the livery)] the same ring, &c. clod, bough, &c. with the deed, do deliver to the feoffee, donee, &c. or to his attorney; and in the delivery thereof do use these or some such like words, *viz.* "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed, to have and to hold according to the form and effect of the same deed." Or, "I deliver you seisin and possession of this house, or ground, in the name of all the lands contained in the deed, according to the form and effect of the deed (27)." And then, if it be a house, the feoffee, &c. doth enter in first alone, and shut the door, and then he doth open it, and let in others. And if the feoffment, gift, or lease be made without deed, then they do and must withal express the very estate itself which the feoffee, donee, or lessee is to have: as for example, the feoffor, donor, or lessor must come to the house, or land, which is to be granted, and where livery of seisin is to be made, and there must by apt words grant the house or land to him

West. Symb. 1. part, Sect. 251. Perk. Sect. 209, 210. Co. super Lit. 48.

(27) In the time of our Saxon ancestors the delivery of a turf was a necessary solemnity to establish a conveyance of lands. *Hicke's Dissert. Epistolar.* 85. 2 *Bl. Com.* 313.

that is to have it, in fee simple, or in tail, or for life, (as the agreement is,) and in seisin thereof must * deliver him the ring of the door, or a turf or twig of the land. [At this day no estate will pass by livery of seisin, unless there be some cotemporaneous writing, under the hand of the party, or signed by his order, evidencing the quantity of the estate conveyed, and the terms upon which it is conveyed; but the contents of this writing, if lost, may be proved by secondary evidence.] And if the feoffment, &c. be made by writing, then it is wisdom to indorse, and set down on the back of the same [writing], how, when, and where the same is made, and the names of the witnesses thereunto. [And at this day the witnesses subscribe their names, and after their deaths proof of their hand-writing is evidence of the facts they attested.] But a livery of seisin that is not so exactly made may be good notwithstanding. And therefore if the feoffor, donor, &c. or his attorney, take any thing else that comes from off the land, as a stone, or the like, and therewithal doth make the livery of seisin; or if he take a turf, or twig from off another man's ground, and not from the same [land] whereof possession is to be given, and deliver that [turf, &c.] upon the ground in the name of seisin; or if he take a piece of silver or gold, or a rod, stick, or the like, and deliver this upon the land in the name of seisin; all these are good deliveries of seisin and possession. So if the feoffor, &c. be at the door of the house, or by the land, or in the house, or upon the land, and after he hath delivered the deed he say to the feoffee, donee, &c. " Here I deliver you seisin and possession of this house, or land, in the name of seisin and possession of all the lands and tenements contained in the deed;" or, " have and enjoy this house or land according to the deed;" or, " enter into this land or house, and God give you joy of it;" or, " I am content you shall enjoy this land:" in all these cases there is a good livery of seisin. *Et sic de similibus.*

*P. 215.

Co. 9. 137. Fits. Feoffments and Fails, 111.

Co. 6. 26. 41 E. 3. 17.

Bro. Feoffment, 28.

If I, being seised of a house in fee, make a feoffment of it, and of divers lands, to a man then present with me in the same house, and there deliver him the deed, in the name of seisin, of all lands contained in the deed; in this case this is a

good delivery of the deed, and a good livery of seisin also, albeit I continue in possession of the house still, and go not out of it. And if I be lord of a manor, and lying sick within some part of the manor, I make a feoffment of the manor, and deliver the deed to the feoffee, saying to him, "I will that you take seisin presently;" and thereupon command all my tenants of the manor to attorn to him, and they do so; this is a good livery of seisin. So if I make a deed, and after I have read it, being upon the land, I deliver it to the feoffee, donee, &c. and say, "Here I deliver you this charter, as my deed, in the name of seisin of all the lands therein contained," or the like; this is a good delivery of the deed and of seisin. But if I do only seal and deliver the deed upon or in view of the land, without saying or doing any more; this [delivery of the deed] will not amount to a livery of seisin. And therefore if a man make a feoffment, with a letter of attorney to give livery of seisin, and then he deliver the deed upon the land; this is no good making of livery of seisin. [By inserting a letter of attorney in the deed, he shows a clear intention that livery of seisin should be made by another person.] And so also if there be no letter of attorney.

Perk. Sect. 211. 212.

Perk. Sect. 215. Co. 6. 26.

Cromwel's case. Adjudged in the Exchequer, 15 El.

If I be seised of a house in fee, and being in the house say to *I. S.*, "Here *I. S.* I demise you this house for term of my life;" this * will not amount to a livery of seisin; and therefore it is no[t, without any language referrible to the land or seisin of the land, a] good lease until livery of seisin be made, but it is a good beginning of a lease.

Co. 6. 26.

*P. 216.

If the father enfeoff his son of land, and the son suffer his father to enjoy it, and after the son doth come to the parish church, where the land doth lie, and there, in the audience of the parishioners, useth these words to his father, "Father, you have given me such and such lands (and doth name them,) as freely as you gave them to me I give them to you again;" this is no good livery of seisin, neither doth any estate pass hereby; [for the livery is not made upon the land, or for any thing that appears, within view of the land.] So if one, being upon his land, say to *I. S.* "*I. S.* stand forth, I do here, reserving an estate to me for mine own life, give this land to thee and thy

Perk. Sect. 216.

Hil. 37 El. B. R. Callard's case.

heirs for ever;" this is no good livery of seisin, neither doth any estate pass thereby. [On account of its being to commence after the death of the feoffor; for the freehold cannot be granted to commence in *futuro*. 1 *Prest. Est.* p. 217.] So if one make a charter of feoffment to me, and make no livery of seisin thereupon; and after I make a feoffment of the land to *I. S.*, and the feoffor, hearing and having notice of it, saith, "I do willingly agree to it, and am contented that *I. S.* shall have it;" or "I do agree to the feoffment," or the like; in this case this [agreement] doth not make the feoffment that was made to me good, [by supplying livery on that feoffment. But see *Perk.* § 215.]

Fitz. Faits and Feoffments.

Co. super Lit. 48. Fitz. Estoppel, 177.

If divers parcels of land be conveyed, and livery of seisin is made in one; or there be divers feoffees, and livery of seisin is made to one of them according to the deed, without using any more words; this is good. But the best form and order of making of livery in this case is, to add these words, "in the name of all the rest, &c." (28).

Co. 9. 137. 6. 26. super Lit. 48. 233.

Livery in law, or within the view.

If the feoffor, donor, &c. deliver the deed in sight or view of the land, [and in the same, or another county, *Bac. Abr. Feoffment*; 1 *Inst.* 48, b.] and use these or any such like words, "I will that you shall enter into the land and have it according to the deed;" or, "take and enjoy the land according to the deed;" or, "I deliver you this deed in the name of seisin;" or, "enter you into the land and take seisin of it;" or, "take the land, and God give you joy of it;" or, (if the estate be made without deed) "I give you yonder land to you and your heirs, and go and enter into the same, and take possession thereof accordingly;" or, "enter into the land and enjoy it in fee-simple to you and your heirs, or for your life, &c.;" in all these cases the estate and the livery is [*read*, are] good, albeit the feoffor, &c. stand in one county, and the land in view be in another county. But in all these cases of livery within the view,—1. It must be made by the person himself that doth make the estate, for it cannot be made by his attorney. 2. There must be a relation [*viz.* language refer-

1] New Terms of the Law. Co. super Lit. 48. Dyer, 18. 2] 18 H. 6. 16.

(28) See more amply as to livery of seisin in deed, by whom, at what time, and in what manner it may be made, in *Bac. Abr. Feoffment* (A.) *Vin. Abr. Feoffment* (E.) (F.) *Com. Dig. Feoffment* (B.)

made, 1. in the lifetime of the feoffor, donor or lessor, and in the lifetime of the feoffee, donee or lessee; for if either of them die, it cannot be done afterwards; neither can a warrant of attorney be made to deliver seisin after the death of the feoffor, &c. [as proceeding from the feoffor.] But if there be more feoffees, donees or lessees than one, [and they are to be joint-tenants,] in such cases, albeit all of them die but one, the livery of seisin may be made to that one that doth survive, and it will be good to him to execute [vest] the estate in all the land. [As to this point, there is a difference where the feoffors are, and also where the feoffees are to be, tenants in common, and where they are or are to be joint-tenants. Where the feoffors are joint-tenants, there, notwithstanding the death of one of them, yet, as the part of the person dying survives to the others, the entirety of the parcels may pass from the survivors. It is otherwise when they are tenants in common, for in that case the part of the person dying will, on his death, devolve to his heirs: and the feoffment of the survivors will not pass his share, for it is not in them. So where the feoffees are to be joint-tenants, notwithstanding the death of one of them before livery, the entirety of the parcels will pass to the survivors; but where they are to be tenants in common, the livery will be void as to the persons dying before livery is made, and as to the shares intended for them. The heir cannot take, since he is not the grantee.] And so it is if there be a warrant of attorney made by a corporation aggregate, as a mayor and commonalty, dean and chapter, or the like, to give livery of seisin; in this case the death of the mayor, &c. will not determine the authority, [because the corporation continues;] and therefore, in that case, the livery of seisin may be made after his death. [But *query* if livery may not be made during the vacancy of a mayor. In that case, according to some books, the ability and also the capacity of the corporation is suspended.] 2. If it be a lease for years, with a remainder over in fee, the livery must be made to the lessee for years before his entry, or at the time when he doth enter for that purpose; [namely, before he enters by virtue of the term, so as to have the term divided from the inheritance, and consequently leave a reversion

Co. super Lit. 49. 216. Perk. Sect. 205.

A caveat.

in the intended feoffor;] for afterwards it cannot be made. *Quod semel meum est, amplius meum esse non potest.* *Quere* also, whether the law be not so in all other cases; and let men take heed they do not (as commonly they do) enter into the land before they have livery of seisin made thereof unto them. [But an entry generally will, it is apprehended, be deemed evidence of an entry only to receive livery.] And yet it seems the livery of seisin is good, when it is made afterwards, by *Co.* 2. 55. 3. It must not be made before the estate [of freehold can] begin; for if a lease be made for years, to begin at Michaelmas, with a remainder over, and the livery of seisin is made before Michaelmas, this livery of seisin is void; for if a livery work at all, it must work presently; and so it cannot in this case, because it is before the estate doth begin. [And if the livery operated, it would pass a freehold in *futuro*, contrary to a principle of law; *Prest. on Est. ch. Freehold*; for as the term is future, and the remainder is expectant thereon, the freehold must necessarily be future; but livery of seisin after Michaelmas would be good.]

Co. super Lit. 217. [Infra, p. 283.]

Co. super Lit. 48. Perk. Sect. 227, 228. Doct. & Stud. 3. Lit. Sect. 61. 418. Perk. Sect. 226. Fitz. Feoffments & Faits, 111.

3. *In respect of the place or thing wherein it is made.*

If an estate be made of divers pieces of land in divers villages in the same county, in this case the making of livery of seisin of and in any part thereof, in the name of all the rest, or of one parcel according to the deed, albeit he doth not say in the name of, &c. sufficeth for all, if all the pieces be in the grantor's possession, and out of lease. But if the pieces of land lie in divers counties, [for the jury of one county has no conusance of livery in another county,] or in the same county, and they be in lease, [under different leases,] or out of the possession of the feoffor, *contra*; for in that case the making of livery in one part, in the name of all the rest, is not sufficient for the rest; for in this case it is requisite that livery of seisin be made upon and in some of the lands in both counties; and upon every parcel of land that is out of possession, [or in the occupation of a distinct occupier,] or at least in some parcel of the land in the occupation of every several tenant. And yet if one part of a manor be in one county, and the other part in another county, in view of that part; in this case, it seems, livery of seisin in the one part in the one

before the livery had been made, the authority would have been determined or suspended. *Sed vide infra.*] But if a letter of attorney be made to deliver seisin of certain land by one that is [at that time] *non sanæ memoriæ*, and the deed of feoffment was made whilst he was of sound memory, and afterwards he doth come to his memory again, and then the livery is made upon the first warrant without any new assent, &c.; in this case the livery is not good: [for the warrant of attorney was void, being made while the feoffor was incapacitated; and, as there was not any valid authority, there could not be any effectual livery.]

Non sanæ memoriæ.

That for the most part, which for the manner and order of making, it is a good livery of seisin if it be made and taken by the parties themselves, is good, being made and taken by their attorneys or deputies that have a good authority and do well [*i. e.* duly] pursue it. And therefore if the conveyance be made of divers lands, and they lie in one county, and a warrant of attorney is made to give livery generally, and the attorney doth make it in one part of the land in the name of all the rest; this is a good livery. *Et sic de similibus.* Dyer, 283.

*P. 218. * If a man be seised of black acre and white acre, and he make a deed of feoffment of both these acres, and a letter of attorney to enter into both these acres, and to deliver seisin of both of them according to the form and effect of the deed, and he doth enter into black acre and deliver seisin *secundum formam chartæ*; in this case the livery of seisin is good, albeit he doth not enter into both the acres, nor into one acre in the name of both: [for, in construction of law, the entry into one acre is an entry into both acres, if they be parcels of the same tenement that is in possession of the feoffor or of the same tenant.] And if the feoffment be made [by deed] to two or more [persons, as joint-tenants,] and the warrant of attorney is to make livery to them both, and the attorney doth make livery of seisin to one of the feoffees *secundum formam et effectum chartæ*; in this case the livery is good to both, and yet he that is absent may waive the livery; [and in that case the seisin will rest wholly with the feoffee, to whom livery is made, if they are to be joint-tenants.] Co. super Lit. 52.

Co. super Lit. 52. 258. Perk. Sect. 187, 188, 189.

And yet if a man be disseised of black acre [by one person,] and [of] white acre [by another per-

son,] and a warrant of attorney is made to one to enter into both these acres, and to make livery, and the attorney doth enter into one acre only, and make livery of seisin there *secundum formam chartæ*; in this case the livery of seisin is void for all, for in this case he doth less than his authority. [But if there is only one disseisin, and only one freehold, then an entry into one acre is, in construction of law, an entry into both acres.] So if a man make a letter of attorney to deliver seisin to *I. S.* upon condition, and the attorney doth deliver seisin absolutely; this livery of seisin is void. And so in all such like cases, where the attorney doth less than the authority and commandment, all that he doth is void. But for the most part, where the attorney doth that which he is authorized to do, and more also, it is good for so much as is warranted, and void for the rest.

Perk. Sect. 109. Co. super Lit. 258. And therefore if the letter of attorney be to give livery of seisin to *I. S.* and the attorney give it to *I. S.* and *W. S.*; this livery is good to *I. S.* and void to *W. S.* So if the letter of attorney be to give livery of seisin of white acre only, and he make livery of white acre and black acre also; this livery is good for white acre, and void for black acre. So if the letter of attorney be absolute, and the attorney give livery upon condition: some hold this [livery] to be good, and the condition to be void.

Co. super Lit. 49. If a letter of attorney be made to two jointly, to make or take livery of seisin, and one of them alone doth it without the other; this is a void livery. But otherwise it is when it is made to two jointly or severally, for there one of them alone may do it (34.)

Perk. Sect. 39. If a letter of attorney be to make livery of seisin after the death of another man, and the attorney doth make livery of seisin during that man's life; this livery is void (35.) [Because it would, if effectual, pass the seisin earlier than was intended.]

---

(34) If a letter of attorney be made to three, *conjunctim et divisim*, and two of them only make the livery, it is not good, because not pursuant to the authority; for the delegation was to them all three, or to each of them separately: but if the third was present at the time of the livery, though without doing or saying any thing, it is good. *Dyer*, 62 a. See further *Mo.* 278. 1 *Leon.* 192.

(35) See more amply as to the doctrine of livery by letter of attorney, in *Vin. Abr. Feoffment* (Q.); *Com. Dig. Feoffment* (B. 3.); and note 2, to 13th edition *Co. Lit.* 52 a. [*Bac. Abr. Feoffment* (E.)]

11. *How it shall ensure, and be taken & construed.*

Livery of seisin is sometimes made single, and without any relation to the deed, whereby the estate, upon which the livery is made, is created at all; and sometimes, and most commonly, it is made with reference to the deed, in these or such like words, "*secundum formam chartæ*;" [and now there must be a writing, at least, to evidence the feoffment; 29 Ch. 2, c. 3.] In the first case the estate is oftentimes made upon the livery, and then there may be one estate contained in the *P. 219. * deed, and another made by the livery; also there may pass more land by the livery than is in the deed, and by this means, when there is a fault in the deed, so that the land will not pass by the deed, it may perhaps pass by the livery; but in this case then there must be apt words used in the making of the livery to create the estate also, as well as to give the possession. [The statute of 29 Ch. 2, c. 3, would now exclude these results.] But where the livery of seisin is made with relation to the deed, there it must take effect according to the deed, or not at all; for these words, *secundum formam chartæ*, are to be understood according to the quantity and quality of the effectual estate contained in the deed. And therefore if one make a deed of feoffment to another, and in the deed there is contained no condition at all, and when the feoffor doth make livery he doth make livery upon condition; or if the deed contain an estate to him [the feoffor] and his heirs, and he maketh livery of an estate in tail or for life; in these cases there doth pass nothing by the deed. And yet if there be [*read*, had been] apt words used to create such an estate at the time of the livery made, such an estate may be [might, at the common law, have been] made by the livery without the deed, and then the deed shall be void. But if in these cases the feoffor say, when he doth make livery on condition in tail, or for life, *secundum formam chartæ*; in this case there is a good feoffment made according to the deed, and the additional words are void. So if a man make a lease for years, and make livery *secundum formam chartæ*; this is but a lease for years still. And if *A.* give land to *B.* to have and to hold after the death of *A.* to *B.* and his heirs, this is a void deed; and therefore if the livery of seisin be made *secundum formam chartæ*, the livery of seisin is void also, [unless

Lit. Sect. 359. Co. super Lit. 48. 121. Fitz. Estoppel, 177. 17 Ed. 4. 25. Co. super Lit. 49. Fitz. Feoffments and Faits, 23.

livery be made after the day.] But if, when he doth give livery of seisin, he give it to him and his heirs without these words *secundum formam, &c.*; or if in the making of livery, he say, "here I deliver you seisin of this land, to have and to hold to you and your heirs for ever," or the like; this may make a fee simple. And so, if one make a deed of feoffment of two acres, and after make livery of seisin of four acres; in this case, if there be words in the livery of seisin sufficient to make a new estate, the other two acres may pass also; [*viz.* might have passed before the statute of 29 Ch. 2, c. 3.]

Co. 2. 55. 5. 94. & Greenwood's case, B. R. Mich. 17 Jac.

If *A.* by deed give land to *B.* to have and to hold, after the death of *A.*, to *B.* and his heirs; this is a void [grant by] deed; and therefore, if upon this deed, livery of seisin be made before the day, by the party himself, or at, or after the day, by his attorney *secundum formam et effectum chartæ*; the livery is void also, for it cannot enure so; [*i. e.* an estate of freehold cannot be granted to commence in *futuro.*] And yet if a lease be made for life to begin in *futuro*, and at, or after the day come, the lessor himself in person doth make livery of seisin *secundum formam chartæ*; in this case the lease, perhaps, may become good by this livery of seisin. [It has been supposed that the attorney could not, by delaying livery, make that grant good which would, if livery had been made at the time, have been void. If he had authority to make livery at or after the day, the livery would be good; and now a letter of attorney, to make livery of seisin, according to the form and effect of the deed, would warrant and support a livery after the day appointed for the commencement of the estate. *Freeman* v. *West*, 2 *Wils.* 165; 1 *Prest. on Est.* p. 223.]

Co. super Lit. 222.

If an agreement be between two, that the one shall enfeoff the * other upon condition for surety of money, and afterwards livery of seisin is made generally, without any such condition; in this case, it is said by some, the estate shall be on condition still; [being part of the same transaction, and founded on the original agreement. However the statute of Frauds and Perjuries, 29 Ch. 2, c. 3, would now exclude the evidence of the condition.] *P. 220.

Perk. Sect. 42.

If there be a fault in the deed, as by the mis-

naming of the feoffor, &c. feoffee, &c. or the like, and afterwards the feoffor, &c. doth himself in person make livery of seisin upon this deed to the feoffee, &c.; by this the fault of the deed may be holpen and cured.

If one make a feoffment to himself and another, and give livery of seisin to the other, this is a good feoffment, and shall enure to the other wholly, and he shall take the whole by the feoffment and the livery; [for no person can give or grant to himself; or be agent and patient: he should have made the feoffment to the other, or to a stranger, and to the use of both, in order to have accomplished his intention.] And so if the livery be made to one that is capable, and to another that is not capable, [as joint-tenants,] he that is capable shall take the whole, and the other shall have nothing. So if a feoffment be made to two, [and as joint-tenants,] and one of them die before the livery is made, and after the livery is made to the survivor; in this case the livery shall enure to the survivor only, and he shall have all the estate thereby. [But if the grantees were to be tenants in common, no grantee could take more than his share, because his share is defined and fixed.] So if a feoffment be made, without deed, to a corporation and to *I. S.*, and livery is made to *I. S.* alone; in this case *I. S.* shall have the whole, and the corporation nothing at all; [because a corporation are incapable of taking except by deed.] Perk. Sect. 204. 203. 7 H. 7. 9.

If a feoffment [by deed] be made to four, and livery of seisin is made to one, two, or three of them, [in the absence of the others;] this [livery] shall enure to them all. But if the feoffment be without deed, it shall enure to him wholly to whom the livery is made. And if one of them give warrant to the rest, to take livery for him, and they do so; this shall enure to them wholly, and not to him at all for any part; [for want of a deed of feoffment to all jointly.] Dyer, 35. 10 E. 4. 1. Co. 5. 95.

If the tenant make a feoffment [by deed] to his lord and another, and give livery of seisin to the other; this shall enure wholly to the other until the lord agree to it, and then to them both. [It is apprehended the law is otherwise; namely, the estate will vest in both, subject to be devested, as to the lord, by his disagreement.] 10 E. 4. 12.

Co. super Lit. 21. If one make a deed of feoffment of one acre of land to *A.* and his heirs, and another deed of the same land to *A.* and his heirs of his body, and deliver seisin according to the form and effect of both deeds; in this case it shall enure by moieties, *i. e.* he shall have an estate tail, and the fee simple expectant in the moiety, and a fee simple in the other moiety. [*Query* if he shall not have an estate tail in the entirety, with the remainder in fee. If there be a feoffment to a man and his heirs of his body, *habendum* to him and his heirs for ever, he will have an estate tail, and also the fee expectant. But if the feoffment be to him and his heirs, *habendum* to him and his heirs of his body, the premises will be qualified and explained by the *habendum*, and the feoffee will have an estate tail only. 1 *Inst.* 21 b.; *Thurman* v. *Cooper*, *Poph.* 138.]

If two several deeds of feoffment be made to two several persons of one and the same thing, he that can get the seisin first shall have it. *Rem, domino, vel non domino, vendente duobus, in jure est potior traditione prior.* [But if a devise be to one man and his heirs, and afterwards to another man and his heirs, by the same will, and there is not any apparent intention of revoking the will, the several devisees will in this instance be joint-tenants; (1 *Inst.* 112 b.; and *Hargr. note*, 144;) or tenants in common, as will best effectuate the intention of the testator. *Ibid.*]

Co. super Lit. 52. If lessee for life make a feoffment, and a letter of attorney to the lessor to make livery, and he doth make livery accordingly; in this case this [act of livery] shall not enure to bar him of his entry upon the feoffee for the forfeiture of his lessee. But if lessee for years make a feoffment in fee, and such a letter of attorney to the lessor, and he doth deliver seisin accordingly; this livery shall bind him: for it shall be said to be his own livery, as in his own right, because the lessee had no freehold whereof to make livery. [At this day the livery could not proceed from the lessor, unless the feoffment were evidenced by writing, as his act.]

Co. super Lit. 52. * If a lessor make a deed of feoffment, and a letter of attorney to the lessee for years to give livery, and he doth it accordingly; this shall not *P. 221.

be construed to extinguish or hurt his term (36), [but merely as his assent to the feoffment; and the

(36) See more amply in *Com. Dig. Feoffment* (B. 5.) *Vin. Abr. Feoffment* (L.) 1 *Wood*, 526. *Bac. Abr. Feoffment* (B.) In what cases livery shall be presumed at law, or supplied in equity, see before in page 205, and further in 1 *Wood*, 529. *Vin. Abr. Feoffment* (F. a.)

The reader, it is presumed, from perusing this chapter, and consulting the authors referred to in it, must be well convinced of the excellent nature of the conveyance by *feoffment with livery of seisin*. This conveyance is now but very little used (as was observed before in page 200), but it is still nevertheless a formal, valid, and effectual mode of conveyance; it has however been of late years almost entirely superseded by the conveyance by *lease and release*. The editor apprehends he cannot explain this circumstance, and the origin and nature of the conveyance by *lease and release*, more satisfactorily to the reader, than by selecting particular passages from some of our most respectable legal writers, in the order of time in which they have written concerning it. Lord *Bacon*, in his *Treatise on the Use of the Law*, page 154, speaking of the inconveniences of the putting lands into use before the statute of Uses, and the frauds which were occasioned thereby, says, that "in the end of 27 "Hen. 8, the parliament, purposing to take away all those uses, and reduce the law to *the* "*ancient form of conveying of lands by public livery of seisin*, fine, and recovery, did ordain, "that where lands were put in trust or use, there the possession and estate should be "presently carried out of the friends in trust, and settled and invested on him that had the "uses, for such term and time as he had the use."

In *Dalrimple* on *Feuds*, p. 210, it is said, in England, although originally conveyances by deed of party were executed by acts of enfeoffment; which, as will appear from a comparison of *Madox* and *Craig*, correspond in their nature and progress to our *(Scottish)* charter and seisin; or by fines, which were originally an acknowledgment of such feoffment in a court of record; yet, earlier than the time of *Littleton*, it had come into fashion, to transmit land by *attornment* if there was a tenant, and by *lease* and *release* if there was none. [*Query* if this was ever practised in *Littleton*'s time, except in the particular case of enlarging the estate of a person who was actually the tenant. There is not any instance, it is believed, of a lease and release being used as parts of the same assurance.] In the first of which cases, the form of getting the consent of the tenant of the ground to the transfer, supplied the place of that livery, which could not be given; and, in the other case, the grantor gave to the grantee an imaginary lease, in order to put him into possession, and the next minute released; or, in the language of the law of *Scotland*, renounced all right or interest he had in the land.

In attornment something was done to supply the want of livery, and in lease and release the entry gave livery; but a statute of Hen. 8, by making provisions concerning a form of conveyance, which had been before in use, enabled people to dispense with these two shadows of a form, and with the circuit of a feoffment altogether. The form of conveyance by bargain and sale, made secure by writing and enrolment, by virtue of this statute, corresponds to the disposition without enfeoffment in *Scotland*. This last with us doth not transfer; it is only a step to the transfer; but in *England*, on a bargain and sale, all notice of a superior or delivery is lost: the moment the deed is enrolled, the estate, to almost all effects whatever, is vested *ab initio*; nor can there be any dispute between competitor purchasers, except what arises from the dates of their respective enrolments. [The first bargain and sale will prevail, if enrolled in due time, although there is a prior enrolment of a second bargain and sale.]

In 1 *Wood's Conveyancing*, p. 714, a conveyance by lease and release is described to be where he who is to convey any lands or tenements first makes a *lease* (or *bargain and sale*,) of the premises to the person to whom the same is to be conveyed for six months, a year, &c. but usually for a year, to the intent that by virtue thereof the lessee may be in the actual possession of the premises granted by the lease, (or bargain and sale,) and intended to be released to him; and then the lessee (or bargainee) by virtue of the statute of the 27 Hen. 8. c. 16, for transferring uses into possession, is enabled to take a grant or release of the reversion or inheritance of the said lands, to the use of himself and his heirs for ever, &c. and then a *release* (usually dated the day next after the date of the lease, reciting the said lease and declaring the uses) is accordingly made; which, in this case, is a conveyance

statute of Uses (27 Hen. 8, c. 10,) has incorporated a provision to save the term of a person who is a mere instrument, as feoffee, &c. to uses.] See more in *Exposition of Deeds, supra, ch.* 5.

And so we come to another kind of deed of common assurance, called a *Bargain and Sale.*

---

one's right or interest that he has in a thing to another who has the possession thereof; [or rather, a precedent estate therein.]

A lease and release are but one conveyance, [or rather, parts of the same assurance,] and in the nature of one deed. 2 *Mod.* 252. Lease and release is now become the most common conveyance of lands. It amounts to a *feoffment*, [or rather, it answers the purposes of a feoffment, considered simply as a conveyance]; for by the said statute the *uses* are transferred into the *possession*, so that thereby the place of *livery of seisin* is supplied; which indeed saves much trouble, especially when the bargainor, &c. lives at a distance from the premises: in which case a letter of attorney to make livery was obliged to be made; otherwise the bargainor, &c. was to deliver seisin in person.

Mr. Justice *Blackstone*, treating of the statute of Uses, (in the second volume of his *Commentaries*, p. 337,) says, The only service to which that statute is now consigned is, in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. And, in the same volume, p. 339, describing the conveyance by lease and release, says, That mode of conveyance was first invented by Serjeant *Moore*, soon after the statute of Uses, and now the most common of any, and therefore not to be shaken; though very great lawyers, (as particularly Mr. *Noy*,) have formerly doubted its validity. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary [should be valuable] consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession* [*read*, estate.] He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before, must be made to a tenant in possession; and accordingly, the next day, a release is granted to him. This is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment.

Mr. *Hargrave*, in note 3, to the 13th edition of *Coke's Littleton*, 48 a, says, But since the introduction of uses and trusts, and the statute of 27 Hen. 8, for transferring the possession to the use, the necessity of livery of seisin, for passing a freehold in corporeal hereditaments, has been almost wholly superseded; and, in consequence of it, the conveyance by feoffment is now very little in use. Before the statute of Uses *equitable* estates of freehold might be created through the *medium* of trusts without livery, and by the operation of the statute *legal* estates of freehold may now be created in the same way. Those who framed the statute of Uses evidently foresaw that it would render livery unnecessary to the passing of freehold, and that a freehold of such things as do not lie in grant would become transferrable by *parol* only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted, in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was *by indenture enrolled*. See 27 Hen. 8, c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance, by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrolment for the more ancient one of livery. But the latter part of this provision, which, if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold, in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from omitting to extend the statute to

CHAP. X.

Of a Bargain and Sale.

1. *Bargain and Sale. Quid.*

Terms of the Law. Plow. 301. Co. 2. 35.

THIS word doth signify the transferring of the property of a thing from one to another, upon valuable consideration, [by way of sale.] And herein only it doth differ from a gift; that this [a gift] may be without any consideration or cause at all; and that [a bargain and sale] hath always some meritorious [*read*, valuable] cause moving it, and cannot be without it. This word also is sometimes applied to the assurance or conveyance whereby this [act, the sale of an use,] is done and made, which is called a deed of bargain and sale, for this may [*read*, might, at the common law,] be done by writing or without writing (1.) [A bargain and sale is an instrument evidencing an agreement between the contracting parties, and by which, in consideration of money paid, or some article of value given, (*postea*, 511. 513,) one party hath sold lands, [or rather the use of lands,] to another for an estate of freehold; and such assurance is not followed up by any of the ceremonies requisite to the conveyance of an estate at common law, as livery of seisin, attornment, &c. But to the validity of a bargain and sale of an use of an estate of freehold, an indenture, and consequently a deed, is essential.]

---

bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The conveyances from this insufficiency of the statute of enrolments are now in some measure prevented by the 29 Cha. 2, c. 3, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts on them, otherwise than by writing. See further as to the nature and operation of the conveyance by lease and release, in the case of *Barker* v. *Keat*, 2 *Mod.* 249. *Shortridge* v. *Lamplugh*, *Ld. Raym.* 798. *Lilly's Pract. Convey.* 227. *Bac. Abr. Release* (C. 4.) *Zouch* v. *Parsons*, 3 *Burr.* 1794. *Vin. Abr. Deeds* (D.) [*Infra*, 221. 2 *Prest. Convey. ch. Lease and Release*, 208. 219.]

(1) Bargain and sale is termed a *real contract*, on a valuable consideration, for passing manors, lands, tenements or hereditaments, by deed indented and enrolled within six months after the date thereof, without livery of seisin, or attornment of tenants. 2 *Inst.* 672. Bargain and sale is a contract in consideration of money, [or other valuable consideration] passing an estate in lands and tenements by deed indented and enrolled. This manner of conveying lands is created and established by the 27 Hen. 8, c. 10, which executes all uses raised; and as this has introduced a more secret way of conveyancing than was known to the policy of the common law, therefore the enrolment of the deed of bargain and sale was made necessary by the 27 Hen. 8, c. 16. *Bac. Abr. Bargain and Sale.* See further in *Lil. Convey.* 12, and 1 *Wood*, 650. [But see the alteration by the statute of Frauds, 29 Car. 2 (frequently mentioned before), which makes a writing necessary.]

Terms of the Law. Plow. 301. Co. 2. 35.

2. Quotuplex.

And sometimes this is and may be of lands, tenements and hereditaments, and to this [assurance] the term is most properly applied. And then it is said to be, where a recompence is given by both parties to the bargain: as where one doth bargain and sell his land to another for money; in this case the land is a recompence to the one for the money, and the money to the other for the land. And this now also is become one of the common assurances of the kingdom; so that such an assurance may now be averred to be fraudulent within the statute of 27 Eliz. as well as any other assurance; a rent may be reserved upon it, or a condition made by it, as well as by any other kind of assurance. And sometimes this [bargain and sale] is and may be of moveable things, as trees, corn, grass, oxen, kine, household-stuff, and the like; the property whereof is and may be altered by this kind of conveyance, as well as by gift or grant. And this kind of bargain and sale is that which is commonly called a contract; which, largely taken, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. But strictly, it is the buying and selling of some personal goods, whereby the property is altered. [5 *Taunt.* 122; *Moor*, 74; *Hob.* 132; *Winch*, 7.] And in both these cases he that doth sell is called the bargainor, and he to whom the sale is made is called the bargainee.

Per Chief Just. Hide, 3 Car. Co. 2. 54.

Terms of the Law, Agreement.

Bargainor.

Bargainee.

Co. 8. 94. 5. 113. 3. 62.

3. *The effect of it.*

The effect of this [bargain and sale] is to transfer the [use, and by means of the statute of Uses, the] property; [*viz.* the legal estate;] and this it will as effectually do as any other kind of conveyance whatsoever (2). And therefore the bargainee of a reversion, howsoever he may not have * benefit of a condition, upon the demand of a rent, without giving notice of the bargain and sale to the lessee; and howsoever if *A.* conusee by a fine of a reversion, before attornment of the tenant, bargain and sell

*P. 222.

(2) If the bargainor may *lawfully* transfer the property, but not otherwise; for if there *be tenant for life*, with contingent remainder thereon depending, it seems a bargain and sale by him in fee does not destroy the contingent remainder; for it is the nature of a bargain and sale to pass no more than a man lawfully may pass; therefore, in the case now put, nothing more passes than the estate for life of the bargainor; so that the same estate continues in the bargainee, and is not destroyed or determined. *Fearne*, 246. *Vide Law of Uses and Trusts*, 140.

the reversion to *B.*, that *B.* cannot distrain for this rent until he can get an attornment of the tenant; yet the bargainee shall have benefit of a condition as an assignee within the statute of 32 H. 8. And it seems he may vouch by force of a warranty annexed to the estate of the land, because he is in partly in the *per*, [*viz.* the act of the bargainor,] and partly in the *post* (3), [*i. e.* by the act of law, the statute of Uses. The necessity of attornment is now superseded by the statute of 4 & 5 Ann, c. 16, for the amendment of the law. Many of the *dicta* on bargains and sales, and their operation, will be reconciled by considering the law to be, that the bargain and sale as such, cannot, after the end of six months, or even during the six months, be given in evidence or pleaded, unless it has been inrolled within the six months.]

4. Of what things a bargain and sale may be; or not.

See West. Symbolit. Bargain and Sale.

All things, for the most part, that are grantable by any other way from one man to another, are grantable, and may be transferred by way of bargain and sale from one to another. And therefore lands, rents, advowsons, commons, tithes, profits of courts, and the like, may be granted by way of bargain and sale in fee simple, fee tail, for life, or years. And all manner of goods and chattels, as leases for years, wardships, cattle, corn, household-stuff, wood, trees, merchandises, and the like, are grantable by way of bargain and sale (4). But it seems estovers, and such like things, [created] *de novo*, and that have not essence before, [*et quæ in ipso usu consumuntur*,] are not grantable by way

6 Jac. B. R. Adjudged 21 H. 6. 43. per Yelverton.

(3) It is said that a *bargain and sale* is not so strong a conveyance as a [feoffment with] livery; for if I have a rent-charge in right of my wife out of the manor of *D.* and afterwards I purchase the manor, and afterwards by deed indented and enrolled I bargain and sell the manor, the rent-charge shall not pass. 1 *Leon.* 6. [It is apprehended the rent would be suspended during the coverture at least; and if the husband was entitled to his courtesy, then during his life.] By *feoffment* or *fine* all uses and possibilities are conveyed, [or rather extinguished,] by reason of the forcible operation, but it is otherwise by *bargain and sale*. See 1 *Leon.* 33. The bargain and sale vests the use, and the statute of Uses the possession, [*viz.* seisin.] *Cro. Jac.* 696. A bargain and sale does not pass away nor affect a *contingent* use in the bargainor; but a feoffment or fine would transfer it, [*read*, extinguish it; and, under particular circumstances, the bargain and sale might be construed a release, and contingent interests may be released. Though a fine, which extends to the fee, will extinguish a contingent interest by estoppel, yet a fine, *sur concessit* for years, will operate only as an estoppel during the term, without extinguishing the contingent interest. *Weale* v. *Lower*, *Poll.* 55.] *Hardr.* 416. See more amply as to the operation of a bargain and sale, 1 *Wood*, 651. *Com. Dig. Bargain and Sale* (B. 3.) 2 *Bl. Com.* 338. *Vin. Abr. Deeds* (A.)

(4) As to bargains and sales of goods and chattles, see *Com. Dig. Bargain and Sale* (A) *Biens* (D. 3.) *Grants* (C.)

of bargain and sale [of an use,] as they are by way of grant or lease [at the common law,] and therefore that a bargain and sale of such things, [by way of use,] is void (5).

Stat. 27 H. 8. ch. 16.

If any estate of freehold or inheritance be made of land, by way of bargain and sale, [of an use,] the same [bargain and sale] must be made by a writing or [read, *viz.*] deed indented (6), and cannot [now] be made by word of mouth only; as a lease for years, (whether it be created *de novo*, or be in *esse* before,) may be, [*read*, might have been, till the statute of Frauds and Perjuries, 29 Car. 2.] But lands in London, by a special proviso within the statute, may [*read*, might till the 29 Car. 2,] be bargained and sold by word of mouth without any writing (7). 2. The very words, bargain and sell, are not necessary to a good bargain and sale; for words equivalent will suffice to make land pass by way of bargain and sale. [See p. 511. 513.] And therefore if a man seised of land in fee do by deed indented, and by the words alien or grant, sell them to another; or if such a man covenant to stand seised of his land to the use of another; and these deeds are made in consideration of money, and the deeds be after [and duly] enrolled; these will amount to good bargains and sales. And if a man, by a deed indented and enrolled, in consideration of 10*l.* paid to him, by the words demise and grant, pass his lands to another for twenty years; this is a good bargain and sale (8). [2 *Prest. Convey.* p. 225.

5. *What shall be said a good bargain and sale; & what things are requisite to make such a bargain and sale; or not.*

Of lands.

Co. 8. 94. 7. 40. 2. 36.

[Ca. Uses. 489.]

(5) *A.* by indenture enrolled bargains and sells to *B.* in fee, with a way over other lands of *A.*; the deed was held to be void as *to the way*, for nothing but the use passed by the deed. And there cannot be an use of a thing which is not in *esse*, as a way, common, &c. which are newly created, and until they are created, no use can be raised by bargain and sale. *Cro. Jac.* 189. See further what may be bargained and sold, *Bac. Abr. Bargain and Sale* (B.) *Com. Dig. Bargain and Sale* (B.) *Vin. Abr. Bargain and Sale* (G.)

(6) And not by *print* or *stamp*, and it must be written on *parchment* or *paper*, and not upon wood, stone, lead, or other material. 2 *Inst.* 672.

(7) For a valuable consideration; lands in the city of London being exempted out of the statute 27 Hen. 8. c. 16; and at the common law such a bargain and sale by word only raised an use; and the statute 27 Hen. 8, c. 10, transfers the use into possession. 2 *Inst.* 675. *Vin. Abr. Deeds* (H.) The statute of Enrolments, 27 Hen. 8, only enables mayors of cities to enrol bargains and sales where, by custom, they did so before this statute; and London is not excepted out of the statute of Frauds; therefore the citizens, notwithstanding their boasted custom, must bargain and sell lands by deed like other people. *J.H.*

(8) See accordingly the words *demise* and *grant* adjudged a good bargain and sale without other words, 1 *Vent.* 141. See also *Taylor* v. *Vale*, *Cro. Eliz.* 166, and *Cro. Jac.* 210; but though the words *bargain and sale* are acknowledged by Lord *Coke* not to be absolutely

233.] 3. There must be some good [valuable] consideration [in money, or moneyworth, as a horse, &c.] given, or at least said [expressed] to be given for the land. And therefore if *A.* (for divers good considerations,) [a] or (in consideration that the bargainee is bound for the bargainor, and for divers other good causes,) [b] or (for divers great and valuable considerations) bargain and sell his land by deed indented and enrolled to *B.* and his heirs, *nihil operatur*, [as a bargain and sale of an use.] But if in these cases, in truth, there be money or other good [*viz.* valuable] consideration given, albeit it be not expressed upon the deed, * the bargainee may aver it; and being proved, the bargain will be good. [*Dyer*, 146 a. *Mildmay's case*, 1 *Co.* 25.] And if the deed make mention of money paid, as in consideration of 100*l.* or the like, and in truth no money is paid, yet the bargain and sale is good. And no averment will lie against this, which is expressly affirmed by the deed, [to defeat its legal operation as a bargain and sale, between the parties, of the use; but as between creditors, &c. and purchasers within the protection of the 27 Eliz. c. 4, the conveyance may be impeached for want of a consideration; and in equity a deed may be set aside, notwithstanding an express consideration, on the ground of fraud, imposition, &c.] And if the deed mention and say (for a certain sum of money,) or (for a certain competent sum of money,) these are good considerations (9). 4. There needs no livery of seisin or attornment in this case. And therefore if one bargain and sell a reversion by deed indented and enrolled, for good consideration, the reversion will pass [*i. e.* prior to the statute of 4 & 5 Ann,

Co. 1. 176.

[a] Ward v. Lambert, Pasche 37 Eliz. b. 41 Eliz. Adjudged.

Dyer, 169.

*P. 223. Averment.

Dyer, 90.

Co. 7. 40. 8. 94.

necessary, yet he says it is good to make use of them, they being contained in the act, 2 *Inst.* 672.

(9) If I bargain and sell land to my son no uses arise unless there be a consideration of money; for selling, *ex vi termini*, supposes my transferring a right of something for money, the common medium of commerce. And if there be no such consideration, it may be an exchange, a covenant to stand seised, a grant, &c. but it can be no sale. *Treatise of Equity*, p. 56. [But if the deed purports to be made for divers good considerations, without expressing them to be in money or some article of property, no use will arise, unless a consideration of this kind is in fact paid, and the payment proved. *Popham's case*, 4 *Leon.* 4. 4 *Rep.* 71 b. *Poph.* 49. *Hob.* 222.] If the *deed expresses for a competent sum of money*, though the certainty of the sum be not mentioned, it is good enough; for against this express mention in the deed no averment nor evidence shall be admitted. *Mo.* 569, *Fisher* v. *Smith*. See more amply what shall be a sufficient consideration, in *Com. Dig. Bargain and Sale* (B. 11.) *Bac. Abr. Bargain and Sale* (D.)

c. 16, for the amendment of the law, and which superseded the necessity of attornment, would have passed] without any attornment of the tenant. And if it be only a lease for years of a reversion that is granted, there needs no attornment nor enrolment. [On this account the practice of conveying by lease, or bargain and sale for a year, and a release, was adopted. 2 *Prest. on Convey.* p. 268. 219.] And in case of a bargain and sale the bargainee is in actual possession, [*read*, hath an actual estate,] before any entry, so that the lessee may attorn to the grant of the reversion, as hath been ruled in *Mitton's case, Mich.* 18 *Jac. in Cur' Ward*, by the two chief justices, and the whole court. [2 *Prest. Convey.* p. 225. 233.] And yet I think he hath not such a possession as to bring any possessory action for trespass, or the like, until an actual entry; [he may maintain an ejectment, but cannot maintain an action for trespass prior to actual possession;] for where the statute
Co. 5. 112. of 27 H. 8. of Uses provides, that the actual possession, [meaning seisin or estate,] shall be adjudged according to the use, yet it ought to have, [as the means of maintaining trespass,] a circumstance which is requisite by the common law, *viz.* an actual
Stat. 27 H. 8. ch. 16. Pl. 307. entry [*read*, possession] in deed. But there must be an enrolment, [and within a limited time,] of the deed in case where any freehold doth pass (10): for it is provided that no lands, (except in some corporations [*read*, cities and corporate towns] only,) shall pass from one to another by any deed whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, by reason only of any bargain and sale thereof, except the same be made and done by writing indented, sealed and enrolled in one of the four courts, the Chancery, King's Bench, Common Pleas, or Exchequer, or else within the same

Enrollment, where necessary; and how it must be done.

(10) And until the enrolment the *lands remain in the bargainor*; [see note *infra*, the cases are at variance on this point: the result seems to be that the freehold is in the bargainee, subject only to be devested in case the deed shall not be enrolled within due time; and yet some of the books inaccurately treat the freehold, as in the bargainee, by relation; see p. 223;] for the bargain and sale on the stat. 27 Hen. 8, c. 16, is but *inchoatum* and *non perfectum*, and gives nothing to the bargainee *till the deed is enrolled*; according to the statute *Vin. Abr. Deeds* (N.), the statute of Enrolment extends only to a bargain and sale of an estate of freehold, and the omission in that statute (it not being made to extend to bargains and sales for terms of years) has occasioned the invention of the conveyance by lease and release, now so universally in practice, as was before observed.

county or counties where the lands so bargained and sold do lie, before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one (11). And the same enrolment to be within six months next after the same writing or deed is dated. And this statute, [27 Hen. 8. c. 16,] was made in the same parliament wherein the law of transferring of uses into possession, [27 Hen. 8. c. 10,] was made, to the end that men's lands might not suddenly and privately pass upon payment of a little money in an alehouse, or the like. And herein these things must be observed: 1. The enrolment upon such a deed as to make the estate to pass, must be in parchment; for an enrolment

(11) By the stat. 5th Eliz. c. 26, bargains and sales may be enrolled in the counties palatine of Lancaster, Chester, and the bishopric of Durham, of manors, lands, &c. within the county of Lancaster, the county of Chester, or the county of the bishopric of Durham respectively. By 5th Ann, ch. 18, bargains and sales of any manors, lands, &c. within the West-riding of the county of York, which shall be enrolled before the register for the said West-riding, or his deputy for the time being, in the public office at Wakefield, shall be as good and available as if the same had been enrolled in one of the king's courts of record at Westminster, or before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the said West-riding, or two of them, according to the act of the 27th Hen. 8. By the 6th Ann, c. 35, § 16, the like provision is made for enrolling bargains and sales in Beverley of lands within the East-riding of the county of York, or the town and county of the town of Kingston-upon-Hull; and by the 30th sect. of that statute it is enacted, "that in "all deeds of bargain and sale enrolled in pursuance of that act, whereby any estate of "*inheritance in fee simple* is limited to the bargainee and his heirs, the words *grant, bargain* "*and sell* shall amount to, and be construed and adjudged in all courts of judicature to be "express covenants to the bargainee, his heirs and assigns, from the bargainor for himself, "his heirs, executors and administrators, that the bargainor, notwithstanding any act done "by him, was at the time of the execution of such deed seised of the hereditaments and "premises thereby granted, bargained and sold, of an indefeasible estate in fee simple, free "from all incumbrances (rents and services due to the lord of the fee only excepted), and "for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming "under him, and also for further assurance thereof to be made by the bargainor, his heirs "and assigns, and all claiming under him; unless the same shall be restrained and limited "by express particular words contained in such deed; and that the bargainee, his heirs, "executors, administrators and assigns respectively, shall and may, in any action to be "brought, assign a breach or breaches thereupon, as they might do in case such covenants "were expressly inserted in such bargain and sale."—By the 8th Geo. 2, c. 6, § 21, the enrolment of bargain and sales of lands in the North-riding of the county of York is authorized in the register office for that Riding.—By the 33 Geo. 2, c. 30, § 10, being an act for widening certain streets, &c. in London, it is enacted, that all bargains and sales made and acknowledged by any person or persons whomsoever, and *which shall be enrolled in the hustings of the said city*, of any lands, tenements and hereditaments, purchased by virtue of and for the purposes of that act, shall have the force, effect and operation in law, to all intents and purposes, which any fine or fines, recovery or recoveries whatsoever, would have, if levied or suffered by the bargainor or bargainors, or any person or persons seised of any estate in the premises, in trust for, or to the use of, such bargainor or bargainors, in any legal manner or form whatsoever. [The like provision is in all the city acts, and also in the acts for making the Wet Docks and Wapping Docks.]

in paper is not good (12). 2. The deed enrolled must be indented; for if it be but poll, the [use, and consequently the] estate will not pass. 3. It must be enrolled within six months of the purchase or sale; [but the time of enrolment may be averred and proved, *Hinde's case*, 4 *Co.* 68 a.; and, *prima facie*, the first day of the term is the time of enrolment. *Moor*, 42. 2 *Inst.* 673.] And this
Co. 5. 1. account [computation] must be: 1. From the date, and not from the time of the * delivery of *P. 224. the deed; [unless the deed has not any date, and then the six months must be computed from the
2] Dyer, 218. Adjudged Franklin & Garter's case, Mich. 37 & 38 Eliz. delivery.] 2. After twenty-eight days to the month, and no more (13). 3. The day of the date to be taken exclusive, and for none of the days of the six months. [*Moor*, 41.] And yet if a deed be enrolled the same day it bears date, it is good.
4] Dyer, 218. Ruled in the court of Wards. Co. 11. 48. 4. If it be enrolled any part of the last day of the six months, it is sufficient. And thus the deed may be enrolled within the six months, albeit either of the parties die within the time. [*Dymock's case*, *Hob.* 136. It was otherwise as to attornment, for unless attornment was made in the lifetime of the grantor and grantee, the grant became void.] And if the deed be not thus enrolled, it is of no force at all (14), [as a bargain and sale of an use.] So that if one bargain and sell his land to me, and the trees upon it; in this case, albeit the trees might have been sold alone by deed without enrolment, yet now being not enrolled, because the sale is not good for the land, it shall not be good for the trees also; [for they are part of the land, and intended to pass with the same, and not distinctly. See *Vin. Abr. Grant.* This decision flowed from the rules of the common

(12) And by the 10th Ann, c. 18, § 3, a copy of the enrolment of a bargain and sale, examined with the enrolment, and signed by the proper officer, having the custody of such enrolment, and proved upon oath to be a true copy so examined and signed, shall, in all cases where a bargain and sale shall be pleaded with a *profert in curia*, be of the same force and effect, as the indenture of bargain and sale should be, if the same was produced.

(13) See accordingly 2 *Inst.* 274.

(14) But if it is so made and duly enrolled, it is not effectual if the bargainor had any legal disability, for if an infant bargains and sells lands by deed indented and enrolled, *he may avoid it when he will*, (although, in the case of a fine, he must reverse it during his minority,) for this deed was of no effect to raise an use; [and *query* whether it does not pass the estate till he or his heir avoids it; and see *Zouch* v. *Parsons*, 3 *Burr.* 1794; but that case is not considered to be rightly decided;] and the statute of Enrolments is intended only of effectual bargains and sales. 2 *Inst.* 673. As to enrolments in various places, and the different forms of enrolments, see *Lilly's Convey.* 21; *Vin. Abr. Deeds*, (K.); 1 *Wood*, 654.

law.] And no subsequent act will help in this case: for if one by words of bargain and sale only, without any other words in the deed, grant a reversion, and the deed be not enrolled, and after the tenant doth attorn; hereby nothing doth pass, neither shall it enure as a confirmation. [This proposition is overruled.] But yet this must be noted, that in some cases, where a deed will not enure by way of bargain and sale for some of the causes aforesaid, it may enure to some other purposes. [Thus, in *Crossing* v. *Scudamore*, 2 *Lev.* 9, a father, for divers good considerations, by an instrument purporting to be a bargain and sale, and which was actually enrolled, conveyed to his son, by the words bargain, sell, alien, enfeoff and confirm, with a clause of warranty, and a covenant for further assurance; but, in fact, no consideration was paid, and it was held that the deed was good as a covenant to stand seised. *Infra*, 486. 488. 1 *Ventr.* 137. 198. 1 *Mod.* 175. 3 *Lev.* 372. So an instrument, in the form of a bargain and sale, may operate as a confirmation, grant, appointment, &c.]

Of goods and chattels.

A bargain and sale may be made of goods and chattels, [and of an use, for a term of years,] without any such solemnity as before; for it may be, [except as to terms of years,] by word as well as by writing, with or without any words of bargain and sale, as well as by those words; by a deed poll, as well as by a deed indented; and that, without any enrolment at all, and without any delivery of any part of the things sold, or of any piece of money, (as the manner is,) in the name of seisin. But in this case also some respect is to be had unto the cause and consideration of the bargain, as well as in the case of the bargain and sale of lands. [See the statute of Frauds and Perjuries, 29 Car. 2, c. 3, which, as to goods and chattels, makes several regulations in this respect.] For howsoever perhaps, in the case of a grant, or bargain and sale, of goods or chattels, by deed in writing, the consideration is not material. And that if a man do, by his deed under his hand and seal, bargain and sell timber trees, or any other thing, without any consideration at all, the same may pass well enough; [for when there is the solemn act of a deed, no express consideration is, as between the parties, required;] yet if the contract be by word,

Experientia.

Plow. 308.

Dyer, 29. 30. 14 H. 8. 19. 9 H. 7. 21. 21 H. 7. 6. 10 H. 7. 6. Plow. 432.

or by writing sealed, and not delivered, if there be no consideration, or no good consideration of it, it is of no effect at all. [In a late case, see *Heraud's Stamp Laws*, Lord *Kenyon* seems to have treated an instrument under hand and seal as equivalent to a deed. *Sed query* the soundness of the decision.] And therefore if a man by word of mouth sell to me his horse, or any other thing, [and do not deliver the horse, &c.] and I give him or promise him nothing for it; this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or all, or part of the money is paid in hand; or I give earnest money, (albeit it be but a penny,) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is a good bargain and sale of the thing to alter the * property thereof: and in the first case I may have an action for the thing, and the seller for his money; in the second case, I may sue for and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies one against another; and, in the last case, the seller may sue for his money. If *A.* sell cloth to *B.* for 10*s.* and *B.* takes away the cloth against the will of *A.* [and without having paid the price,] in this case *A.* shall have an action of trespass [or trover] against *B.* And if *A.* sell cloth to *B.* for 10*s.* in his election to make it a bargain or not, and if he will he may keep his cloth until the other pay him; and if *A.* say nothing, but doth suffer *B.* to take it away, he may make it a bargain if he will, and bring an action of debt for his money. If I offer money for a thing in a market or fair, and the seller agree to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another; or when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money; in both these cases, especially in the first, the bargains are [*read*, were before the stat. 29 Car. 2, c. 3, § 7,]

[Roberts on Frauds, 166.]

*P. 225.

good, so as the seller may not sell them afterwards to another; and, upon the payment, or tender and refusal of the money agreed upon, I may take or recover the things. [Altered by the statute of 29 Car. 2, c. 3, § 7.]

6. How a bargain and sale shall be taken.

If one do bargain and sell his land to me for money, to have and to hold to me generally, and doth not say to me and my heirs; by this [bargain and sale] I have but an estate for life, and no more; [although, before the statute of Uses, the bargainee would in equity have had the fee by reason of the consideration.] Co. 1. 87. super Lit. 10. Dyer, 169.

Of lands.

If one, in consideration of 10*l.* paid by me, doth bargain and sell his land to me and my heirs, to have and to hold to me to the use of the bargainor for life, the remainder in tail to me, the remainder to the right heirs of the bargainor; this *habendum* in this case is void, and I and my heirs shall have the land for ever (15). [This case turned on the ground that an use cannot arise on an use, and that the words of the premises of the deed were sufficient to pass the fee. There is not any doubt but that a particular estate and a remainder may be limited by bargain and sale, but the bargainor cannot limit the use to himself. A bargain and sale may give a freehold to commence *in futuro*; and *query*, therefore, whether this bargain and sale might not be construed as the bargain and sale of a future use.] Dyer, 155.

If one, in consideration of 10*l.* sell me land for the term of twenty years, and doth not say when this term shall begin; in this case it shall begin presently. See more in *Exposition of Deeds, chap.* 5, *in toto* (16). Co. 6. 33.

(15) See the case in *Dyer*. See also *Ash* v. *Gallen*, 1 *Ca. in Chan.* 114.

(16) A covenant in a bargain and sale not enrolled is binding, 1 *Ld. Raym.* 388. [In *Moore*, 337. 680, there are two cases in which separately bargains and sales were made; and afterwards, and before the enrolment of the indentures, fines were levied, and it was held that the estates passed by the fines, and not by the bargains and sales; but in both these instances the fines were levied in pursuance of a covenant contained in the indentures for further assurance. In another case it was admitted, that if land is bargained and sold to one man, and afterwards and before enrolment to another man, and the second bargain and sale was first enrolled, and the first bargain and sale is enrolled before the end of the six months, that the first bargain and sale shall not be defeated by the enrolment of the second bargain and sale. And, by *Browne*, the use passes immediately at the commencement by the sale; and the statute is not to this effect, that nothing shall pass until the enrolment of the indenture. And in this case it was also said, that if lands are bargained and sold to one man, and the bargainor levies a fine to another before enrolment, and enrolment is made within six months, the bargain and sale is not defeated by the fine, if it is for pay-

Kelw. 87. Plow. 140. 41. Of goods.

If one sell me any thing by the tod, pound, bushel, yard, or ell; it shall be accounted [to] me, assured, and reckoned according to the custom of the country and place, and not according to the statutes or the measures of other countries. [See statutes of 22 Car. 2, c. 8, § 2; and 22, 23 Car. 2, c. 12, § 2. In *King* v. *Major*, 4 *Term Rep.* 750, it was held illegal to sell corn by any other than the Winchester measure; and in *Hooker* v. *Cooke*, 4 *Term Rep.* 314, it was held, that evidence to sell by a particular measure did not support a declaration, stating a contract for so many bushels, since a bushel, without any other explanation, means a bushel by statute measure. In *Master* v. *Lord Howard*, 6 *Term Rep.* 338, it was decided that a quarter, even in college leases, means a legal quarter of eight bushels.]

Plow. 86. 27 H. 8. 27. Bro. Contract, 4.

If one sell me twenty barrels of ale, or ten pottles, or cups of wine; by these bargains I shall not have the barrels, pottles, or cups, with the ale or the wine. But if one sell me a hogshead, or a firkin of wine, it seems by this bargain I shall have the hogshead and firkin with the wine.

27 Ass. 29.

If one sell me all his trees in such a wood, and that I shall not cut them until Michaelmas, and in the interim hawks do breed in the trees; it seems in this case that the vendor shall have them, * and that I may not meddle with them. And yet see *Co.* 11. 58, which seems to be to the contrary. *P. 226.

Co. 4. 71. Bro. Fait, Enrol. 9.

7. *How and to what purposes a deed of bargain and sale of lands, and the enrolment thereupon shall relate. And how, and to what purposes not.*

The enrolment of a deed of bargain and sale, when it is done within the six months, shall to most purposes relate to the time of the delivery, or of the date of the deed. And it is given as a rule, that it shall have relation to the time of the delivery of the deed, *viz.* to avoid all mean estates and charges made to a stranger by the bargainor after the delivery of the deed before the enrolment, but not to devest any estate lawfully settled in the interim in the bargainee himself. [In *Popham's case*, 4 *Leon.* 4, the bargainee levied a fine before enrolment, and the bargain and sale was afterwards enrolled, and the estate passed by the fine.] And

---

ment of money, or in any other respect a covenant in gross; but as to dependant covenants, the covenants are void unless the estate passes, or unless there are words which relieve the covenant from its dependancy, as, hereby bargained and sold, or intended so to be.] Though after the enrolment and acknowledgment the bargainor or bargainee dies before the enrolment, yet the land passeth. *Wood's Inst.* 259. 2 *Inst.* 674.

therefore if one bargain and sell his land by deed indented to one, and after, before the deed is enrolled, he enter into a statute, or grant a rent-charge out of this land, or make a lease of the land to another, and then the deed is enrolled within the time; in this case the relation shall avoid all the mean charges and estates. And if *A.* bargain and sell his land by deed indented to *B.* and afterwards doth sell the same land by deed indented to *C.* and the deed made to *C.* is first enrolled, and then the deed made to *B.* is enrolled also within the six months; in this case *B.* shall have the land, and the relation of his enrolment shall make the enrolment of the other deed void (17). So if *A.* levy a fine of the land to *C.* yet *B.* shall have the land. But if the first deed made to *B.* be not enrolled within the six months, and the deed to *C.* be enrolled within the six months, *contra.*

Dyer, 218. Curia M. 3. Jac. B. R.

If *A.* bargain and sell land to *B.* and after levy a fine to *B.* of the same land, and after within the six months the deed is enrolled; in this case *B.* shall take by the fine, and not by the bargain and sale (18).

Co. 4. 71. [1 Ch. Cas. 114. 4 Leon. 4.]

If one joint-tenant alien all his lands in *Dale* to *A.* and before the enrolment the other joint-tenant die, and after the deed is enrolled; in this case but a moiety, and not the whole land doth pass (19).

Bro. Fait, Enrol. 9.

Bankrupt.

If *A.* bargain and sell his land to *B.* and after this *A.* doth become bankrupt, and the commissioners sell the land to *C.* and after the deed is

So held 4 Car. B. R.

---

(17) Accordingly in *Wood's Inst.* 259, if two bargains and sales are made of the same lands to two several persons, and the last deed is first enrolled, and afterwards the first deed is also enrolled within six months, the first buyer shall have the land: for when the deed is enrolled, the bargainee is seised of the land from the delivery of the deed, and the enrolment shall relate to it. See further *Mo.* 41. *Cro. Jac.* 53. 409. *Noy*, 106. If a man bargains and sells to *A.* and afterwards makes a bargain and sale of the same land to *B.* and the deed to *B.* is first enrolled, but the deed to *A.* is not enrolled within six months, the bargain and sale is good; but if the deed to *A.* had been enrolled within the six months, the deed to *B.* had been void. *Hob.* 165.

(18) For when the fee simple passed by the fine to the conusee and his heirs, the enrolment of the deed afterwards could not devest and turn the estate out of himself which was absolutely settled in him by the fine; for then, where he was *in* before in the *per*, he would be now in the *post*. 4 *Co.* 71 a. Bargainee may suffer a recovery before enrolment, for he is a good tenant to the *præcipe*; and this is said to be warranted by practice. 1 *Ventr.* 361, *Perry* v. *Bowes*. *Vin. Abr. Deeds*, (N.) pl. 5. 2 *Inst.* 675. *Selwyn* v. *Selwyn*, 2 *Burr.* 1131. [*Hinde's case*, 4 *Rep.* 71. *Forrest.* 167. *Cru. on Recov.* 88.]

(19) For the enrolment had relation to the making and delivery of the deed; so that it shall give nothing but that which was sold by it at the time of the delivery of the deed. *Vin. Abr. Deeds*, (K.) pl. 6.

enrolled within six months; in this case *B.*, and not *C.* the purchaser, shall have the land (20).

Pasch. 15 Jac. — If *A.* bargain and sell his land, held *in capite*, to *B.* in fee, and *B.* dieth before enrolment, and then the deed is enrolled; in this case the heir of *B.* shall be in ward. And so it was held by all the justices in *Sir Walter Earl's case*, *Pasch.* 15 *Jac. Curia Ward.* And yet in this [case] the wife of the bargainee shall not have dower, as was held by *Anderson*, chief justice, and justice *Walmsley*, 3 *Jac. Co. B.* and again in *Sir Robert Barker's case*, 6 *Jac.* [Not law at this day. *Owen*, 70.] And if one bargain and sell his land to *I. S.* and after this the rent incur; and then the deed is enrolled; the bargainee, and not the bargainor, shall have the rent. *Per curiam B. R. Hil.* 11 *Car.*

Ward. Contrarium tent. per Just. Berkley, Hil. 11 Car. Dower. Rent.

21 Eliz. — If *A.* bargain and sell his land to *B.* in fee, and then marry *C.* and die, and *C.* is endowed, and after the deed is enrolled; in this case * the dower of the woman shall be taken away by relation, as was held in *Baron Frevil's case*, 22 *Eliz. Co. B.* (21). [This is admitting she was dowable for a time, and consequently that her husband had a seisin; a point now overruled.]

*P. 227.

3 Jac. Co. B. — If *A.* bargain and sell land to *B.* and *C.* in fee, and *B.* release to *C.* before the enrolment; this release is void [for want of seisin; not law at this day.]

Release.

So held in Mocket's case, 10 Eliz. — If *A.* disseisor, bargain and sell the land disseised to *B.* in fee, and the disseisee doth release to the bargainor, and after the deed is enrolled; in this case this release shall avail *B.* (22). [The release is supposed to extinguish the right, on account of the continuing seisin in the bargainor; and the bargainor cannot, as against his bargainee, take any advantage of the release. The principle is still larger: a release to a terre-tenant is good,

---

(20) As to the power of the commissioners over the real estate of the bankrupt, and in what manner the sale thereof shall be made by them, see stat. 13th *Eliz.* c. 7. 21 *Jac.* c. 19. 2 *Bl. Com.* 285. *Green's Bankrupt Laws*, 189.

(21) But relation in several cases shall *aid acts in law*, as in case of *dower*, &c. though not *acts of parties*, viz. to make void acts of the parties good by relation or fiction of law. 3 *Co.* 29 a. *Co. Lit.* 150 a.

(22) If a disseisor bargains and sells land, and the *disseisee releases to the bargainee* before enrolment, it is void. *Arg. Roll. R.* 425, says it was so adjudged Mich. 10 Eliz. *Mocket's case.* But a release to the *disseisor* before enrolment had been good, and then the enrolment should pass the estate to the bargainee, and he should take advantage of the release. 1 *Roll. Rep.* 425. *Mich.* 14 *Jac.* in pl. 16. *Vin. Abr. Deeds*, (O.) pl. 11.

and any stranger may avail himself of it. The difficulty, on the authority of modern times, is to treat the bargainor as tenant.]

If *A.* bargain and sell his land to *B.*, and *B.* before enrolment doth bargain and sell the land to *C.*, the first deed is enrolled, and then the second deed is enrolled: in this case the last bargain and sale is void, and shall not be made good by relation, as was held by the court in *Sir Robert Barker's case.* [So in *Iseham* v. *Morris*, *Cro. Car.* 110, it was the opinion of the court that a lease by a bargainee before enrolment was void. See *infra.*] 6 Jac. [Dymock's case, Hob. 136.]

If a lease be made rendering rent, on condition to re-enter for non-payment, and the lessor bargain and sell the reversion by deed indented, and after the deed made the rent is in arrear, and then the deed is enrolled: in this case it shall not relate to give a re-entry for the condition broken. [It should seem this point is no longer law.] So it was held in Sir Christopher Hatton's case.

If *A.* bargain and sell land to *B.* in tail, and *B.* before enrolment of the deed doth make a lease according to the statute of 32 Hen. 8, and after the deed is enrolled: this is a good lease (23). [It has been decided that a grant of a rent by a bargainee, between the bargain and sale and enrolment, is a good grant. *Flower* v. *Bladwin*, *Cro. Car.* 217. The distinction deducible from the authorities is, that the estate passes immediately by the bargain and sale: so as to enable the bargainee to grant, convey, bargain and sell, and make a good tenant to a writ of entry for a recovery; but the estate is subject to this condition or qualification, that unless the bargain and sale shall be enrolled in due time, the title will be in the same state as if no bargain and sale had been made; and therefore all intermediate acts proceeding from the bargainee will be void. But if enrolment be essential to a bargain and sale under the Land-tax Act, &c. or to an appointment in exercise of a power, no estate will vest until enrolment shall have taken place. *Hawkins* v. *Kemp*, 3 *East*, 410. In practice it is very frequent to annex a condition to a bargain and sale; but it does not, as a So hath it been adjudged.

(23) See more amply, as to the operation of a bargain and sale, and of the enrolment thereof, and in what cases and in what manner it shall relate. *Bac. Abr. Bargain and Sale* (E.) *Vin. Abr. Bargain and Sale* (K. to N.) *Enrolment* (E.) *Com. Dig. Bargain and Sale* (B. 9.)

conditional limitation would, determine the estate without entry or action. 1 *Inst.* 237 a. It is apprehended the use may be shifted under a conveyance by bargain and sale, and the prior use may, in that case, cease without entry or claim. A remainder may, it is apprehended, be limited by a bargain and sale, whether any part of the consideration proceed from him or not; but no use can execute into estate, which is limited to arise out of the estate and seisin of the bargainee of an use. This is an use in the second degree, and therefore an use upon an use, and consequently a mere trust. But an use may arise from a seisin, which arises from a bargain and sale under a common law authority, or an authority given by act of parliament. A rent may be reserved on a bargain and sale in fee. 1 *Inst.* 144 a. *Supra*, 218. 2 *Inst.* 673. 2 *Co.* 54. *Com. Dig. Bargain and Sale* (B. 3.) *Saund. Uses*, 332.]

And now we come to a *Gift.*

CHAP. XI.

Of a Gift.

THIS word, importing no more than the transferring of the property of a thing from one to another, is of larger extent than a feoffment, which is always applied to an immoveable thing; for this is often applied to moveable things also; as trees, cattle, household stuff, &c. the property whereof is and may be altered as well by gift [and delivery], as by sale or grant. And in this sense a gift is sometimes by the act of the party; as when one man doth give a thing to another. And this is, or may be, either by word or by writing (1). And sometimes it is by act of law; as when a woman is married to a husband, or one is made executor to another; in these cases by the marriage only, or the taking of the executorship, the law gives all

Gift. Quid.

(1) By the civil law a gift of *goods* is not good without delivery, yet in our law it is otherwise, *per Coke* Ch. J.; 1 *Roll. Rep.* 61, [when there is a deed. Also in a *donatio causa mortis* there must be a delivery.]

the goods of the woman to the husband, and of the testator to his executor. So where one doth take my goods as a trespasser, and I recover damages for them upon a suit in law; in this case the law doth give him the property of the goods, because he hath paid for them. But this word gift
*P. 223. is sometimes taken more * strictly, and applied to a conveyance or passing of an estate of lands or tenements to another in tail, wherein this word *dedi* is most commonly used (2.) And then he which
Donor. [*read*, who] doth so give the land is called the donor,
Donee. and he to whom it is given the donee. And this for the most part is by deed, though it may be otherwise; [*viz.* without deed, as by livery of seisin, with a writing evidencing the livery.] And for these deeds of gift, of immoveable or moveable things, see *Deed* and *Grant in toto*, wherein all the learning touching this matter is involved.

And so we pass to a *Grant*.

(2) The conveyance by *gift*, *donatio*, is properly applied to the creation of an estate tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee simple. And this is the only distinction that *Littleton* seems to take, when he says, "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" *viz.* feoffor is applied to a feoffment in fee simple; donor to a gift in tail; and lessor to a lease for life, or for years, or at will. 2 *Bl. Com.* 316. See further as to a *gift*, in 1 *Wood*, 116. 659. *Br. Abr. Done. Vin. Abr. Gift.*

END OF THE FIRST VOLUME.

Luke Hansard & Sons,
near Lincoln's Inn Fields.

SHEPPARD'S

Touchstone

OF

COMMON ASSURANCES;

OR

A PLAIN AND FAMILIAR TREATISE,

OPENING

THE LEARNING OF THE COMMON ASSURANCES,

OR

Conveyances of the Kingdom.

THE SEVENTH EDITION,

INCLUDING ALL THE NOTES AND ADDITIONAL REFERENCES IN THE FORMER EDITIONS, AND IN THE IMPROVED MSS. COPY OF

EDWARD HILLIARD, Esq.

VOL. II.

ALSO,

AN ENLARGEMENT OF THE TEXT, &c. BY THE ADDITION OF VARIOUS CRITICISMS, DISTINCTIONS, &c. &c.

AND A COPIOUS INDEX.

By RICHARD PRESTON, Esq.

OF THE INNER TEMPLE.

LONDON:

PRINTED FOR J. & W. T. CLARKE, LAW-BOOKSELLERS,
PORTUGAL-STREET, LINCOLN'S-INN.

1821.

Printed by Luke Hansard & Sons,
near Lincoln's-Inn Fields.

THE

CONTENTS

OF THE

CHAPTERS.

CHAP. XII.

Of a Grant.

1. DEFINITION of a grant - - - - - - - p. 228
2. Different kinds of grants - - - - - - - - - ib.
3. Things necessarily requisite to every good grant - - - - 229
4. What shall be said a good and sufficient grant, gift or sale; or not - ib.
1st. For the manner of it; and what may be granted without deed; or not; and how - - - - - - - - - - ib.
2d. In respect of the person of the grantor, &c. and the naming of him; and who may be a grantor, and how - - - - - - 232
3d. In respect of the grantee and the naming of him; and who may be a grantee &c. and how - - - - - 235
4th. In respect to matter touching the thing granted, charged, &c. 237
1st. In respect of the nature of the thing granted; and what things are grantable over, or chargeable; or not - 238
1st. In respect of the nature of the thing itself - - - ib.
2d. In respect of the estate, property and possession of the grantor - - - - - - - - - 242
3d. In respect of a former grant of the same thing - - 245
4th. In respect of the naming or description of the thing granted - - - - - - - - - - ib.
5th. In respect of matter in some other parts of the grant - 251
1st. In the commencement of the estate - - - ib.
2d. In the limitation of the estate; or in the *habendum* of the grant - - - - - - - - - 252
6th. In respect of the end or ground of the grant - - ib.
7th. In respect of the omission of some ceremony, &c. - ib.
8th. What shall be said a good grant in the nature of a release or discharge; or not - - - - - - - 253

CHAP. XIII.

Of an Attornment.

1. Definition of an attornment - - - - - - - p. 253
2. Different kinds of attornments - - - - - - - - ib.
3. The effect of it - - - - - - - - - - 254
4. Where and in what cases the attornment of the tenant is necessary; or not; and how; and to what intents - - - - - - 254
5. By whom an attornment may and must be made; or not - - 258
6. To whom an attornment may and must be made; or not - - 259
7. When and at what time the attornment must be made - - - 260
8. The manner of making an attornment; and what shall be said a good attornment; or not - - - - - - - - - 261
9. Who shall be compelled to attorn; or not; and where - - - 265
10. How an attornment shall enure and be taken - - - - ib.
11. How an attornment shall relate - - - - - - - 266

CHAP. XIV.

Of a Lease.

1. Definition of a lease - - - - - - - - - 266
2. Different kind of leases - - - - - - - - - 267
3. Things necessarily required in every good lease - - - - ib.
4. What shall be said a good and sufficient lease for life or years; or not 268
1st. In respect of the persons of the lessor and the lessee, the thing wasted and the estate, property or possession of the lessor therein - 268
2d. In respect of the manner of the agreement and the words whereby the same is set down; and what words will make an estate for life; or years - - - - - - - - - - - 270
3d. In respect of the commencement and continuance, and end of the term or estate - - - - - - - - - 272
4th. In respect of another lease then in being of the same thing - 275
5. What leases or other acts may be made or done by a tenant at will; and what leases made by such a tenant shall be good to bind the issue or him in remainder, or others after the death of the tenant at will; and how they shall bind - - - - - - - - - 277
6. What leases or other acts may be made or done by the husband with the lands he hath in fee simple or fee tail in right of his wife, or jointly with her; and what leases made by him of such lands are good; or not; and how - - - - - - - - - - - 280
7. What leases or other acts bishops or other spiritual or ecclesiastical persons may make or do with the lands they have in right of their churches; and what leases made by such persons will bind their successors and others; or not - - - - - - - - - - - 281
8 What shall be said a good lease at will; or not - - - - 283
9. Where a lease for life or years shall be void *ipso facto* by the death of the lessor or by other means; or not; but voidable by entry, &c. and how - - - - - - - - - - - 283

CHAP. XV.

Of a Feoffment, Gift, Grant, and Lease.

1. Where and by what means a feoffment, gift, grant, or lease, and the estate thereby made, being good at first, becometh void, by matter *ex post facto*, and may be avoided or not; and how - - - - - 284

2. Where a man may void his own grant; or not; and how - - p. 287
3. Where and by what means a feoffment, gift, grant, or lease, or the estate thereby made, being void or voidable at the first, may become good by matter *ex post facto*; or not - - - - - - - - 287
4. Where and when a feoffment, gift, grant or lease may be good for one time, and void for another; and good against one person, but void against another; and good in part, and void in part; or not - - - 288
5. Who may avoid a feoffment, gift, grant, or lease, that is voidable; or not; and how - - - - - - - - - - - - 289

CHAP. XV.

Of an Exchange.

1. Definition of an exchange - - - - - - - - 289
2. The effect and form of it - - - - - - - - - 290
3. How an exchange must be made; and what shall be said a good exchange; or not - - - - - - - - - - - - - 291
1st. In respect of the parties thereunto, and their estates - - 292
2d. In respect of the matter whereof it is made, or the nature of the thing exchanged;
and of what things and estates an exchange may be made - 292
3d. In respect of the manner of the making of the exchange; and where it shall be good without deed; or not - - - - - 294
4th. In respect of the quality or equality of the estates or interests exchanged - - - - - - - - - - 295
5th. In respect of the execution of it - - - - - 297
4. When a deed shall take effect as an exchange; or not - - - ib.
5. How an exchange shall be construed and taken - - - - - 298
6. Where an exchange shall be determined, or the nature of it changed by matter *ex post facto*; and how; and where not - - - 298
7. Who may take advantage of a void or voidable exchange; or not; and when - - - - - - - - - - - - 299
8. Where an exchange voidable at first doth become good by matter *ex post facto*; or not - - - - - - - - - - - 299

CHAP. XVII.

Of a Surrender.

1. Definition of a surrender - - - - - - - - 300
2. The different sorts of surrenders - - - - - - - ib.
3. The effect of it - - - - - - - - - - - ib.
4. What shall be said a surrender in law of lands; and by what means an estate shall be surrendered in law; or not - - - - - 301
5. What shall be said a surrender in deed of lands; and when they shall be said to pass by such a surrender; or not - - - - - - 303
1st. In respect of the persons between whom it is made, and their estate and possession - - - - - - - - - 303
2d. In respect of the place where it is made; and where the surrender of lands in one county may be good for the lands that do lie in another county; or not - - - - - - - - - - 306
3d. In respect of the matter or thing;
and of what things a surrender may be made; or not - - ib.
4th. In respect of the manner, and how and by what words a surrender may be made;
and where it may be made without deed, and upon condition; or not - - - - - - - - - - - 306

5th. In respect of the agreement of him to whom the surrender is made; and what agreement is necessary - - - - - p. 307
6. How a surrender shall be construed and taken - - - - - 308
7. Where a feoffment, lease, grant or other act, made or done by the tenant for life or years, shall be a surrender or not; and how it shall enure, or be construed and taken - - - - - - - - - - 308
1st. When it is made to him in reversion or remainder - - ib.
2d. When it is done or made to him and a stranger - - - 309
3d. When it is done with him in reversion or remainder - - 310
8. Where a deed or rent may be surrendered; and how such a surrender shall enure or be taken - - - - - - - - - - - 310

CHAP. XVIII.

Of a Confirmation.

1. Definition of a confirmation - - - - - - - - 311
2. Different sorts of confirmations - - - - - - - - ib.
3. The nature and operation of it in general - - - - - - ib.
4. Where the confirmation of some persons is needful to perfect the grant of others, or not; and how it may be done - - - - - 312
5. What confirmations may be made; and what shall be said a good express or implied confirmation, or not; and by what words it may be made - 312
1st. To confirm or alter the quality of the estate of him to whom it is made - - - - - - - - - - - 312
2d. To enlarge the estate of him to whom it is made - - 315
3d. To diminish or abridge the services - - - - - 316
6. Where a confirmation may be good for part of the estate, or for part of the thing; or not - - - - - - - - - - - 317
7. The force and virtue of it; and how it shall enure and be construed and taken - - - - - - - - - - - - 317

CHAP. XIX.

Of a Release.

1. Definition of a release - - - - - - - - - 320
2. The different kinds of releases - - - - - - - - ib.
3. The nature and operation of it in general - - - - - 321
4. What things may be released; or not; and how - - - - ib.
5. How and after what manner these things may be released - - 323
6. What releases may be made of lands or tenements; and what shall be said a good release in deed; or not; and by what words it may be made - - - - - - - - - - - - 324
1st. When it enures by way of enlargement or passing of an estate - - - - - - - - - - - 324
1. In respect of the estate of the releasor - - - ib.
2. In respect of the estate of him to whom the release is made ib.
3. In respect of privity - - - - - - - - 325
4. In respect of the words whereby it is made - - - 327
2d. When it doth enure by way of passing an extinguishment of a right or title only - - - - - - - - - - - 328
1. In respect of the estate of the releasor - - - - ib.
2. In respect of the estate of him to whom the release is made ib.
3. In respect of privity - - - - - - - - 330
4. In respect of the words whereby it is made - - - 331

7. What releases may be made of other things; and what shall be said a good release in deed of such things; or not; and by what words - p. 331
1st. In respect of the persons - - - - - - - 333
2d. In respect of time - - - - - - - - ib.
8. What shall be said a release in law; or not; and how - - - 334
9. The force and virtue of it; and how it shall enure and be construed and taken - - - - - - - - - - - - 335
1st. In respect of the persons; and where a release made by one shall bind another; and where not; and where a release made to one shall enure to others; or not - - - - - - - - 335
2d. In respect of the thing released - - - - - 338
3d. In respect of the time or estate - - - - - 346
10. Acquittance; what it is - - - - - - - - - 347
11. Where a man is not bound to pay money without he hath an acquittance - - - - - - - - - - - - 348

CHAP. XX.

Of a Statute.

1. Definition of a statute - - - - - - - - - 353
2. Different kinds of statutes - - - - - - - - ib.
3. What shall be said a good statute or recognizance, and what not - 355
1st. In respect of the persons before whom it is acknowledged - ib.
2d. In respect of the manner of making it - - - - ib.
4. All the proceedings upon a statute or recognizance, and the manner and order of execution thereupon - - - - - - - - 356
5. What things are subject and liable to execution upon a statute or recognizance; and when, and how; and what not - - - - 359
1st. In respect of the nature and quality of the things themselves ib.
2d. In respect of the estate, property and possession of the conusor in the thing - - - - - - - - - - 360
3d. In respect of the time - - - - - - - - 361
4th. In respect of the quantity - - - - - - ib.
6. Where a man shall have a re-extent or new execution, and where not 362
7. Where and by what means a statute or recognizance, and the execution thereof, shall be discharged, suspended or avoided in all or in part; and where not - - - - - - - - - - - 364
8. Where the conusor or his heir, or an alienee, or purchaser, shall have contribution upon a statute or recognizance; or not - - - - 365

CHAP. XXI.

Of an Obligation.

1. Definition of an obligation - - - - - - - - 367
2. Different kinds of obligations - - - - - - - - ib.
3. What shall be said a good obligation in its original creation, or not ib.
1st. For the manner and form of it;
and what words are sufficient to make an obligation - - ib.
2d. For the matter and substance of it - - - - - 370
4. What shall be said a good condition of an obligation, or not - ib.
1st. For the matter and form of it - - - - - ib.
2d. For the matter and substance of it - - - - - ib.

5. When an obligation shall be void; for that it is made to another, and not to the sheriff, in another manner than is appointed by the statute of 23 Hen. 6, c. 10 - - - - - - - - - p. 373
6. How a single obligation shall be taken - - - - - - 375
7. How an obligation with a condition, or the condition of an obligation shall be taken, and how it must and ought to be performed - 376
1st. In respect of the persons that are to do the thing - - 377
2nd. In respect of the time when the thing is to be done - - ib.
3rd. In respect of the place where the thing is to be done - 378
4th. In respect of the thing itself to be done - - - - 399
5th. In respect of the manner and order of doing the thing, and other matters - - - - - - - - - - - - 380
8. When the condition of an obligation shall be said to be performed and the obligation saved; or not - - - - - - - - 383
9. When a single obligation shall be said to be broken and forfeited; or not - - - - - - - - - - - - - 388
10. When the condition of an obligation shall be said to be broken, and the obligation forfeit, or not - - - - - - - - - 389
11. By what means and when an obligation, good in its original creation, doth or may become void, be discharged, or gone by matter *ex post facto*; or not - - - - - - - - - - - - - 393

CHAP. XXII.

Of a Defeasance.

1. Definition of a defeasance - - - - - - - - - 396
2. Where and in what cases a defeasance may be; and what things may be defeated and avoided thereby; and where, and what not - - - - - - - - - ib.
3. What shall be said a good defeasance, and what not - - - 397

CHAP. XXIII.

Of a Testament.

1. The definition of a testament - - - - - - - - 399
2. The parts of it - - - - - - - - - - - ib.
3. The nature and effect of a testament, and of a codicil - - - 401
4. What shall be said a good and a sufficient testament, or not - 402
1st. In respect of the person that doth make it, and the thing whereof it is made; and what persons may make a testament, and of what things, or not, and how - - - - - - - - - - 402
2nd. In respect of the mind of him that doth make it - - 404
3rd. In respect of the occasion or motive of it - - - 405
4th. In respect of the manner and form of the disposition - 406
1st. Naming of an executor - - - - - - - ib.
2nd. If it be of lands, it must be in writing - - - ib.
3rd. Uses and lands by custom, and chattels, devisable without writing - - - - - - - - - - - 407
4th. The matter or hand wherein and whereby it is written - ib.
5th. Sealing and subscribing the testator's name not needful - ib.
6th. Interruption in the making of the will - - - - ib.
7th. In respect of the proof of it; and what shall be said a sufficient proof of a testament, or not - - - - - - - 408

5. Where and how a testament, good in its beginning, may become void by matter *ex post facto*, or not - - - - - - - p. 409.
1st. By countermand or revocation - - - - - ib.
2nd. By cancelling of it - - - - - - - - 411
3rd. By alteration of the estate of the testator - - - ib.
4th. By intention to alter it - - - - - - - 412
5th. By making another of the same date - - - - ib.
6th. By the declaration of the testator - - - - 413
6. Where a testament, void or voidable in its inception, may become good by some matter or accident *ex post facto*; and where not - 413
7. What shall be said a good and sufficient devise or legacy, or not - ib.
1st. In respect of the devisor, and who may be the devisor - 414
2nd. In respect of the devisee; and who may be a devisee; and by what name - - - - - - - - - - - 414
3rd. In respect of the mind of the testator - - - - 415
4th. In respect of the free will of the testator - - - ib.
5th. In respect of the manner and form of the devise; and how a devise may be made - - - - - - - - - 416
6th. In respect of the thing devised; and what may be devised; and by what name - - - - - - - - - - 420
7th. In respect of the tenures and conditions, causes and ends of the devise - - - - - - - - - - - 433
8. The exposition of testaments and devises, and how they shall be construed and taken - - - - - - - - - - - - 434
1st. In respect of the person that is to take by the devise; and what, and when, and how he shall so take by the devise - - 434
2nd. In respect of the thing devised - - - - - 437
3rd. In respect of the estate and time that is devised - - 439
4th. In respect of other matters - - - - - - 445
1st. In respect of the person that shall take by the devise - 446
2nd. In respect of the thing - - - - - - - ib.
3rd. In respect of the time - - - - - - - 447
9. Devise of lands to executors or others to sell; or that executors or others shall sell, or otherwise dispose of them; how this shall be taken, and what sale and disposition shall be good, or not - - - - 448
10. Devise upon condition, and what words in a will shall be construed in the sense of a condition, and what not - - - - - - 450
11. Where a devise, void or voidable in its inception, may become good by matter *ex post facto*, or not - - - - - - - - - 451
12. Where a devise, good in its inception, shall or may become void by matter *ex post facto*, or not - - - - - - - - - - 451
13. Where a legacy shall go to the executor when the legatee doth die, before he doth receive it; and where not - - - - - 453
14. Where an executor, upon a devise to him, hath an election to have the thing devised as executor, or as legatee; and when he shall have it in the one right or in the other, and what act shall make a declaration of his election - - - - - - - - - - - 454
15. Definition of an assent - - - - - - - - - - 455
16. Where an assent is necessary, or not; and where a man may enter into the lands, or take the goods or chattels devised, unto him, without the assent or delivery of the executor; and what shall be said a sufficient assent to execute a legacy, or not - - - - - - - 455
17. How a devisee may attain the thing devised; and what remedy he shall have to recover it, or damages for it - - - - - - 458
18. What person may make or appoint an executor, and what not, and how - - - - - - - - - - - - - 459
19. What person may be made or appointed an executor, and what not, and by what name - - - - - - - - - - - 460

20. By what words a man may be made an executor, and what words in a testament shall make a man full executor, or not, but a coadjutor or supervisor; and who shall be an executor by such words - p. 461
21. Where and in what case an administration is grantable, or not; and to whom it doth belong to grant it, and to whom it must be granted - 461
22. How an administration may be granted, and what shall be said a good administration, or not - - - - - - - - - 464
23. Who shall administer after the death of an executor or administrator, and who not; and how an executor of an executor shall charge, and be charged - - - - - - - - - - - - 464
24. Where an executor or administrator may accept or refuse the executorship or administration, and how; and where he may be executor after he hath refused, or not; and what act or intermeddling with the goods of the deceased shall be said an administration; and what not - 466
25. What things an executor or administrator shall have by virtue of his executorship or administration; and what not - - - 468
1st. In respect of the nature of the thing - - - - ib.
2nd. In respect of the case - - - - - - - 469
26. What an executor may do by virtue of his executorship; and the power of an executor, administrator, or ordinary - - - - - 474
27. The office, duty, charge of an executor or administrator, and of the ordinary - - - - - - - - - - - - 476
1st. In the funerals - - - - - - - - - ib.
2d. In making an inventory - - - - - - - ib.
3d. In probate of the will - - - - - - - - 477
4th. In payment of debts and legacies; and the order of payment of debts and legacies - - - - - - - - - 477
5th. In making an account - - - - - - - - 480
28. Where and how an executor or administrator shall charge others in respect of the estate of the deceased, and what actions and remedy he may have against others, and what not, and how - - - - - - 481
29. Where and how an executor or administrator shall be charged by others, and what actions and remedy may be had against him, or not - 482
30. What act one executor or administrator alone may do; and where the act or laches of one may prejudice or bar his companion, and where not 484
31. What act one executor may do to another; and what remedy or action one executor or administrator may have against another, or not - 485
32. Definition of a *devastavit* - - - - - - - - - ib.
1st. What shall be said a *devastavit*, and wasting of the goods of the deceased by an executor or administrator; and how he shall be charged thereupon - - - - - - - - - 485
33. Executor of his own wrong, who shall be said to be so; and what act shall make him so to be accounted; and what act such an executor may do, and how he shall be charged, or not - - - - - - - 487
34. Administrator *durante minori ætate*; what he is, and his power, and when it shall end - - - - - - - - - - - - 490
35. Where an administration once committed by the ordinary may be afterwards revoked; and what shall be said a revocation of such an administration, or not; and what acts done before shall stand in force, or not 491
36. What acts done by one executor or administrator may be avoided by the subsequent executor or administrator, and what not - - - - 492
37. What shall be said a good bar in debt; or other action brought by or against an executor or administrator, and what not - - - 498
38. Where and in what case an executor or administrator shall be charged by his own act or pleading upon his own goods; and where execution shall be *de bonis propriis*, and where not - - - - - - - 494
39. What shall be said to be assets in the hands of an executor or administrator to charge him, or not - - - - - - - - - 496

40. The definition of a probate - - - - - - - p. 498
41. Where the probate of a will is necessary, and where not; and by and before whom, and in what time it must be proved - - - 491

CHAP. XXIV.

Of an Use.

1. Definition of an use - - - - - - - - - 501
2. Different kinds of uses - - - - - - - - - ib.
3. The nature, incidents, and original of it - - - - - 502
4. What shall be said a good use of land, or not; and when and where such an use shall be raised, altered or created, or not - - - 507
1st. In respect of the manner of raising it, and the several ways whereby uses may be raised - - - - - - - - - 507
2d. In respect of the persons entrusted, and who may be seised to an use - - - - - - - - - - - 508
3d. In respect of the persons for whom the trust is, or the *cestui que use* - - - - - - - - - - - 509
4th. In respect of the estate and possession of him that doth create the use - - - - - - - - - - 509
5th. In respect of the estate and possession of him that doth take by the conveyance - - - - - - - - - 509
6th. In respect of the cause or consideration of it; and what shall be a sufficient consideration to raise or alter an use; or not - 510
7th. In respect of the manner and form of the words used in the raising of uses; and what manner of uses may be made; or not - 514
8th. In respect of the nature and quality of the use - - 516
5. Declaration of uses; and where an use of land may be declared upon any assurance; and what shall be said a sufficient declaration of such an use; or not - - - - - - - - - - - - 517
6. Averment of uses; and where an use of land may be averred upon any assurance; and what shall be said a sufficient averment; or not - 520
7. To what use an assurance of land shall be by construction of law, and how the limitation of the uses of land by a deed shall be construed - 521
8. Where and how uses of land may be extinguished and destroyed, or suspended, or not; and where the ancient uses shall be revived by the entry of the feoffees, or not - - - - - - - - - 523
9. Where a power to revoke uses of land shall be good, and how they shall be taken; and what revocation by reason of such power shall be good, and what not - - - - - - - - - - 524
10. Other trusts and confidences of lands and chattels real and personal, the nature of such trusts, the duty of them that are trusted, and the remedy to be had against them for breach of their trust - - - - 527

APPENDIX - - - - - - - - - - - - 531
INDEX - - - - - - - - - - - - - 543

For the different subjects of the Chapters the Reader is advised to refer to this Table of Contents, and not to the Index. The Index has been prepared in contemplation of this advice.

ERRATA.

for " his [the father's] brother," last line but one, p. 33, *read* " his [deceased] brother."
" teeate," p. 36, *read* " estate."
" may," p. 82, last line, *read* " many."
" cass," p. 82, *read* " case."
" opening," p. 91, last line, *read* " opinion."
" for if the soil were to have pass," p. 101, *read* " for if the soil were to have been excepted."
" *deivcativus*," p. 155, *read* " derivations."
" feoffment," p. 160, *read* " release."
" observation," p. 186, *read* " derivation."
" re-entry," p. 235, *read* " recovery."
" Exetion," p. 375, *read* " Execution."
387, " not" *omitted*.

THE

TOUCH-STONE

OF

COMMON ASSURANCES.

CHAP. XII.

Of a Grant.

Co. super Lit. 172. 9. Fincheley, 29.

THIS word is taken largely where any thing is granted or passed from one to another. And in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like; for he that doth give, or sell, doth grant also. And thus it is sometimes in writing or by deed, and sometimes it is by word without writing. [Now, in consequence of the statute of Frauds and Perjuries, 29 Car. 2, c. 3, there must be a writing if any estate beyond three years, or even an estate for less than three years, at a less rent than two-third parts of the value, be designed to pass.] But the word being taken more strictly and properly, it is the grant, conveyance, or gift, by writing, of such an incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed. Or it is the grant of such persons as cannot pass any thing from them but by deed, as the king, bodies corporate, &c. And this albeit it may be made by other words, yet it is most commonly made by this word "grant," as being most proper to this purpose. Know therefore that amongst hereditaments some are such as are said to lie in livery, *i. e.* such as whereof livery of seisin may be made, as manors, houses, lands, [held for an estate which confers the right of possession,] &c.; and some are such as do not lie in livery, *i. e.* whereof no livery of seisin can, nor need to be made, but they pass by the delivery of the

Grant. Quas.

[King.]

[Corporation.

Co. super Lit.

[Thing lying in livery.]

deed without any more, [except that at the common law; and till the statute of 4 and 5 Ann, c. 16, attornment was necessary for the perfection of every grant;] and of this sort are rents, reversions, [even of manors, houses, lands, &c.] services, advowsons in gross, and the like; which things cannot pass from man to man without deed; or matter of record, which is of a higher nature than a deed (1). And he that makes this grant is called the grantor, and he to whom it is made is called the grantee.

Grantor.
Grantee.

2. *Quotuplex.*

It is taken here in the largest sense as that which doth comprehend both. And so some grants are of the land or soil itself; and some are of some profit to be taken out of or from the soil, as rent, common, &c. And some are of goods and chattels; and some are of other things, as authorities, elections, &c. And they are made sometimes by matter of record, and sometimes by *P. 229. * deed or writing in the country, and sometimes by word without either. Some grants also tend to charge the grantor with something he was not charged with before; and some to pass something out of him to the grantee; and some tend to discharge the grantee of something wherewith he was charged or chargeable before, and whereof he is now hereby discharged (2).

3. *Things necessarily requisite to every good grant.*

Regularly these things are requisite in every good grant or gift: 1. That there be a grantor, donor, &c. and that he be a person able to grant, and not disabled by any legal or natural impediment. 2. That there be a grantee, donee, &c. and that he be a person capable of the thing granted, and not disabled to receive it. 3. That

Co. 11. 78. Plow. 555.

Perk. Sect. 1.

(1) On this difference between things corporeal and incorporeal, it hath been held, that there can be no discontinuance of things which lie in grant; and therefore if tenant in tail of a rent, advowson, common, or remainder or reversion expectant on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing whereof he is seised in tail, and make a feoffment with warranty, that these acts work a discontinuance of the intail, for nothing passes but during the life of the tenant in tail which is lawful. *Co. Lit.* 327 b. 3 *Co.* 85 b. [This is not correct, see *Mackell* v. *Clark*, 2 *Ld. Raym.* 778. When the tenant in tail enters and disseises the freeholder, he gains a fee by wrong, though he does not discontinue the estate tail. So when he conveys his reversion by grant or lease and release, a determinable fee passes.] Also of things which may be transferred without the notoriety of livery of seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any act, [viz. alienation in deed, as distinguished from an act on record,] in *pais* forfeit them. *Bac. Abr. Grants.* See further as to the nature of a *grant* in 2 *Bl. Com.* 317. *Vin. Abr. Grants* (A. 2.)

(2) See accordingly 1 *Wood*, 660. *Shep. Law of Assur.* 150.

there be a thing granted, and that the thing be such a thing as is grantable. [Or a charge created, or a duty, right or title discharged; or an obligation created, or an election or authority communicated.] 4. That it be granted in that order and manner that [*viz.* which the] law requireth; as where the thing is not grantable without deed, that it be done by deed. And if it be [granted] by deed, that the deed have apt words to describe and set forth the person of the grantor and grantee, and thing granted, &c.; and that all necessary circumstances, as sealing, and delivery, and livery of seisin, and attornment where it is needful, be observed. [The necessity of attornment is now superseded by the stat. of 4 and 5 Ann, c. 16. See *chap. Attornment.*] 5. That there be an agreement to, and acceptance of, the grant or thing granted by him to whom it is made; [a fact which is to be presumed till the contrary be shown. *Thompson* v. *Leach*, 3 *Mod.* 296.] And for default in either of these particulars a grant may be void. *In acquirendo rerum dominio scilicet quod donationes non valent licet sint inceptæ, nisi sint perfectæ.* But if grants be very ancient, and the things granted have been enjoyed according to the grant ever since the making of it; in this case the grant may be good, notwithstanding some legal defect in some of these particulars. [As absence of evidence of livery, &c. for, from possession, &c. livery, &c. will be presumed.]

Bro. Grant, 89.

Corporations, as dean and chapter, mayor and commonalty, and such like, regularly can neither grant lands, goods, or chattles, but it must [*read*, except it] be by deed. But the grantees of such persons, and all other common persons, may grant or give any thing which doth lie in livery, as manors, houses, lands, and such like things, in fee simple, fee tail, for life, for years, or at will, by word, [now by writing duly signed, 29 Car. 2, c. 3,] without deed. And if a lease be made of any such thing for life or years, with a remainder over in fee simple, fee tail, or for life, it is good, albeit the same be done by word, [*viz.* writing duly signed,] without any deed in writing (3). [*Omit*,

Park. Sect. 64.

4 H. 7. 17.
Bro. 150.
11 H. 7. 3.
Park. Sect. 60.

4. What shall be said a good and sufficient grant, gift, or sale; or not.
1. For the manner of it; and what may be granted without deed; or not; and how.
Rents, services, &c.

(3) Before the statute 29 Car. 2, c. 3, for prevention of frauds and perjuries. That statute has been often referred to in the notes to this edition; and as that act passed since the third edition of the *Touchstone* (in 1651,) the student will therefore consider the altera-

in writing. But a remainder when created, and while it retains that quality, cannot be granted without deed.]

Such things as are said to lie in grant and not in livery, generally cannot be granted or given, had or taken, without deed; unless it be in some special cases (4). And therefore rents and services, and such like things which are in gross, and not incident to some other thing, may not be granted without a deed. And therefore if a rent-charge be granted unto me for years, I may not grant this rent over without deed. [And yet lands held for a term of years may, as to the term, but not as to rent or services, be transferred without deed.] And if there be lord and tenant of arable land by fealty, and the service of yielding the tenth sheaf of corn before [*read*, whenever] it be sowed; the lord cannot grant this service for * years without deed. But if a rent or any service be parcel of, or incident to, a manor, or any other thing which is grantable without deed; in this case, by the grant of the principal by word, [*read*, livery evidenced by writing,] this thing may pass, as belonging thereunto, without any deed. Also rents or services may be granted upon a partition by one coparcener to another without deed (5).

Co. super Lit. 49. Dyer, 139. Perk. Sect. 61. 60. 63. Bro. Grant, 69.

[Rent-charge for years.]

*P. 230.

A reversion cannot be granted [for an estate] in fee simple, fee tail, for life, or years, without deed; unless it be in case where it is parcel of a manor (6.) But a reversion may be granted upon a partition, by one coparcener to another, without any deed. And the same law is of a remainder [on a like partition.] And therefore if one make a lease for life or years to one, the remainder in fee simple, fee tail, or for life, to another, without deed, howsoever this be a good remainder in the first creation without deed, yet this remainder cannot, [while it is a remainder, and as already observed,] be granted over without deed.

Reversion or remainder.

Perk. Sect. 61. Dyer, 174. Plow. 433. Bro. Grant, 104.

A parsonage or rectory, albeit it consist of

[Rectory,] advowson, tithes, &c.

15 H. 7. 8. 16 H. 7. 3.

tion made by that statute in the several parts of the *Touchstone* which treat of leases (exceeding the term of three years,) grants, &c. being made by parol and without deed in writing, if the act is not particularly mentioned.

(4) Because of things which lie in grant no possession can be delivered; and they are not like corporeal inheritances, which pass by livery, and therefore he that claims them must show a grant of them, which he cannot do without deed.

(5) Accordingly *Co. Lit.* 169.

(6) 2 *Roll. Abr.* 62.

19 H. 8. 12. 21 H. 6. 43. nothing but tithes, and the like, besides the church and church-yard, and it hath no house nor glebe belonging to it, yet may be granted without deed in fee simple, for life, or years; [consequently it lies in livery, and is a corporeal hereditament;] and then the tithes and offerings will pass as incident. [See page 213.] But the tithes alone, or a portion of tithes, oblations, mortuaries, or obventions, are not grantable, by themselves, without deed. And

All this was agreed, 36 El. B. R. therefore a lease parol of tithes, [*i. e.* a lease, not being by deed,] albeit it be but for years, is not good. And if the parson agree with one of his parishioners that he shall have his own tithes; this is not a good grant of the tithes, neither may it be pleaded or used so; but perhaps by way of agreement a parishioner may retain his tithes. [This is constantly done, and is valid by way of contract.] And if a lessee for years of tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron Denham, 2 Car. at Sarum Assizes. And yet it is held that a parson may grant his tithes from year to year, to him that is to pay them, without any deed, but this is by way of retainer; [and the right to take the tithes in kind will not arise till a half year's notice has been given to determine the agreement.] But this grant or agreement must be made to and with the party himself that is to pay the tithe, and not with another; neither can this interest be assigned, or a stranger take advantage of it, as hath been agreed in the case of *Hawkes* and *Brafield*, *Pasch.* 3 *Jac. B. R.*

[Lease of tithes.]

[Retainer of tithes.]

Mich. 8 Jac. Dr. Longworth's case.

21 Ed. 3. 38. 11 H. 4. 3. Dyer, 29. 10. Co. 1. 1. An advowson in gross cannot be granted without deed; yea [indeed] the grantee of the grantee of an advowson is to show both the deeds. But an advowson is grantable upon a partition between coparceners without deed. And an advowson incident to a manor, or piece of land, is grantable with the manor or land, [by livery and writing evidencing the livery,] without any deed. The next avoidance to a church is not grantable without deed (7).

[Partition.]

Plow. 150. 9 Ed. 4. 47. [Next avoidance.]

Perk. Sect. 61. Common of pasture, &c. Common of pasture, &c. cannot be granted [for an estate] in fee simple, fee tail, for life, or years, unless it be in case of

(7) See accordingly in *Cro. Eliz.* 163, *Crispe's case*; *Long* and *Hemming's case*, 1 *Leon.* 207; *Co. Lit.* 332. 335; and *Whistler's case*, 10 *Co.* 63. See more amply how an advowson shall be granted, in *Com. Dig. Advowson* (C. 1.)

partition, or of appendancy, as incident to some
*P. 231. corporeal thing, * without deed. And therefore if a man grant by word of mouth, [or writing, not being a deed,] to me common for twenty beasts in his manor; this is not good. Neither, if it be granted to me by deed, may I grant this over to another without deed. But if a man have common of pasture appendant or appurtenant to his land; in this case he may grant his land with the common appendant by word only, [*viz.* livery of seisin, evidenced by mere writing,] without any deed. Franchises, as fairs, markets, courts, warrens, [*i. e.* the franchise of a free warren, not the soil of a warren,] and the like, or the profits thereof, are not grantable without deed. But it seems a hundred, [not being a mere franchise,] is grantable without deed; for that, [like a manor,] is *liberum tenementum.* The profits of a mill, county, ferry, corody, or the like, are not grantable without deed.

[Common appurtenant.]

Franchises and such like things.

15 H. 7. 8.

[Hundred.]

[Profits.]

Things in action, and such like things.

Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing, [or possibilities, or uncertain interests not vested, as contingent remainders, executory devises, &c.] are not grantable at all, but by way of release to the tenant of the land, &c. by which means it may be extinguished; but this [release] may not be neither without deed. And therefore if a man take my goods as a trespssaer, or I deliver him my goods to keep, [*query*, in this case,] and after I will give these goods to him; I cannot do this without deed, [or accord and satisfaction. But contingent remainders may be assigned in equity, and devised at law; and choses in action, not being titles of entry, as rights of action in or to lands, may be transferred in equity. Equities of redemption, on mortgages in fee, are also transferrable in equity.]

6 H. 7. 9. Dyer, 91. 196. Dect. & Stud. 16.

[Condition.] [Election.]

An election, condition, [see *ch. Condition*,] covenant, assent, licence, or liberty, cannot be created and annexed to an estate of inheritance or freehold without deed.

Dyer, 281.

Offices. [Privileges.]

A privilege to hold land for life, [or years,] without impeachment of waste, is not grantable without deed. Offices for the most part are not grantable without deed. And yet some inferior offices, as stewardships, bailiwicks, and the like,

Co. 9. 9.

[Stewards.]

are; for such officers a lord of a manor, [and even a corporation,] may retain by word without deed.

Park. Sect. 57. 60. Bro. Done, i. Dyer, 370. 5 H. 7. 35, 36. Plow. 150.

Most chattels real and personal may be given and granted without deed. And therefore if a man by word of mouth grant, give, or sell me his lease for years (8), the wardship of body and land, or the wardship of land that he hath by reason of a tenure by knight's service, or by grant from the king, or grant or sell me the trees standing upon his ground, the corn growing upon his land, his horse, sword, plate, or other household stuff; this is a good grant or gift. But the wardship of the body of an heir only cannot be granted without deed. So a next presentation cannot be granted without deed (9).

Chattels.

[Wardship of land.]

[Wardship of body.]

[Next presentation.]

Plow. 540.

If one grant his reversion of land to one, and by the same deed granteth a rent out of the same land to another, and delivereth the deed to both of them at one time; this is [*i. e.* both these grants are] good, and shall enure first as a grant of the rent to one, and then as a grant of the reversion to the other, [as the only mode of giving effect to the intention.]

What by the same deed.

Dyer, 6.

If one convey land to another, and the grantee by the same deed doth grant a rent or common to the grantor out of the same land conveyed; this is as good as if it were by another deed; [for it amounts, first, as grant of the land; and secondly, as a grant, by the grantee of the rent or common. The same rule is applied (4 *Leon.* 147) to a bargain and sale, and a grant of a rent by the bargainee, in one and the same deed.]

[Two grants out of one deed.]

* *Dedi et concessi* be the most apt words for all kind of grants; yet it may be by other words, and the grant as good as by those words (10); [and the words limit and appoint may amount to a grant. *Shove* v. *Pinke*, 5 *Term Rep.* 124. 310. No formal words are necessary, *ibid*; and see *Coventry* v. *Coventry*, 1 *Amb.* 312; *Doe d. Wilkinson* v. *Tranmer*, 2 *Wils.* 75; *Willes*, 682. In *Coventry* v. *Coventry* it was held, that if a deed

*P. 232.

By what words of grant.

(8) A lease is not assignable without a writing signed by the parties, since the statute 29 Car. 2. *Queen* v. *Goddard*, 3 *Salk.* 171. [And must now be stamped.]

(9) See accordingly 1 *Wood*, 662; and fully as to a grant of the next presentation, *Com. Dig. Condition* (C. 2.)

(10) The words *dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use to which of these purposes he will. *Co. Lit.* 301 b.

could not operate in the way intended, it might in another, in order to effectuate the intent of the parties; *per Kenyon*, 5 *Term Rep.* 130. The words bargain and sell may amount to a grant; *Noy*, 66. The contrary was formerly held to be law; but it was agreed, at that time, that a deed with the words bargain, sell and alien, would operate as a grant. 2 *Cro.* 210; *Godol.* 7; *Browne* v. *Jones*, 1 *Atk.* 190. A release, if the lease for a year be lost, &c. may operate as a covenant to stand seised, if there be the consideration of blood, &c.]

The best way in grants is to grant by words in the present tense, as well as in the preterperfect tense. [See 2 *Prest. Convey.* p. 377.] But a grant by words of the preterperfect tense only, as by *dedi et concessi* only, without words of the present tense, is good (11). 35 H. 6. 12.

2. In respect of the person of the grantor, &c. and the naming of him; and who may be a grantor; and how.

Touching this part, two things are requisite: 1. That the grantor be a person able. 2. That if the grant be by deed, he be sufficiently described and set forth, either by his proper names or else by some other matter of distinction. Note, therefore, that whosoever may be a feoffor, may be a grantor. And any natural, politic or corporate body, (not prohibited by law, as monk, friar, woman covert, infant, and such like,) may be a grantor, donor, &c. And the grants of such persons will be good, [provided, as to a married woman, there be a fine or recovery; and as to infants, see *infra*.] See Feoffment, ch. 9. Numb. 4. Perk. Sect. 3.

Alien.

An alien may and is able to grant or give any thing that he is capable to have or take by grant or gift, (12) [as against himself, &c. but

(11) In many cases the law creates a good grant without express words, because it is the design of the law to render all contracts binding and effectual, so far as the intention of the parties may be gathered from the deed; and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with. 2 *Roll. Abr.* 56. *Bac. Abr. Grants* (F.) See further by what words grants may be made, or what may be said to amount to a grant, in *Vin. Abr. Grants* (H. 7.)

(12) An alien may purchase *any thing*, but can *hold nothing* except a lease for years of a house for convenience of merchandize, *Co. Lit.* 2 b; but stat. 32 H. 8, c. 16, § 23, makes void all leases of houses or shops to an alien, being an *artificer* or *handicraftsman*. This law, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed; but in favour of aliens it has been construed very strictly. See 1 *Sid.* 309. 1 *Saund.* 7. 2 *Show.* 135. 3 *Mod.* 94. 3 *Salk.* 29. In the latter book, a lease to an *alien artificer* is said to be forfeitable to the king at common law; but for this extraordinary doctrine no authority is cited, see note 7 to *Co. Lit.* 2 b. As to the capacity of aliens to take personal chattels, see 3 *Ro. Rep.* 93. All other purchases (when found by inquest of office) being forfeited to the king. He is not capable of inheriting or transmitting

not as against the crown; and an alien, tenant in tail, may suffer a common recovery, which will be effectual as against him and his issue, and the persons in reversion and remainder. 4 *Leon.* 84.]

Perk. Sect. 26. See ch. 2. Numb. 6.

Persons attaint or outlawed.

A person attainted of treason or felony may give or grant his land; and this [grant] is good against all others, besides the king, and the lord of whom his land is held. [*Sed query*, if this is not only as to the king, since the title of the lord is a title by escheat, and there is no escheat, since there is a tenant by the alienation. If an attainted person be disqualified to alien as against the lord, this disability is because he is *civiliter mortuus*. For treason there is a forfeiture of the inheritance; in felony there is not any such forfeiture. 3 *Prest. Abstr.* 393. In one case at N. P., Lord Kenyon declared himself of opinion, that a grant by a felon or a person who had committed treason, made at any time before attainder, was good; *sed query*; for the books, by making a distinction as to freeholds and chattels, seem to consider the law differently. A recovery by a person who has committed felony, and suffered after conviction, and before attainder, would bar the issue and the reversioner and remainder-men. 1 *Prest. Conv.* 257.] And he may [before conviction, *Sir Gerard Fleetwood's case*, 8 *Rep.* 171,] grant or give his goods to relieve himself in prison; and this will be good against all others, and the king and lord also. [The doctrine of forfeiture, on attainder for felony, seems to be involved in confusion. The king is certainly entitled to his year day and waste; he is also entitled to hold during the life of the person attainted, because the attainted person cannot hold; and the title of the lord doth not commence till the death of the party, because it is a title by escheat, and not a title by forfeiture; or rather, it is a title by escheat, by reason of forfeiture. Some books say the title of the lord relates to the time of the crime committed; and Lord Raymond seems to think an alienation before attainder will defeat the lord. This is consistent

by descent; but if he be made denizen, the issue which he hath afterwards shall be heir to him. *Co. Lit.* 2. 8. The law will not give an alien the benefit of taking by act of law, as by descent, curtesy, dower, or guardianship, because he cannot keep it; *et lex nihil facit frustra*; *per Hale, Ch. B.* 1 *Vent.* 417. Alienation to an alien is a cause of forfeiture to the crown of the lands so alienated. 2 *Bl. Com.* 274. See more fully as to the law respecting the capacity of an alien to acquire or convey property, in the notes to the 13th edit. *Co. Lit.* 2. 8. 42. *Vin. Abr. Alien* (A.) *Com. Dig. Alien* (C.)

with the idea that the king, as king, has a title by forfeiture relating to the time when the crime is committed, and that the title of the lord is a title by escheat, and takes place only when, for want of alienation, there is a defect of tenant. On an inquisition for the crown as lord, the finding of the jury is, that upon the attainder of the party, the lands did escheat and become forfeited to the king. 4 *Black. Com.* 379. And Blackstone treats the title of the lord as a title by escheat; and yet says, it relates back to the time of the crime committed, as well as forfeiture by treason, so as to avoid all intermediate charges and conveyances; but if it be a title by escheat, (and there seems no doubt on that point,) why should it have any relation, since it is the death without heirs; in other words, the defect of a tenant, which is the reason of the forfeiture, though the failure of heirs is the consequence of the attainder and of the corruption of blood. 3 *Prest. Abstr.* 393.] A person outlawed in a personal action may give or grant his goods or chattels; and the gift or grant will be good against all others but the king (13).

Woman covert. [Queen.]

The queen [is considered as a feme sole, and] may, without the agreement of the king, make grants, gifts, &c. of her lands or goods (14); but another woman that hath a husband cannot give or grant her lands or goods without her husband's consent, unless it be in some special cases. And albeit she do recite by the deed that she is sole, and not covert, yet this will not help. And if the case be so, that by agreement between her and her husband, there be a certain portion of her husband's lands or goods allotted unto her to dispose of, and manage at her pleasure, yet she alone, without her husband, [unless there be a power formally and properly created,] can make no good grant or gift of any part of these lands or goods

Co. super Lit. 3 *Perk.* Sect. 8. 20. 41. See ch. 2. Numb. 6.

(13) Persons attainted of treason or felony are incapable of conveying after the offences committed, provided attainder follows. *Co. Lit.* 42. See more amply as to the consequences of attainder or outlawry, with respect to the forfeiture of the lands of persons attainted or outlawed, and how far and in what cases grants made by them are effectual, *Bac. Abr. Forfeiture* (A.) *Outlawry* (D.); *Com. Dig. Forfeiture* (B. 1.) *Utlagary* (B.); *Bac. Use of the Law*, 42. 1 *Wils. Rep.* pt. 2, p. 219. 2 *Bl. Com.* 290. *Vin. Abr. Attainder* (B.) *Forfeiture* (P.)

(14) The queen consort is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and to do other acts of ownership, without the concurrence of her lord; a very ancient privilege, and which no other married woman hath. See 1 *Bl. Com.* 218, 7th edit.; and further in *Co. Lit.* 133 a.

[at law; see *Goodill* v. *Brigham*, 1 *Bos. & Pul.* 192; but it is otherwise in equity.] But if she [do, as a feme sole,] grant any thing by fine, and the husband do not avoid it during the coverture; this grant will bind her after his death. [But if it appear by the record that she is under coverture, the fine will be void, unless her husband joins in the fine, or has abjured the realm, &c. 1 *Prest. Convey.* 255.] And if she make a gift or grant of her husband's goods, it is thought this is not good until her husband agree to it (15); [because they are his property.]

9 H. 7. 24. 26 H. 8. 2. Perk. Sect. 12, 13, 14. 19. 7 H. 4. 5. See ch. 2. Numb. 6.

An infant cannot make any gift or grant, &c. [Infant.] that is good, but in special cases; for if he maketh any grant or gift that taketh effect by the delivery of the deed only, as if he grant a rent-charge out of his land, or make a feoffment with a letter of attorney to give livery of seisin, [*Whittingham's case*, 8 *Rep.* 42, b.] or give or sell his horse, and the buyer or donee take him himself; these are void *ab initio*. [The old cases certainly warranted this difference; but in *Zouch* v. *Parsons*, 3 *Burr.* 1794; 2 *Term Rep.* 161, the cases were re-considered, and this difference strongly urged; but the K. B. held the conveyance of an infant mortgagee voidable only, not void. But this decision is not followed in practice, or approved by sound lawyers. As to leases by infants, see *Bac. Abr. Leases.*] And if the grant or gift take effect by the delivery of his own hand, as if he * make a feoffment and give livery of seisin himself, or sell a horse and deliver him with his own hands; this [feoffment or gift] is voidable by the infant himself, or others that shall have his right, &c. [as heirs, executors, &c.] But [not a lord by escheat. And] if an infant grant any thing by fine, this [fine] must be avoided during his minority, or else it cannot be avoided at all (16); [or at least there must be an inspection

*P. 233.

(15) As to grants by feme coverts, see the references in note 18, p. 53, and more amply in *Bac. Abr. Grant* (A. 4.) *Baron and Feme* (I.) *Com. Dig. Baron and Feme* (P.) (Q.)

(16) See before, note 37, p. 7, and note 23, p. 56; and further, with respect to the grants of infants, in the case of *Zouch* v. *Parsons*, 3 *Burr.* 1794. The first general question in that case was, whether the conveyance was good, and *bound the infant*; respecting that question the Ch. J. elegantly says, "miserable must the condition of minors be, excluded from the society and commerce of the world, deprived of necessaries, education, employment, and many advantages, if they could do *no* binding acts. Great inconveniences must arise to *others*, if they were *bound* by no act. The law therefore, at the same time that it protects their imbecility and indiscretion from injury, through their own imprudence, enables them to do binding acts for their *own benefit*, and, without prejudice to themselves, for the benefit of *others*." The court in that case held that the conveyance, which was by lease and release, *bound the infant*. Infant may take a jointure and bar herself of her dower.

(which is the mode of trial) during infancy, and the infancy must be recorded. *Vin. Abr. Fine; supra, ch. Fine.*]

Duress. All grants that are made by duress are voidable by the parties themselves that make it [them,] or others that have their estates, &c. But if it [the grant] be done by fine, it is good and unavoidable; [though in particular cases, in which fraud exists, equity may relieve.] Perk. Sect. 16.

Non sanæ memoriæ. All gifts, grants, &c. made by deed in the country, by those that are *non sanæ memoriæ*, are good against themselves, but voidable by those that are their heirs, executors, or have their estate. [This was the rule prior to *Thompson* v. *Leach*, 3 *Mod.* 296; 2 *Ventr.* 198; *Bac. Abr. Idiot* (F.); in that case it was held that the surrender of a person *non compos mentis* was absolutely void, and not merely voidable.] But if it be by fine, it is good and unavoidable; [except so far as there may be fraud, affording to a court of equity ground for interposition and relief.] Co. 123, 124. See cap. 2. Numb. 6.

A man that is born dumb, or dumb and deaf, if he have understanding, may, by delivery of the deed and making of signs, make a good grant, gift, &c. But a man that is born deaf, dumb and blind cannot (17). Perk. Sect. 25.

Bastard. A bastard may give or grant, as well as any other man, after he hath gotten a name by reputation. [*Wilkinson* v. *Adams*, 1 *Ves. & Bea.* 423.] Perk. Sect. 26.

Parson. A parson may grant any thing belonging to his parsonage for no longer time than for his own life, and therein likewise but during his residency, [*read*, incumbency,] albeit he have the consent of the patron and ordinary. [The stat. of Eliz. c. 10, is repealed by 39 & 40 Geo. 3, c. 41.] See Lease.

Corporation. Neither the head without the members of a corporation, nor the members without the head, as dean without the chapter, or chapter without the dean, may give or grant any of the lands belonging to their corporation. [And during the time of vacancy of the head, there cannot be a grant by or to a corporation; and if there be not any head of a corporation at the time when a contingent remainder must vest in the corporation, or fail of Perk. Sect. 31, 32, 33.

Drury v. *Drury*, 5 *Brown's Parl. Ca.* 570; and may *make* a binding settlement [too general] of her own property. *Durnford* v. *Lane*, *Brown's Rep. in Chanc.* 106.

(17) See fully in the references in the notes before, and in *Bac. Abr. Grants* (A. 5.)

effect, this remainder will fail of effect. And the head of a corporation cannot make a grant to, or be the grantee of, a corporation. An individual member, (not being the head of a corporation aggregate,) may be a grantor to, or a grantee of, the corporation.]

See Executors.

Executors [or administrators.]

One executor or administrator may give or sell any of the goods of the deceased, and this is good to bind all the rest (18). [This is certainly true of executors. All the books agree on the point. And although several executors are named as grantors, and the grant is executed by only one of them, the grant would be effectual for the entirety. 3 *Bac. Abr.* 30. As to administrators it has been frequently said, they have only a joint authority, and that they must all join in a grant; the contrary, however, was held in *Willand* v. *Feern*, after three arguments. 2 *Ves.* s. 368. Executors, &c. who have an authority to sell, &c. by virtue of a power, must, it is apprehended, join in executing the authority.]

[Dyer, 23 b. Com. Dig. Administration, (B. 12.)]

What grants ecclesiastical persons may make of their ecclesiastical lands; husbands of the lands of their wives; and tenants in tail of their lands entailed; see in *Lease*. [A power of exchanging is, under various modifications, given to ecclesiastical persons by the stat. of 17 Geo. 3, c. 53, s. 11.]

Co. 6. 63. super Lit. 3.

Misnaming.

The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain; and therefore, howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his surname, and if it be a corporation, by the true name whereby the corporation is made, yet mistakes in this case, unless they be very gross, will not make void the grant. *Nihil facit error nominis cum de corpore constat.* And therefore if one that is a bastard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common esteem than his own right name, [*Sir M. Finch's case*,

[Bastard.]

(18) If a man appoints several executors, they are esteemed in law but as one person representing the testator; and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all; for they have a joint and entire authority over the whole. *Godolp. Orp. Leg.* 134. 1 *Roll. Abr.* 924. *Went. Off. of Ex.* 95. See further *post* in the chapter on testaments.

Rep. 63,] or is usually called by another name than his true name in the place where he lives; in these cases they may grant by this name, and the grant is good. [On this point there are various distinctions, and they may be reduced to the following points: 1st. If a grant, or at least a bond, be made by *A.* by the name of *B.* he is bound by estoppel. 2dly. If the grant of *A.* be made by the name of *B.* and he signs with his proper name of *A.*, then there is not any estoppel, and the grant is void. 3dly. A grant depending on livery, &c. with an instrument to which delivery is not essential, may be good as depending on the livery, though void as depending on the instrument. 4thly. Though a grant by a person ought to name the grantor precisely, so as to bind him by estoppel, no error in the name of the grantor will vitiate the grant when there is sufficient evidence of the certainty of the person. 5thly. In wills, a mistake in the name will not vitiate, when the certainty of the person can be made out by parol evidence, keeping within the rules which govern the doctrine of patent and latent ambiguities. The maxim is *nil facit error nominis, cum de persona constat.*] And if a man be baptized by one name, and after be confirmed by another [name], some have said he may grant by either * of these names. *Sed quære.* And if *John* at *Stile* grant by the name of *William* at *Stile*, this grant is good, [provided he sign the deed by the name of *William*, for then he is estopped; but if he sign the name of *John*, it is apprehended the grant is void. See the distinctions, *Vin. Abr. Grant*, 34.] *Et sic de similibus.* And these grants are good especially, when there is some other addition to make it more certain; as when a duke, marquis, earl or bishop, grant by their names [*read*, his name] of honour or dignity, and grant without any name, or with a false name of baptism; as when the duke of *Suffolk* by the name of the duke of *Suffolk* without any more words, or by the name of *William* duke of *Suffolk* when his name is *John*, or the bishop of *Norwich* grant so; these are good grants, because there is but [*viz.* only] one such duke, and one such bishop, within the kingdom. So if a dean and chapter, mayor and commonalty grant by the name of their corporation,

Perk. Sect. 41. Co. super Lit. 3.

*P. 234.

Perk. Sect. 39. [See text, Perk. Sect. 40, the text does not warrant the conclusion.] Co. super Lit. 3. Fitz. Grant, 67. Perk. Sect. 42.

[Corporation.]

without any addition of christian or surname [of the mayor, dean, &c.;] it is good. And especially then also are these grants good, when the true name doth appear in some other part of the deed; as when *John* at *Stile* reciteth by his deed that his name is *John* at *Stile*, and by the same deed doth grant by the name of *Thomas* at *Stile*, [for on the context this appears to be the grant of *Thomas*.] Or *Alice* at *Stile* reciting by her deed that she is a feme covert, when it truth she is sole, [for her recital of a falsehood cannot vitiate her grant.] But if an ordinary man grant by his surname only without any name of baptism, or by his name of baptism without any surname at all; in these, and such like cases, for the most part, the grant will be void for incertainty; unless there be some other matter in the deed to help it, or some matter done *ex post facto* to supply it; for in some cases where the thing granted doth lie in livery, such a mistake or incertainty in the grant may be holpen by the livery of seisin upon the deed afterwards; [because the act of livery gives an identity to the person; *sed query* at this day, since the statute of Frauds and Perjuries, 29 Car. 2, c. 3.] And so also it is in the names of corporations; for if the variance and mistake by omission or alteration be only in some small matter, so as it is literal and verbal only, the grant will not be hurt by it. [*Per Gibbs*, 6 *Taunt.* 550.] But if the mistake or omission be in the substance of the name, the grant may be void by it, [*i. e.* for this mistake; while, if the substance and certainty of the corporate name be in the grant, a variance from the corporate name will not vitiate the grant.] And therefore if *Decanus & capitulum ecclesiæ cathed' sanctæ & individ. Trin. Caerlil.* grant by the name of *Decanus ecclesiæ cathed. sanctæ Trin. in Caerlil. & totum capitulum ecclesiæ predict*; this is good. *Et sic de similibus.* For if the sense doth still remain either expressly, or by necessary implication; and the description be such, as doth import a sufficient and certain demonstration of the true name of the corporation according to the foundation thereof, it sufficeth. But if any of the substance or essence of the name be omitted, *contra*. And therefore if a corporation incorporate by the name of *Prepositi*

Perk. Sect. 40.

3 H. 6. 26. Perk. Sect. 38. 42.

[Omission of name of baptism.] [Of surname.]

Co. 6. 65. 10. 122. 11. 19. Dyer, 150. Co. 10. 124.

[Corporations.]

& collegii regalis coll. beatæ Mariæ de Eaton juxta Windsor grant by the name of *Prep. & sociorum Colleg. regalis de Eaton, &c.*, leaving out *Collegium et beatæ Mariæ*; this grant is void (19). [A grant by a man and woman described as his wife, when in fact she was not his wife, and perfected by a common re-entry, was deemed a binding and effectual assurance. *Boughton* v. *Sandilands*, 3 *Taunt.* 342.]

3. In respect of the grantee, and the naming of him; and who may be a grantee, &c.; and how.

*P. 235.

Touching this part, three things are requisite: 1. That the grantee be a person capable, *i. e.* that he be a person in being at the time of the grant made, [if he be to take immediately,] and not disabled by any legal * impediment to take by the grant. [But if he be to take by way of remainder, it is not necessary that he should be in being, so as there be a preceding estate of freehold to support a contingent remainder for an estate of freehold.] 2. That if the grant be by deed, the grantee be sufficiently named, or at the least set forth and distinguished by some circumstantial matter, and that he be so named or described as that he may be capable by that name whereby he is set forth. 3. That he himself, and not a stranger, do take [the first or immediate estate] by the same grant. Note, therefore, that all natural and politic or corporate bodies that are not disabled by law may be grantees. And all persons that may be grantors may be grantees; and some others that cannot grant or give, yet may take or receive. And a grant made to one, two, three, or twenty such persons is good. A[n immediate] grant of land, or rent in possession, to the right heirs [or heirs of the body] of *I. S.*, *I. S.* being then living, is void; for there neither is, or can be, any such person *in rerum natura*; for no man can be an heir to another that is living. [The maxim is, *Nemo est hæres viventis*, 1 *Inst.* 164 a; 3 *Prest. Abstr.* 6; see 1 *Fearne*, 213; and *Counden* v. *Clerk*, *Moor.* 860; *Hob.* 29. But devise may be made to a child in *ventre sa mere*, and it will be good under the learning of executory devises.] But such a grant to one in [*i. e* by way

Co. super Lit. 2, 3. Perk. Sect. 43. See in Feoffment, cap. 9. Numb. 4.

Co. 1. 101. Perk. Sect. 52. 54. Co. 2. 31.

(19) The words "*beatæ Mariæ*" are not mentioned in 10 *Co.* 124, to have been omitted; but the omission of *those words*, as well as of the word "*collegium*" is mentioned in *Dyer*, 150.

of] remainder is good, if so be that *I. S.* die before the particular estate end, and before the remainder happen. [The latter part of the proposition is inserted by mistake.] So if a grant be to him or her that shall be the first child of *I. S.* and he have no child at the time of the grant, this is void [as an immediate gift, though it may be good by way of remainder or executory devise.] So if a grant be made to the wife or child [*tanquam in esse*] of *I. S.* when there is none such [wife or child] it is void; as if a grant be to *I. S.* and to his first-born son, [as joint-tenants;] or to *I. S.* and her that shall be his wife, and he hath at the time of the grant neither wife nor son; in these cases the grant is void as to the wife and son, and *I. S.* shall have all by the grant (20); [for a grant to several, of whom some only are capable, is good to those only who are capable. But under a similar limitation to uses the wife or child may take jointly with the husband or parent. By the rules of the common law persons taking at different times, could not take as joint-tenants. If they took at all, they must have taken as tenants in common. *Windham's case*, 5 *Rep.* 8 b; 2 *Prest. Abstr.* 74. But under the doctrine of uses, or executory devises, persons taking at different times may take as joint-tenants. So when a class of persons, as children, are to take as tenants in common, one or more may take the entirety as they come in *esse*; and when more are born the estate will open to admit them to their shares. *Comberback* v. *Perryn*, 3 *Term. Rep.* 484, provided if they be to take by way of remainder they be capable during the particular estate. *Mogg* v. *Mogg*, 1 *Meriv.* 654.]

Co. super Lit. a. An alien may be a grantee; but if any thing be granted unto him whereof he is incapable, as any estate of lands in fee simple, for life, or years, he Alien.

(20) By the stat. 10 and 11 William 3, c. 16, posthumous children are enabled to take in remainder, in the same manner as if they had been born in their father's lifetime; although there happen to be no estate limited to trustees after the decease of the father, to preserve the contingent remainder to such after-born children, until they are born, or come in *esse* to receive the same. And in *Basset* v. *Basset*, determined under that statute, 3 *Atk.* 203, a posthumous child, born after the next rent day had incurred after the death of his father, is by that statute entitled to the intermediate profits of the estate, *settled* from the death of the father, as well as to the lands themselves; but note the distinction where the estate is by descent, for the profits of the estate *descended* are only to be accounted for to the infant from the time of his birth. *Ibid.* See further how far the law regards and takes notice of infants *in ventre sa mere*, 1 *Bl. Com.* (7 edit.) 130, 2 vol. 169, &c. *Abr. Infancy* (C.) *Fearne on Cont. Rem.* 3d edit. 235.

Prerogative.

cannot hold it [after an inquisition, &c. in his lifetime,] but the king will have it from him; [and estates of inheritance vest on the death of the alien, if he die seised in the king without office. It is common to limit lands to an alien from and after his naturalization; and it seems, that on being naturalized, he is capable to take and to hold. It was a prevailing opinion, that on the naturalization of an alien, all purchases previously made by him might be held as if he had been a natural-born subject. But that opinion is not warranted, unless the act of naturalization expressly provide for the case. *Fish* v. *Klein*, 3 *Meriv.* 431. Aliens generally purchase in the names of their wives or children, by way of advancement to them,] (21).

Persons attaint.

A person attainted of treason or felony, before or after attainder, may be a grantee; [*Airlie Peerage Case*, 3 *Prest. Abstr.* 407;] but he cannot hold the thing granted; for if the king or lord will, he may have it from him. So also persons outlawed in personal actions may be grantees of lands, or goods; but the king will have the profits of the lands and property of the goods. Co. super Lit. 2. Perk. Sect. 48.

Woman covert.

A woman covert may be a grantee; but her husband may by his disagreement avoid the grant. And yet if he do not avoid it in his lifetime, [during coverture, if his interest determine with the coverture,] the grant will be good; and he that will have the grant to be void, must show that the husband did disagree to it. [The wife or her heirs may disagree to the grant, that is, the wife if she survive, otherwise her heirs.] Perk Sect. 43. Co. super Lit. 2.

Infant.

An infant may be a grantee, for this [grant] is presumed to be for his advantage. And yet at his full age he may agree to it or avoid it, perfect it or disagree to it, and without any cause showed; [so may his heir, if he die under age, or before agreement.] Perk. Sect. 4. Co. super Lit. 2.

Men *non sanæ memoriæ*.

A man *non sanæ memoriæ* may be a grantee as well as any other man, and it seems these grants cannot be afterwards avoided. [It is Co. idem.

(21) Lord Hardwicke in *Burch* v. *Brown*, 2 *Atk.* 398, says, "an alien, to be sure, is capable of taking by purchase; but by that is meant a conveyance at common law, or any other kind of purchase, but then it is for the benefit of the crown;" and he there adds, "I know of no instance where a woman alien is in possession of an estate, but that it must be for the benefit of the crown; and I do not remember that it has ever been held, that the husband, by marrying her, can be said to be seised of this estate." It is a general rule that an alien cannot take by act of law.

apprehended they may be avoided by disagreement.] But such men may not be grantees of offices of trust and such like things.

Co. idem. A bastard, persons deformed having human shape, lepers, and such like, may be grantees of lands or goods, &c. as other men may be (22). [Indeed a bastard, being in *esse, i. e.* in the mother's womb, has a capability of description, and consequently a capacity to take. *Gordon* v. *Gordon*, 1 *Meriv.* 141. He must be described as the child of the woman, and not merely and simply as the child of the father, since the fact of its being the child of the father will not be allowed to be tried. No provision can be made by law for illegitimate children until they are in *esse*. *Metham* v. *D. of Devonshire*, 1 *P. Wms.* 529; *Wilkinson* v. *Adams*, 1 *Ves. & B.* 422; *Earle* v. *Wilson*, 17 *Ves.* 528; *Cro. Eliz.* 509.] Bastard.

Co. idem. An hermaphrodite may be a grantee according to the most prevailing sex. Hermaphrodite.

Co. super Lit. 3. Park. Sect. 48. 51. * A clerk convict, and a man imprisoned, may be a grantee as well as any other. And so also may a villain of the king or of a common person; but he cannot retain the thing granted, for the king or lord may have it from him if he will. But monks, friars, and such like persons, cannot be grantees, for they are utterly disabled (23), [being *civiliter mortui.*] Clerk convict. Villains. *P. 236.

Co. super Lit. 3. Regularly it is requisite that the grantee be named by his names of baptism and surname, and so it [*i. e.* this mode] is most safe; and special heed must be taken to the name of baptism, for that a man cannot have two or more names of baptism, as he may of surnames. [*Godb.* 17; 3 *Newn.* 38.] And yet in some cases, though the name be mistaken, the grant is good; as if a grant be to *I. S.* and *Em* his wife, and her name Misnaming, or not naming.

*Bro. Nosme, 9.

(22) See further in what cases bastards shall take by grant or devise, in *Vin. Abr. Bastard* (P.) *Com. Dig. Bastard* (E.) 1 *Burn's Ecc. Law*, 120, 3d edit.

(23) Papists, and persons professing the popish religion were, by stat. 11 and 12 Will. 3, c. 4, § 4, disabled to purchase lands, rents or hereditaments; and all estates made to their use, or in trust for them, were declared void. By the stat. of 18 Geo. 3, c. 60, several parts of the statute of 11 and 12 Will. 3, are repealed, and particularly so much thereof "as disables persons educated in the popish religion, or professing the same, under the circumstances therein mentioned, to inherit or take by descent, devise or limitation, in possession, reversion or remainder, any lands, tenements, or hereditaments, within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed, and gives to the next of kin, being a protestant, a right to have and enjoy such lands, tenements, and hereditaments." [See also the statute 31 Geo. 3, c. 20, which has made further provisions as to papists who conform.]

is *Emelin*; [b] or a grant is made to *Alfred Fitzjames* by the name of *Etheldred Fitzjames*; [c] or a grant be to *Robert* Earl of *Pembroke* where his name is *Henry*; or to *George* Bishop of *Norwich* where his name is *John*; [d] or a grant be to a mayor and commonalty, or a dean and chapter, and mayor or dean is not named by his proper name; [e] or a grant be to *I. S.* wife of *W. S.* [*Hob.* 32,] where she is sole; all these, and such like grants, are good; for in this case the rule doth hold, *utile per inutile non vitiatur*; [and *nil facit error nominis cum de persona constat.*] [f] And if one be baptized by one name, and after confirmed by another; yet a grant to him by his first name is good. And so also some think of a grant to him by his second name, [*viz.* his name of confirmation, is good.] *Sed query* of this. Also when a bastard hath gotten the name by reputation, a grant may be made to him by that name, and it is good. [3 *Leon.* 48; *Wilkinson* v. *Adams*, 1 *Ves. & B.* 422; *supra*, 235.]

[b] Bro. Confirmation, 30.
[c] Co. 6. 65. 27 E. 3. 85.
[d] Co. super Lit. 3.
[e] Dyer, 119. [Boughton v. Sandilands, 3 Taunt. 342.]
[f] Co. super Lit. 3.

If a grant be made to *W.* at *Stile*, by the name of *W.* at *Gappe*, [and he be known by one as well as the other name;] this is a good grant, notwithstanding this mistake.

9 E. 4. 43. Fitz. Grant, 93.

But where a grant doth intend to describe the person of the grantee by his proper name, and doth omit or mistake his christian name or surname; in this case, for the most part, the grant is void, unless there be some special matter to help it, as in the cases before. And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the second son, or to the youngest son, or *seniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis I. S.* or *omnibus exitibus I. S.* or to the right heirs of *I. S.* or to the next of blood of *I. S.*; in these cases grants made to these persons, in these words, are good; for the person is certainly enough described. And if a lease be made to *I. S.* for life, the remainder to him that shall come first to Paul's such a day, or to him that *I. S.* shall name in three days; if, in these cases, any one doth come to Paul's that day, or be named by *I. S.* within three days, and

Co. super Lit. 3. Perk. Sect 54. Bro. Grant, 65. Done, 17. Dyer, 337. Perk. Sect. 55. 56. Bro. Done, 31. Grant, 172. Done, 50. Fitz. Done, 1. Perk. Sect. 55. 52.

Incertainty.

the particular estate doth so long continue; this is a good grant of the remainder, [*i. e.* a contingent remainder.] *Id certum est quod certum reddi potest.* But if a grant be made * in these words, *viz.* To four of the parishioners of *Dale*; or *Deo et ecclesiæ de D.*; or to two of the sons of *I. S.* and he hath many sons, [*Co. Tracts, Copyholder*, § 35;] or to *I. S.* or *W. S.* in the disjunctive; these, and such like grants as these, are utterly void for incertainty, [and cannot be made good by any averment. There is a patent ambiguity, or rather an inexplicable uncertainty. So if a grant be made to *I. S.* son of *I. D.* and he have two sons of that name, this grant will be good if the grantee can be ascertained by clear and direct evidence, leaving no doubt of the certainty of the grantee. *Cheney's case*, 5 *Rep.* 68. But if no evidence ascertaining the person can be given; or if the evidence raise a doubt who was the grantee, the grant will be void for uncertainty. *Thomas* v. *Thomas*, 6 *Term. Rep.* 671; *Owen*, 33; 3 *Leon.* 18; *Finch's Rep.* 395. 403; 3 *East*, 72; 6 *Ves.* 42. And according to *Jenk.* 100, a grant by the name of baptism, after confirmation by a different name, is void. All grants made to Sir *Francis Gawdy* were made to him by the name of *Francis*, and that was his name of confirmation. 1 *Inst.* 3 a.] And if a gift or grant of goods be to the parishioners of *Dale* in these words, it seems this [gift] is good, [and the churchwardens shall take to the use of the parish;] but if a grant or gift of land be made to them [the parishioners, 1 *Inst.* 3 a,] by these words, it seems this [grant] is void. And so also it is of a grant of goods to the churchwardens of a parish, this is held to be good; but otherwise it is of a grant of land to them [*eo nomine.*] A bastard is capable by that name whereby he is usually called; and therefore a grant to him by that name is good (24). And a right heir, or one that shall be the first issue of *J. S.* that hath no child, is capable of a remainder by that name; but of land in possession he is not capable by that name, [in a grant by deed. He may take by executory devise, or by a future springing shifting use. At one time an opinion

*P. 237.

(24) But a bastard cannot be heir, for the estate shall escheat to the lord. *Finch's Law*, 117. The difference between our law and the civil law, respecting bastards being capable of inheriting, is explained in 1 *Bl. Com.* 247. [And yet a bastard *eigne* is, against a *mulier puisne*, recognised by law. 1 *Inst.* 224 b.]

prevailed, that a child unborn could not take a life estate; it was thought necessary to give him an estate of inheritance; but now it is settled (*Hay* v. *Coventry*, 3 *Term. Rep.* 83; 2 *Ves. jun.* 357; *Adams* v. *Adams*, *Cowp.* 366,) that an unborn child is capable of a life estate. 1 *Prest. Abstr.* 112. The rule is merely, that you cannot engraft on that limitation estates to the issue of the unborn child, as purchasers, since such issue may not be born within twenty-one years after a life or lives in being. The limitation over, and that limitation alone, has a tendency to a perpetuity, and is rejected as void; but a limitation over for life, intail, or in fee, to a person in *esse*, is good. In wills, under the doctrine of *cy pres*, the courts sometimes raise an estate tail to the unborn child for the purpose of admitting into the line of succession his issue, designated to take by purchase. Then they take by descent; but the doctrine of *cy près* is not admissible in deeds, or even as to leasehold or personal estates, in wills.] And a bastard, as the reputed son of *I. S.* may take by a grant to *I. S.* and his issue. [The law seems contrary. *Cartwright* v. *Vawdry*, 5 *Ves. jun.* 530. In the construction of a deed or will, the law will never allow a bastard to take under the general denomination of a child or issue, unless there be some other designation which refers to and describes the bastard. *Wilkinson* v. *Adam*, 1 *V. & B.* 446.] A bishop may take by the name of a bishop without any other name. [3 *Newn.* 38. And if the grant be to him and his heirs, he will take in his individual right; but if it be to him and his successors, he will take in his character of bishop. 1 *Inst.* 8 b.] But if a grant be made to the parishioners or inhabitants of *Dale*, or *probis hominibus de Dale*, or to the commoners of such a waste, or to the lord and his tenants bond and free; these are not good grants; for albeit these persons are capable, yet are they not capable by these means; [for want of identity, or that certainty which the law will allow to be tried.]

If there be two grantees, and one of them doth take by the deed, it is sufficient [*quoad* him; *i. e.* if the two persons were to be joint-tenants, and one of them only is capable, he will take the whole exclusively; but if they were to be tenants in common, he will have only an aliquot part. But in a gift to a class of persons, as tenants in

Doct. & Stud. 94. Co. l. 1b. super Lit. 231. New Terms of the Law, 251, 252. 5 E. 3. 17. Co. super Lit. 21.

common, those who are capable shall take the entirety. *Mogg* v. *Mogg*, 1 *Meriv.* 654.] But if the grant be to one that is no party to the deed, and not to the grantee himself; in this case, albeit the grantee and he to whom the grant is made be capable and never so well described by their names, yet is the grant void [as to the person who is not a party, because he is not to take by way of remainder;] for no grant can be made but to him that is party to the deed, except it be by way of remainder. And therefore if a man make a lease for term of life, and after the lessor grant to a stranger that the tenant for life shall have the land to him and his heirs; this grant is void. *Et sic de similibus.* [This is clear, because the stranger and not the tenant for life is named as the grantee.] And yet it seems in some cases, if one of the grantees be party to the deed, that another grantee that is no party to the deed may take with him. And therefore the case was, [a case peculiar to gifts in frank-marriage;] *Robert* gave the reversion of lands, which *Agnes* his wife did hold for her life, to *Stephen de la Moor, Habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*; in this case it was adjudged, that albeit *Joan* were not named before the *habendum*, yet that she should take in tail with her husband. [But where the grant was to one, *habendum* to him and two others as joint-tenants, (2 *Prest. Convey.* 394; 1 *Inst.* 231 a,) it was decided that the grantee alone could take. But if the grant be to one, *habendum* to him and two others, successively as they are named; or by any other like term, regulating the order of succession, for their lives; this grant and *habendum* are good, because the words, as named, &c. are descriptive of the order in which the parties shall take, and the two have estates in remainder, and not in possession. And in copyhold grants the custom may prescribe the order of succession, and remove the objection of uncertainty.]

Touching these points these things are requisite: 1. That the thing whereof the grant is made be grantable, and that both in respect of the nature of the thing itself, and also of his estate that doth grant it; for in some cases, albeit the thing for the quality of it be grantable, yet in respect of the

4. In respect of matter touching the thing granted, charged, &c.

estate and property that the owner hath in it, [as an estate at will, an office of trust, &c. a personal right, &c. &c.] it is not grantable. 2. That if it be by deed, it be sufficiently distinguished and named.

Amongst other things that are grantable, some
*P. 238. are grantable *de novo* * and in their first creation, but not transmissible nor assignable afterwards. And some are grantable at first in their original creation, and assignable over afterwards from man to man *in infinitum*.

1. In respect of the nature of the thing granted; & what things are grantable over, or chargeable; or not.

All things that may be granted by fine, and whereof a fine may be levied, may be granted over from man to man. See Fine, Numb. 6, part 3. See in Exposition of the terms of Grants, supra, cap. 5. Numb. 15. Bro. Dane, 10.

1. In respect of the nature of the thing itself.

All the things that are before observed to be grantable by [deed], or without deed, are grantable over from man to man. And therefore all corporeal and immoveable things that lie in livery, as manors, messuages, cottages, lands, meadows, pastures, woods, and the like, are grantable in fee simple, for life, or years at first, and assignable over again at the pleasure of the grantee. Also trees, and emblements are grantable. [And so are growing crops of corn, potatoes, turnips, &c. But estovers appendant are not grantable, because they are a privilege annexed to the farm or house, and to be used in the occupation thereof.] And a man may grant the vesture or herbage, *i. e.* the grass of his ground and not the ground itself. [*Crosby* v. *Wadsworth*, 6 *East*, 602.] And a man that is seised in fee of a house may give or sell the timber, stone, &c. of the house, and the donee or grantee may take it [even] after the death of the donor. [But if tenant in tail sell timber and die before it is severed, and after avoidance of the grant, the grantee cannot take the timber.]

Rent, services.

Also all incorporeal things that lie in grant, as rents, services and the like, are grantable over in fee simple, for life, or years, and therefore rents or services reserved upon any estate, and rents granted out of lands, are grantable over *in infinitum*. And if a man have a rent reserved on a particular estate, he may grant over parcel of it [the rent.] But a rent or service [wholly] suspended cannot be granted, [*supra*, 240, at least so far as it is suspended. See *Co. Lit.* 314. *Sed query.*] Neither can a man grant a rent

Perk. Sect. 103. Bro. Grant, 3. 3 H. 6. 20. 9 H. 6. 12. Perk. Sect. 91. 87. 101. Fitz. Grant, 145. Co. super Lit. 144.

issuing out of a rent. [For regularly it is not a rent but an annuity; but it is certainly grantable in equity.] If a rent be granted to me I may grant it over to a stranger before I be seised of it; and this grant is good. [*Query*; for it seems to be a general rule, that nothing can be granted till the grantor is in seisin, either for an estate in possession, or an estate in remainder or reversion. The meaning is, perhaps, that the annual sum may be granted as an annuity, before it is become a rent by election or by seisin.] But an annuity it seems is not grantable over after the first creation of it. [The better opinion is, that an annuity is grantable over, even without the word assigns in the grant, unless the annuity be personal. See *F. N. B. Writ of Annuity* (D); *Dyer*, 65 a, pl. 1.] And yet if an annuity be granted to *I. S.* and his assigns *pro consilio*, it seems this annuity is grantable over. [*Dyer*, 2 a. Though an annuity *pro consilio impendendo* is not grantable, unless the grant be to the grantee and his assigns. *Perk.* 887; *Dyer*, 2 a.] Advowsons are grantable in fee simple, for life, or years, from man to man *in infinitum*. Also the presentation to a church before the church is void, is grantable; but when the church is void, that turn is not grantable, for it is then in the nature of a thing in action. Also rectories, and tithes, and portions of tithes, and pensions are grantable from man to man *in infinitum* (25).

Stat. 32 H. 8. cap. 7. Perk. Sect. 90.

Advowsons, &c.

Perk. Sect. 73. 88. 87.

Reversions and remainders.

Reversions and remainders are grantable from man to man in fee simple, fee tail, for life, or years. [A contingent remainder does not confer any interest which is grantable; it may be released or devised, assigned in equity, or bound by estoppel.] And if I have a tenancy for life of three houses, I may grant the reversion of two [or one] of them. And if I have the reversion of three houses and four acres of land, I may grant the reversion of two houses and of two acres of land. And if tenant in tail be of an acre of land, the remainder to his right heirs, [being a vested remainder in him, under the rule in *Shelley's case*, 1 *Co.* 93,] he may grant over this remainder by itself; and yet it is such a thing as

(25) See more amply in *Vin. Abr. Grant* (F.), and therein particularly as to the grant of an annuity, or of a presentation.

the tenant in tail himself may bar by a common recovery, [notwithstanding his own grant. As the remainder is a distinct estate, it is grantable by the name of a remainder; what shall be considered as a distinct estate, see *Prest. Est.* 263; *Butler's Fearne*, 180.] But if a grant be of land to *I. S.* for years, the remainder to the right heirs of *I. D.* and *I. D.* is living; this remainder is not grantable so long as *I. D.* doth live. [This limitation in a grant is void in its creation for want of a particular estate of freehold to support the remainder. To make the point applicable it must be taken of a contingent remainder depending on an estate of freehold in *I. S.*]

Common.

Commons of pasture, of turbary, of fishing, of estovers are grantable in fee, for life, or years, from man to man *in infinitum*. [Commons of pasture, unless for a certain number of cattle, &c. may be granted distinct from the land.] And yet if a common in gross, and without number, be granted to a man and * his heirs, it seems this is, [while such common for life or years (2 *Roll. Abr.* 46)] not grantable over to another man (26). But if common for a certain number of beasts be so granted, it seems the law is otherwise; and that this is grantable over [even] in case where the first grant is to the grantee only, and not [to] the grantee and his assigns.

Perk. Sect. 103. Per two judges against one, Hil. 16 Jac. B. R.

*P. 239.

Offices.

Offices are grantable at first; but the great judicial offices of the kingdom, as the offices of the lord keeper, chief justices, or chief baron, or of other of the justices or barons, and such like, are not grantable over to others, neither may they be executed by deputies. But the sheriff's office, albeit it be not grantable over, yet may it be executed by deputy. [But in some cases the sheriff must attend in person, as on the execution of writs of partition, &c.] (27).

Perk. Sect. 101.

Prerogative.

The reversion of an office is not grantable by a subject as it is by a king, yet a subject may grant an office *habendum* after the death of the present officer,

Per Lord Keeper, and 2 Ch. J. M. 5 Car. in cancellaria. Co. super Lit. 233. Perk. Sect. 101.

(26) 2 *Roll. Abr.* 45, *contra*; a common without number in fee is grantable to another, 18 *E.* 4, 84, for the word heirs implies assigns.

(27) Wherever one office is incident to another, such incident office is grantable by him who hath the principal office, and therefore it is held that the king's grant of the office of county clerk was void, it being inseparably incident to the office of sheriff. 4 *Co.* 33. In like manner the office of chamberlain of the King's Bench is inseparably incident to the office of marshal; and therefore a grant of the office of marshal, with a reservation of the office of chamberlain is void. *Per Holt*, C. J. 2 *Salk.* 439.

and this is good. [And yet this in effect is the grant of the office in reversion.] The inferior offices also, that are offices of trust, especially if they concern the person[s] of the grantor[s], howsoever they are grantable at first, yet are they not grantable over by the officer[s] to any other[s] unless they be granted to them and their assigns, and of this sort are the offices of the steward, bailiff, receiver, sewer, chamberlain, carver, and the like; neither may these be executed by deputy but where the grant is so, [as to authorize the appointment of a deputy. And by the common law even the steward of a manor may not, without an express grant, appoint a deputy. See *Com. Dig. Copyhold*; 1 *Watk. Copy.* 29, 2d edit.; 1 *Lord Raym.* 658.] (28).

12 E. 7. 25. 13 H. 7. 13. Licences, and authorities, [though they do not confer any interest,] are grantable at first for the lives of the parties or for years. But the grantees of them cannot, [when they do not confer an interest,] assign them over. And therefore if power be given to me to make an award or livery of seisin; I may not grant over this power to another, [unless a power be given to appoint a deputy; and even in that case, the deputy becomes the attorney of the principal, and must act in his name. These powers of substitution are very common.] And if licence be granted me to walk in another man's garden, or to go through another man's ground, I may not give or grant this to another, [for the licence was personal to me. *Wingate's Maxims*, 379.] Licences, authorities, &c.

Co. 4. 66 5. 24. Dyer, 244. Co. 10. 51. A bare possibility of an interest which is incertain, [and though it may be released or bound by estoppel, and if coupled with an interest, and to a person who is ascertained, is devisable,] is not grantable [to a stranger.] And therefore if one have a term of years in land, and by his will devise it to *I. S.* for his life, and afterwards to Possibilities.

(28) See accordingly *Br. Abr. Deputy*, pl. 9. Office of filacer is not grantable or assignable over, because it is an office of trust. *Vin. Abr. Grants* (H. 1.) pl. 4. See more amply who may assign his office, *Com. Dig. Office* (C.); by whom offices shall be granted, *Vin. Abr. Offices* (A.); as to the grants of offices by ecclesiastical persons, see *Bac. Abr. Offices* (D.), and 1 *Burr.* 219; the case of *Sir John Trelawney* v. *Bishop of Winchester*, where the court were unanimously of opinion, that an office and fee which existed before the 1st of Eliz. is *not* within the statute of 1 Eliz. c. 19, but may be granted *since*, precisely in the *same manner*, in which it was granted *before*.

me for the residue of the years; or devise it to *I. S.* if he live so long as the term shall last, and if he die before the term end, the remainder to me; in these cases, so long as *I. S.* doth live, I cannot grant over this possibility. [For during that time the term is in construction of law wholly in the first taker, subject only to the chance or right of enjoyment of the second legatee. This construction arises from the presumed possibility that the life may continue beyond the term. But this interest may be released to the *quasi* tenant for life, or his assignee: it is transmissible to executors, &c.: it may be given by will, and it is assignable in equity. *Infra, ch. Testament.* It is rather singular that it never occurred in practice to avoid this difficulty by devising to *A.* for a term of years by way of under-lease, if he should so long live; and after the expiration, or sooner determination of the derivative term, to *B.* for the residue of the original term, or for a derivative term determinable, &c. By such bequests each taker would have a legal estate. 2 *Prest. Abstr.* 4.] So if a lease be made to me and my wife for life, the remainder to the survivor of us, I may not grant this remainder over to another man. [For this is a contingent remainder to vest in the survivor when ascertained; nor is this interest devisable, since the owner is not ascertained. But a limitation to two, and the survivor of them, during their lives, gives them a vested estate as joint-tenants; (1 *Prest. Est. ch. Life,* 136; *Eustace's case, Jones,* 55; 3 *Salk.* 204;) for the rule is, *expressio eorum quæ tacitæ insunt nihil operatur,* and the survivor would in this case have been entitled, though no grant had been to the survivor.] But a possibility, coupled with some present interest, is grantable over. And therefore if *A.* have four houses in execution upon a statute, and by course of time it will endure thirteen years, and after two of the houses are evicted by *elegit* for fifteen years; in this case he that hath this execution upon the statute may assign over his interest in these two houses, for after the execution by the *elegit* is satisfied, *A.* shall have the two houses again until he be satisfied. [This interest is inaccurately called a possibility. It is an actual reversionary estate, capable of causing a merger

of any prior term or estate of the same quality. *Grenville* v. *Deighton, Collins' Parl. Cases*, 64; *Ventr.* 231.] The lord cannot grant the wardship of the heir of his tenant whilst the tenant is living (27); for this is in the nature of a hope or chance of succession. So an heir cannot in the lifetime of his ancestor (*Sir W. Wivel's case, Hob.* 451; *Roll Abr.* 482; 3 *Prest. Abstr.* 273,) make any conveyance, or as to copyhold lands, surrender, which will be binding on him, except by estoppel (*Helps* v. *Hereford*, 2 *Barn. & Ald.* 244,) of lands of his ancestor, though they afterwards descend to him. Equity will relieve against the heir himself, but it is questionable whether it would relieve as against his heir, since the equity is said to be merely personal. *Morse* v. *Faulkner*, 1 *Anstr.* 11.] A surrender of copyhold lands cannot operate by estoppel. [The mere uncertainty of the time of enjoyment, or the possibility that the right of enjoyment may not arise, will not, provided the person be ascertained, and there be a right of taking the possession as early as the possession shall be vacant, render an interest contingent. See *Butler's Fearne*, 9; 1 *Prest. Est.* 63.]

Perk. Sect. 90.

1 R. 4. 10. Those things that are inseparably incident to others, are not * grantable without the thing to which they are so incident and belonging. And therefore a court baron, which is evermore incident to a manor, is not grantable without the manor itself; common appendant to land, is not grantable without the land itself to which it doth belong; and common of estovers appendant to a house is not grantable without the house itself to which it doth belong, [nor common appurtenant measured by levancy and couchancy, or any other terms applicable to the farm. But common appurtenant for a certain number of sheep, &c. is severable.]

*P. 240.

Incidents.

Perk. Sect. 104. 5 H. 7. 7.

16 H. 7. 4. Co. super Lit. 314. Bro. Grant, 173. Perk. Sect. 88, 89.

A rent, service, or other thing, whilst it is wholly in suspense, is not grantable. And therefore if the lord disseise the tenant, or the tenant enfeoff the lord upon condition; the lord cannot grant over the seigniory during this suspension. [In *Perk.* § 89, the word *not* is omitted.] But if one have a rent in fee out of my land, and he purchase the same land for life or years; in this case it

Suspended things.

(29) See more amply as to the grant of a possibility, *Vin. Abr. Grant* (N.) *Possibility* (B.); *Bac. Abr. Grants* (D. 3.); [2 *Prest. Abstr.* 96.]

seems the rent is grantable, even whilst the estate of the land doth continue. [*Com. Dig. Suspension*; and *vide* 1 *Inst.* 313 a.]

So if the tenant make a lease for years or life, of the tenancy, to the lord; in this case the lord may grant the seigniory notwithstanding. And yet if the tenant make a lease to another man for life, and the lord grant the seigniory to this tenant for life in fee; in this case, it seems, the grantee of the seigniory cannot grant it over, because it was never in *esse*.

Franchises. Franchises, as views of frank-pledge, perquisites of courts, leets, conusance of pleas, fairs, markets, goods of felons, waifs, estrays, hundreds, ferries, or passages, warrens, and the like, [annuities, except annuities for personal services, *Dyer*, 2 a; 3 *Meriv.* 86; *Swanst.* 74; 1 *H. Black.* 628,] are grantable over from man to man, in fee, for life, or years, *in infinitum* (30). [And warrens and law days, or view of frank-pledge, will not pass by a grant of the manor, unless they are mentioned, or the grant be of the manor with the appurtenances.]

Things in action. Things in action, and things of that nature, as causes of suit, rights and titles of entry, are not grantable over to strangers but in special cases; [as under particular statutes, as the law against bankrupts. *Smith* v. *Coffin*, 2 *H. Black. Rep.* 444; 3 *Prest. Abstr.* 95.] And therefore if a man have disseised me of my land or taken away my goods, I may not grant over this land, or these goods, until I have seisin of them again; [*i. e.* seisin of the land, or possession of the goods.] Neither can I grant the suit which the law doth give to me for my relief in these cases to another man. So if I make a feoffment to another man, on condition that if I do such a thing I shall have the land again; in this case I may not, before or after the time of performance of the condition, [*i. e.* until the estate be restored by entry, claim, &c. or the possession of the goods be resumed,] grant over the

Co. 5. 24. 10. 48. Co. super Lit. 214. Dyer. 244. Perk. Sect. 86, 87. 85. Bro. Done, 27. 24. 28. Co. 6. 50.

(30) If the *king grants liberties to J. S.* he cannot grant them over. Nor he who has liberties in gross by prescription, as hundred, &c. cannot grant them over. *Br. Abr. Franchises*, pl. 38, cites 6 E. 2. See further in *Vin. Abr. Franchises* (A. 2.) See more amply as to the nature of franchises and their incidents, and therein more particularly as to the privileges of a county palatine, the cinque ports, and corporations, *in Com. Dig. Franchises*. 2 *Bl. Com.* 37. *Wood's Inst.* 205.

condition to another; [but in equity an equity of redemption, even on a mortgage in fee, is devisable and grantable. And choses in action, debts, &c. are grantable in equity.] But all these things I may release to the parties themselves; for it is a maxim in law, that every right, title or interest in *presenti* or in *futuro*, by the joint act of all them that may claim any such right, title or interest, may be barred or extinguished; [*i. e.* every estate is grantable or transferrable, and every right is releasable; and a conveyance by the person who has the estate, and the person who has the right, amounts to a conveyance of the estate and a release of the right, and completes the title.] And

See Condition. Co. super 232. Perk. Sect. 86.

in some cases, [by statute law,] a grantee of a reversion may take advantage of a condition annexed to an estate for life or years; [*ch. Condition.*] If a man owe me money on an obligation, or the like, I cannot grant this debt to another [at law; but choses in action are assignable in equity;] but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor; [and in equity the right to the debt may be transferred.] A presentation to a church, after the church is become void, is not grantable [at law or in equity,] for it is in the nature of a thing in action. [The object is to prevent simony;] but even after avoidance and during the vacancy, the advowson, including the right of all future presentations, is grantable. *Barret* v. *Glubb, Sir W. Black. Rep.* 1052, contrary to some crude opinions to be found in the books.]

[General rule as to releases.]

Dyer, 283.

[Presentation.]

Perk. Sect. 92. Fitz. Done, 3. 7.

And if a man take my goods from me, or from another man in whose hands they are; or I buy goods of another man and * suffer them in his possession, and a stranger taketh them from him; it seems, in these cases, I may give the goods to the trespasser, because the property of them is still in me (31); [*i. e.* his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action, or of resumption by recaption.]

*P. 241.

(31) As to a grant or assignment of choses in action, see before in page 94; see further *Vin. Abr. Assignment* (B.) (D.); *Grant* (G.); *Bac. Abr. Grant* (D. 1.)

Personal things. Trusts and confidences, which are personal things, [*omit*, things,] for the most part are not grantable over to others. And hence it is also that offices of trust and confidence are not grantable over, but in some special cases where they are granted to a man and his assigns; or where they are granted to a man and his heirs. And hence it is also that a wardship, by reason of a term [tenure] in socage, which by the law is given to the next of kin, is not grantable over to any other person by the guardian in socage; [for the guardian in socage has not any interest: he is guardian to the infant, for the benefit of the infant. But the benefit of trusts and confidences, *viz.* the equitable estates or interests in lands are grantable in equity, and transferrable from man to man. See 2 *Prest. Abst.* 234; *Philips* v. *Brydges*, 3 *Ves.* 127.] Perk. Sect. 99. Plow. 379. [Cruise v. Dicken, 4 Ves. 97.] Plow. 293.

Entire things. Some things are so entire that they cannot be severed by grant. And therefore if a man hold three acres of land of me by 12*d.* rent, and I grant the services of the third acre; this is void; and he shall have all or none, for I cannot sever the tenure. [*Com. Dig. Grant* (C); 2 *Roll. Abr.* (H); *contra.* But under the statute of *quia emptores* the rent and services will be apportioned when the tenure is divided, as when the three acres are sold to three different persons. It is otherwise of rent charges. And if the tenure be by an entire thing, as a horse, the services will be multiplied by the severance of the tenancy.] But if a man hold land of me by homage, fealty, escuage, and a certain rent; in this case I may grant the rent and keep the seigniory. Fitz. Grant, 19. 76.

Villains. A villain is grantable for life, or years; and if the villain, during the estate of the grantee, purchase land in fee, the grantee shall have it for ever as a perquisite, albeit he have but an estate for life in the villain itself (32). Perk. Sect. 94.

Chattels, real and personal. All chattels, real and personal, regularly are grantable from man to man *in infinitum*, as leases for years, be they present or future, [viz. *interesse termini*,] wardships of tenants in *capite*, or by knight's Dyer, 58. Plow. 149. 167. Perk. Sect. 91. Dyer, 305. Perk. Sect. 90. [Hob. 132.]

(32) Yet the villain may purchase some kinds of inheritances in fee simple, which the lord of the villain cannot have, [because the grant is personal, or would be varied;] as, a common *sans* number, a corody, &c. *Co. Lit.* 117 a. For the doctrine of villenage see *Co. Lit.* 116 to 141; Mr. *Hargrave's* argument in *Sommersett's case*, and Mr. *Estwick's* considerations on that case.

service, trees, oxen, horses, plate, household stuff, and and the like. [Terms actually vested, or merely giving an *interesse termini* are, while the mere possibility of a term is not, grantable over. *Lampet's case*, 10 *Rep.* 46. Even a term to arise on a contingency is grantable, *sed query*.] Also trees, grass and corn, growing and standing upon the ground, fruit upon the trees, [see stat. of 5 and 6 *Ed.* 6, c. 19; *Hadham's case*, 3 *Inst.* 197; 1 *East*, 167; 12 *Geo.* 1, c. 71,] wool upon the sheep's back, is [*read*, are] grantable, [provided they are potentially in the grantor. *Hob.* 132. But a man cannot *grant* the wool, &c. which shall grow on the sheep he shall have. *Hob.* 179. And yet a parson may grant all the tithes of wool which shall arise in such a year, although none may arise; for the tithes, though not the wool, are potentially in the parson. 2 *Roll.* 48, pl. 20. In *Waddington* v. *Bristow*, 2 *Bos. & Pull.* 452, a crop of growing hops; and in *Emmerson* v. *Heelis*, 2 *Taunt.* 38, a crop of growing turnips, were held to be grantable. So a crop of growing corn may be granted, unless the contract can be tainted with the offence of engrossing.]

Co. 5. 24. If a man sell me ten load of wood in his wood, to be taken by his assignment; or sell me three acres of wood towards the north side of the wood; by this grant, in these words, I have such an interest as is grantable over. If I make a lease by deed of a house to another, and therein it is agreed between us, that if the rent be not paid me by such a time I shall enter into the house, and take and sell the goods there as mine own, to pay the rent; it seems this is a good grant of the goods, and that I may do according to the agreement. [*Query*, on this point, unless the grant be confined to things which the grantor has potentially; or unless the grant be understood as reserving only a remedy by distress.] And if one that doth hold land of me, grant to me, by deed indented, that I shall distrain for my service in all his land, this is a good grant. Distress.

Fitz. Barre, 280.

Fitz. Grant, 6.

Fitz. Done, 11. A man may give or grant money; as if I deliver one money, on condition that if he assure me of such land, he shall have it, otherwise that he shall re-deliver it to me again; in this case, if he make the assurance he shall have the money, if not, I may have an account for it. Money.

Bro. Done, 34. Such things as are *feræ naturæ*, as coneys, hares, Feræ naturæ.

deer, and such like, are not, [while in an unreclaimed state,] grantable at all (33). [A man may grant the deer in his park, 2 *Roll. Abr. Grants*, 45.]

Tithes. A parson of a church may grant his tithes for years, and yet they are not in him; [but he has an estate or interest which confers a title to them.] Perk. Sect. 90.

Deeds. A man may give or grant his deeds, *i. e.* the *P. 242. parchment, paper and wax,* to another at his pleasure, and the grantee may keep or cancel them. And therefore if a man have an obligation he may give or grant it away, [*Dyer*, 23 b.] and so sever the debt and it, [*i. e.* retain the debt, while he has given away the property of the deed.] So tenant in fee simple may give or grant away the deeds of his land; and the executor in the first case, and the heir in the last case, hath no[t any] remedy. But a tenant in tail of land cannot, [as against his issue, or those in reversion or remainder,] give or grant any of the deeds belonging to the land entailed, no more than the land itself (34); [he may give them during his own ownership.] Co. super Lit. 232. Trin. 38 El. B. R. 25 H. 8. 5. 1 H. 7. Dove's case. 1 H. 4. 31. Fitz. Barre, 179.

Apparel. One may give or grant apparel; and it is said if one make apparel for another, and put it upon him to use and wear, this is a gift or grant of the apparel itself. [The right to apparel depends on the intention; thus, in the case of a servant, the livery is given to him to be worn in his master's service.]

Wool. If one grant to another all the wool of his sheep for seven years; this is a good grant [of those sheep he has potentially, not of those he shall purchase. *Hob.* 132.] Perk. Sect. 90.

If one, being a parson, give to another all the wool he shall have for tithe the next year; this is a good grant, [for he has the tithe potentially. See p. 241.] Fitz. Grant, 40.

(33) A man may be invested with a qualified, but not an absolute property, in creatures that are *feræ naturæ*: 1. Either *per industriam*, by reclaiming and making them tame by art, industry, and education; or by so confining them within his own power, that they cannot escape and use their natural liberty. 2. Or *propter impotentiam*, on account of the inability of the animals, as when birds build in my trees, or coneys breed in my ground. 3. Or *propter privilegium*, where a man has the privilege of hunting, taking, or killing animals, in exclusion of other persons. 2 *Bl. Com.* 391. See further as to the nature of property in *animals feræ naturæ*, and what remedy may be had against persons unlawfully destroying or stealing them, in 1 *Hol. Pleas of the Crown*, 512; 1 *Hawk. Pl.* c. 94, cap. 33; and *Vin. Abr.* tit. *Feræ Naturæ*.

(34) See the case of *Papillon* v. *Voice*, 2 *Pr. Wms.* 471, where the Master of the Rolls decreed the plaintiff had only an *estate for life*, and therefore should not have the deeds delivered to him, but that they should be brought into court. Upon an appeal in that case to Lord Chancellor King, he decreed that the plaintiff took an *estate tail*, and therefore ordered the deeds to be delivered to him. See further to whom the possession of deeds appertains in note 4. to *Co. Lit.* 6 a.

Bro. Done, 19. If one grant to another his horse or his cow in the disjunctive; this is a good grant notwithstanding this incertainty, and the donee shall have election, and by that [election] make the grant good (35). [*Bac. Abr. Grant* (H. 3.) But the election must be in the lifetime of the grantee.] Incertainty.

2. *In respect of the estate, property, and possession of the grantor.* Any estate that a man hath in fee simple, fee tail, for life, or years, in any lands, &c. or any rent, or profit apprender out of the same, is grantable from man to man *in infinitum*. And he that hath any such estate of any lands may charge it with any rent or profit, to be taken out of it, as long as the [*i. e.* his] estate of [*read*, in] the land doth last. But an estate at will is not grantable over. And if an estate be made to a man and his heirs without the word assigns, yet he may assign it at his pleasure, for assigns is included within heirs.

22 E. 4. 37. Perk. Sect. 91. [Supra, 241.] An *interesse termini*, *i. e.* a lease for years to commence in *futuro*, is grantable before the term doth begin, [2 *Prest. Abstr.* 4;] whether it be a lease of the land itself, or any rent or other profit out of it.

Co. 4. 64. The interest or estate, that a man hath by extent, is assignable from man to man at pleasure.

Co. 6. S. Geo. Carson's case. Co. 1. Altonwood's case. The reversion upon an estate tail is grantable: [it is also devisable. 2 *Wiscot's case*, 60. So a remainder is grantable or devisable;] and yet the tenant in tail in possession, by the suffering of a common recovery, may bar him in reversion of any fruit of it, [even though he himself was the grantor of the remainder in fee. For this is not a derogation from his own grant.]

Co. 1. 147. 10. 48, 49. Lit. chap. Confirmation. If an estate be made of land upon condition, as if *A.* make a feoffment to *B.* on condition that if *A.* pay 20*l.* he shall have the land again; in this case *A.* and *B.* together may, at any time before the performance of the condition, join together and grant this land, or charge it with any rent, &c. and this will be good; for it is a maxim in law, fee simple land may be charged one way or other; [and their conveyance will amount to the grant of *B.* and the confirmation of *A.*] And in this case *B.* may grant over his estate alone, but it will be subject to the condition, [unless there be confirmation

(35) See accordingly 1 *Wood*, 668, 9; and further what things may be granted, *Vin. Abr. Grants* (D.) *Com. Dig. Grant* (C.)

by the feoffor.] And if *B.* grant a rent out of the land to a stranger, and after the condition is performed, and the feoffor enter; in this case he shall avoid the rent. But in this case *A.* [the feoffor,] cannot grant; for he hath nothing but a possibility; [and this possibility, though an interest is not devisable: it may be released. The equity of redemption on a mortgage in fee, or an interest to arise on a condition precedent, is devisable.] If one enfeoff divers to the use of his son and heir upon condition, and before the time of performance of the condition the father and son join to grant or charge the land, this is a good grant or charge. [And before the condition broken, it is the grant of the son, and the confirmation of the father. After the condition broken, it is the grant of the father, and the confirmation of the son.] Co. 1. 147.

*P. 243. * If the tenant in tail, and he that is next in remainder in fee, join in the grant of a rent-charge in fee, and after the tenant in tail doth die without issue; in this case this is a good grant and charge against him in remainder (36). [Originally, this is the grant of the tenant in tail, and the confirmation of him in remainder; on the determination of the interest in tail, it is the grant of him in the remainder, and the confirmation of the tenant in tail.] And if *A.* doth bargain and sell land to *B.* by indenture, and before enrolment they do join to grant a rent-charge to *C.* by deed; in this case this is a good charge and grant, whether there be any enrolment or not. [For if there be not any enrolment to perfect the bargain and sale, the grant of the bargainor will prevail. *Bac. Abr. Grant* (G.)] And so if donor and donee in tail grant a rent-charge out of the land, and then the donee die without issue; in this case the grant is good to bind the donor, [supposing the reversion in fee to remain in him at the time of grant.] Co. super Lit. 45. Co. 10. 48, 49.

If land be granted to two men and to the heirs of their two bodies begotten; in this case, albeit they have several inheritances after their death, Co. super Lit. 182.

(36) When tenant in tail makes a grant *of the thing itself intailed*, this grant is not void by his death, for that the same may be made good, it being only voidable; otherwise it is of a *thing granted out of an intailed thing*, as of a *rent* granted out of land intailed, this grant is void by the death of the grantor tenant in tail, and the same can never be made good after. Arg. *Walter* v. *Bould*, 1 *Buls.* 32. [*Machel* v. *Clark*, 2 *Lord Raym.* 778.]

yet neither of them can grant away his estate after his life, [*i. e.* his inheritance, distinct from his ownership for life;] for they are divided only in supposition of law. [The rule is, when several estates exist distinctly in the same person, he may grant one estate, retaining another estate; but a man, who has one entire estate, cannot make a grant of one estate of freehold to commence in *futuro*. It therefore frequently becomes important to consider what shall be said to be one estate, and what shall be said to be several estates. See 3 *Prest. Convey.* p. 58; 1 *Prest. on Est.* p. 340. In this instance, the donees are joint-tenants of the inheritance during their joint lives; though from necessity, on account of the limited succession to their respective issue, there will not be any benefit of survivorship *quoad* the inheritance. But the freehold will survive; and if one die during the joint-tenancy, the other will have the entirety for his life, but the inheritance of *a moiety* will descend to the issue, and will be distinct in him, and grantable as such, even in the lifetime of the surviving joint-tenant. If a grant be to two and the survivor in fee, and they grant their life estates, the inheritance will be a distinct interest. *Dormer* v. *Wilson*, *K. B. Hil. Term*, 1821.]

Perk. Sect. 73. Perk. Sect. 103. One coparcener of a seigniory, [or of land, &c.] may grant his part to a stranger.

If two joint-tenants be of a plow land, and one of them doth grant to a stranger common of pasture for beasts without number, to be taken in the same land; this is void. [If void, it is on the ground, that it is incompatible with the nature of the right, at common law, to the possession by joint-tenants, since they could only stock in common; while, if a grant of this nature were operative, one of them might authorize the stocking by a person who was a stranger to the tenancy, and at the same time stock as part owner.]

Perk. Sect. 80. Perk. Sect. 65. Dyer, 12. 33. If two joint-tenants be of a reversion, and one of them grant the whole, this is void for a moiety, [even though he should survive.] If a man grant or charge that which is none of [*read*, not] his, and that wherein he hath no property, it being in the grantee, or a stranger; the grant is void. [The maxim is, *Qui non habet ille non dat.* 1 *Prest. Abstr.* 244. 3 *Prest. Abstr.* 25.] And therefore if a man grant a rent-charge out of the manor of Joint-tenants.

Dale, or grant a reversion of land, and in truth the grantor hath nothing in the manor of *Dale*, or in the land; in this case the grant is void. And albeit the grantor doth afterward purchase the manor, or the land, yet this will not make the grant good [at law. Equity would as against the grantor, though it is questionable as against his heir, decree a conveyance. *Morse* v. *Faulkner*, 1 *Anstr.* 11.] But if the grant be by fine, or by indenture, [*Helps* v. *Hereford*, 2 *Barn. & Ald.* 244. *Bac. Abr. Leases*, 189,] there in some cases it shall be good by way of estoppel. And in this case, albeit the party recite that it is his own, yet this will not mend the case. And therefore if a man recite that he hath a rent of 10*l.* a year, and then grant 5*l.* a year parcel of it; in this case, if he have no such rent the grant is void. [On the other hand, though a man recite that he has no estate while he has an estate, his grant would be effectual. *Bac. Abr. Grant*, (H. 1.)]

Estoppel.

Servant.

A shepherd, bailiff, or parker, cannot give or grant away the goods of his master without authority. And yet it seems the servant of a taverner or mercer may give or grant his master's wine or wares (37), [because he has an implied authority for this purpose.] And if a wife give or grant the goods of her husband; this is a good gift or grant until the husband disagree to it, and by his agreement it is made good for ever.

Bro. Done. 56. 4.

Husband and wife,

If a man have a lease for years of land, and make a lease for life of it, or charge it for longer time than the lease for years doth last; in this case, the grant is good for so long as the lease for years doth last and no longer. [2 *Prest. Abstr.* 199. The maxim is, *cessante statu primitivo, cessat derivativus.*] But if he make a lease for life, and give livery of seisin, he doth forfeit his estate, [and pass a fee by disseisin. So a tenant for life, who makes a feoffment in fee, passes a fee by disseisin. See authorities, 1 *Prest. Abstr.* 145. 3 *Ibid.* 391.]

Plow. 524, 535.

Regularly a man cannot, [except that possibilities, coupled with an interest to persons who are ascertained, are devisable,] grant or charge that which is not in his own possession, [by possession, in this place, is meant estate, dominion, or perfect, *i. e.* vested ownership,] albeit he have a right to it, [or an inchoate interest, not complete;] and therefore if a

Co. super Lit. 214. Perk. Sect. 86.

(37) See accordingly *Vin. Abr. Grants* (H. 9.) pl. 4.

man be disseised of his land, and before he hath entered into or * recovered the land, he doth grant *P. 244. or give the land, or his right to the land, to a stranger, or grant a rent-charge out of the land to a stranger; in these cases the grants are not good [to transfer any estate; but he may confirm, and the confirmation will bind him when restored to his former ownership.] And yet such grants by fine may be good by way of estoppel. [If the Estoppel. fine be for years, it will operate to give the grantee an estate by estoppel, which will bind the ownership when it vests. *Weale* v. *Lower*, *Pollex.* 55. So would a lease by indenture. *Bro. Abrid. Estoppel*, pl. 221; *Gwill. Bac. Leases* (O). But if a disseisor levy, even to a stranger, a fine *sur conusance de droit come ceo, &c.* or other fine which imports a conveyance of the inheritance, this fine will operate as an extinguishment of the right. *Weale* v. *Lower*, *Pollex.* 55; 2 *Prest. on Abstr.* 206. It concludes the party who levied the fine from suing to recover the land; and the conusee cannot recover, since the conusor had not any seisin to transfer to him; and the person in possession may take advantage of this estoppel or conclusion. *Buckler's case*, 2 *Rep.* 55; 5 *Resol.*; 2 *Prest. Abstr.* 100.] And by a release also the right may be extinct. But if one hath a reversion upon an estate for life, and he grant a rent issuing out of this land; in this case the grant is good, and the charge shall fasten upon the land [immediately, so as to charge the possession] after the estate of the tenant for life is ended, [in point of limitation, or determined by surrender, (1 *Inst.* 338 b.) and of consequence by forfeiture, or any other means, giving the right of immediate possession to the owner of the reversion.] And if a man grant common, or rent, notwithstanding that a stranger take the rent, or use the common at the time of the grant, yet this grant is good; for a man cannot be out of possession [*i. e.* disseised] of these things but at his pleasure, [for there cannot be any actual disseisin of incorporeal hereditaments.] And if a lease for years be made to me, I may grant away my estate before my entry; [for I have an *interesse termini*; and an *interesse termini* is assignable.] And if the lease be to begin at a day to come, [being also an *interesse termini*;]

Perk. Sect. 92. 98. Co. super Lit. 48.

Hil. 18 Jac. B. R. per two justices.

I may assign over my interest before the day come; for in this case the interest is in me from the time of making of the lease. [But if the termor be dispossessed, he cannot assign the land till he has re-entered or revived his estate. *Stephen* v. *Hanham*, 3 *Lev.* 312.] Also I may give or sell my goods that I have not in possession; and therefore if a man take my goods out of mine or another man's possession, I may afterwards give or grant these goods to him or another man, and this grant or gift is good. [Of this proposition doubt may be entertained; for a gift of the goods, if it might be made, would in reality be a gift of a right of action to recover them, and the law will not allow the action to be transferred. As to the person taking the goods, the proposition is sound law, for a gift to him amounts to a release; and a release is an act favoured and strenuously supported by the law, as it induces peace and promotes good order. Or the grant may operate as a gift, since, by an acceptance, the grantee admits the right of the grantor to give. If the goods were in the possession of a servant, &c. to my use, they might be granted. But it was said, by *Windham, Justice*, 1 *Leon.* 43, that if I let certain sheep to one for two years, now upon that lease somewhat remains in me, but that cannot be properly said a property, but rather the possibility of a property, which cannot be granted over. But this proposition is questionable, since I retain the property subject to the qualified interest of the lessee. And in equity choses in action, &c. may be assigned.]

Perk. Sect. 92, 93. Fitz. Done, 3. Bro. Done, 13. Dyer, 90. 30. Co. 4. 62, 63. Dyer, 305. 20 H. 6. 22. Perk. Sect. 59. Co. 11. 50.

Tenant for life. Trees.

A lessor cannot give or grant the trees growing on the ground of his lessee for life, or years, without the licence of the lessee; except they be first cut down by the lessee or some other; for then he may. [This must be understood with the qualification: first, that the trees are not excepted. Secondly, that the grant is void only against the lessee during the continuance of his interest, for the property of the trees may be transferred. And as soon as the trees are wrongfully severed, the property vests in the owner of the inheritance.] And if there be lessee for life, and the lessor give the trees growing on the ground, and after the lessee

for life dieth; in this case the donee cannot take them; for that at the time of the gift a property of them was in the lessee, [discharged from the interest of the tenant. This proposition is not law. The lessee has merely the possession and not the property; or he has at most only a qualified property; and as the trees may pass without the inheritance, it is unreasonable that they should not be granted distinct from the inheritance.] But if a tenant in fee simple give or grant the houses standing, or trees growing, on the ground he hath in his possession; in this case the grantee or donee may take them after the death of the grantor; and that, albeit they be not cut or taken down before his death. And yet if the tenant in tail give or grant the trees growing upon his intailed land, [and he may grant the trees distinct from the land, and for an estate of inheritance. 11 *Rep.* 48 a; *Com. Dig. Bien* (H.)] and the donor [of the trees] die before the trees be cut, [without having barred the estate tail, &c.] in this case the donee or grantee cannot cut them afterwards. Howbeit, if such a tenant in tail give or grant his emblements of corn, growing on the ground, the donee may cut and take them after the death of the tenant in tail (38); [because the property was in the grantor, and does not devolve to the issue.] And if the tenant in tail give or grant his trees, and die before they be cut, and afterwards, before the issue in tail enter into the land, the donee or grantee cut them and take them away; in this case the issue in tail can bring no action of trespass against the donee, or grantee, for the trees: but, perhaps, if the trees be not removed off the ground, he may take them. [And if they be not severed in the lifetime of the tenant in tail, though they are cut before

Tenant in tail.

Emblements

(38) And where there is no grant of them, if tenant in fee or in tail die after sowing the corn, and before severance, his executor or administrator shall, [as against his heir or the issue in tail, or those in remainder,] have the emblements as the chattels of the testator. [But if lands held for an estate in fee or for life be devised, the devisee will be entitled to the emblements. *Toller's Executors*, 157; *Cro. Eliz.* 61; for the gift of the lands includes the growing emblements.] So every one who has an uncertain interest, if his estate determines by the act of God before severance of the corn, shall have the emblements, or they go to his executor or administrator. *Co. Lit.* 55 b. See fully as to the nature of emblements, and who shall have them, 2 *Bl. Com.* 122. 403. *Com. Dig. Biens* (G.) *Vin. Abr. Emblements* (A.) 3 *Atk.* 16. And as to a devise of them, *post*, in the chapter on testaments; [and also see *Toller's Executors*, 157, 2d edit. *Powell on Mortgages*, 73. 75.]

the entry of the issue, then it is apprehended trover would lie for the trees on the ground, of property. Trespass could not be maintained, since the possession is necessary to maintain trespass; and is not necessary to maintain trover. This doctrine does not apply when the trees are cut by the discontinuee of the tenant in tail, or his assignee; against him no action for the trees will lie. But if there be merely an alienation of the land for an estate in fee, determinable by the entry of the issue, and the trees were cut before the determination of the base fee; then, though the trees or their value could not be recovered in trover, their value would be recoverable in an action for mesne profits.]

Presentation.

If two coparceners be of an advowson, and the one doth present, and then he doth grant the "next presentation;" this is a good grant; but by this grant doth pass the next he hath to grant, for his companion must have the next. So if one be seised in fee of an * advowson, and he hath a wife, and he grant the third presentation; this is a good grant, but it shall be taken for the third he may grant, which is the fourth, for the wife is to have the third for her dower (39). [It is apprehended the fourth turn, if the wife present under her title of dower; the third turn, if she do not present.]

Dyer, 35. 15 H. 7.

*P. 245.

3. *In respect of a former grant of the same thing.*

If a man have [effectually] granted a thing once, he cannot afterwards grant it again (40); [for he cannot derogate from his own grant; also, *quod meum est amplius meum non esse potest.*] And therefore if a man give or grant me a horse, first, by word of mouth, and after grant him to me by deed; this second grant is void; [or rather is a confirmation only;] and therefore, if there be any fault in this grant in writing, it is not material. [*Bac. Abr. Grant* (C).] And if a man grant to me common of pasture without number in his ground, and after make the like grant to another; this second grant is void as to me, albeit it be

Perk. Sect. Dyer, 35. 350. Lit. Bro. Sect. 298. Perk. Sect. 102.

(39) Parceners, seised of an advowson, may join in a presentation; but if they cannot agree to present, the law doth give the first presentment to the eldest; and this privilege shall descend to her issue, nay, her assignee shall have it, and so shall her husband who is tenant by the curtesy. *Co. Lit.* 166 b. 186 b. See more amply in *Com. Dig. Eglise* (H. 3) *Vin. Abr. Presentation* (G. a.)

(40) A second grant of the same thing to the same person by the same person, and reciting the former grant, must not be pleaded as a *grant*, but as a *confirmation*. *Plow. Com.* 307

good against the grantor. [It cannot restrain or limit my right of common. But the second grant may be effectual, so far as it may operate without prejudice to the grant in my favour.] And if one grant the next presentation to a church after the death of the present incumbent, and after grant the same to another; or make a lease of land to one for ten years, and after make a lease of the same land to another for the same ten years; or give a horse to one, and after give the same horse to another; in all these cases the second grant is void. [In the instance of the second grant, it will, if by deed, operate as a lease of the reversion.] But if the first grant or gift be only of part of the thing granted afterwards, or of part of the time only, the second grant will be good for the overplus. [As to the lease of sheep for two years, and a subsequent grant, see p. 244.] And therefore if one be seised of a manor, and demise ten acres of the demesne to one for ten years, and after demise the whole manor to another for twenty years; this is a good grant for the overplus of the manor, besides [except] the ten acres, presently; and for the whole manor, for the last ten years; [*read*, twenty years, subject to the term of ten acres.] So if the second grant be to begin after the first is determined, it is good. And if the second be such as may be satisfied, and not impeach the former, both shall stand good. And therefore if one that hath an advowson, grant the next presentation to one, and after he doth grant the next presentation to another, and doth not say "after the death of the incumbent;" in this case the second grant is good, and the grantee thereby shall have the second avoidance after the death of the present incumbent (41). [On the principle of this rule in law, if *A.* be tenant in tail, with remainder to *B.* in fee, and *B.* grant or devise to *A.* in tail; this grant or devise is void, because he was actually entitled to an estate of that extent; and this second grant is *actum agere*. It is otherwise if the first estate be in tail special, and the second in tail general, or for a more extended duration than the former estate tail, and capable of admitting issue which were

(41) *Ut res magis valeat quam pereat*, according to the rule of construction mentioned in page 84.

not within the inheritable qualities of the first estate tail. So if the owner of the reversion in fee make a gift or a devise to a tenant in tail general, for an estate co-extensive only with his former estate tail; this is a good grant or devise. It operates to pass a benefit including the services. *Badger* v. *Lloyd, Lord Raym.* 523.]

4. In respect of the naming or description of the thing granted.

Misnaming or misrecital.

By the grant of an acre of land, or of any other thing, by the name whereby it is called, the reversion of that thing, if the grantor have no more but [*i. e.* than] a reversion, will pass, and this mistake will not hurt. But it is not so *e converso*. [a] And yet some have said, if one grant a thing in possession, by the name of the reversion of the thing, this is good to pass the possession. *Quod non est lex.* [For land in possession will not pass by the grant of the reversion or remainder of that land, since, if the possession were to pass, the grant would be more extensive than the intention. *Supra.*] [b] For if one make a lease for years, and before the lessee enter, the lessor grant the land by the name of the reversion or the land; this grant is void. [This must be understood of a lease of lands in possession to take effect by the rules of the common law; for if the instrument can operate as a bargain and sale, or as a grant of the reversion, the title of the lessee will be perfect without entry; and from the moment there is a vested interest in the termor, there is a reversion in the grantor.] If one make a lease for life of the demesnes of a manor rendering rent, and after he doth grant the manor by the name of the manor; this is a good grant for the reversion of the demesnes, as well as for the residue of the manor; [because the reversion of the lands so demised is parcel of the manor. And observe, that even at the common law a recovery of the manor, without the concurrence of the lessee, or a jointress, &c. of parcel of the demesnes of the manor, would have been good; for the manor and the reversion, as part of the manor, passed. *Pig. Recov.* 41; 1 *Prest. Convey.* 65; *Jenk. Cent.* 311. But if a lease be made of the manor for life, reserving an acre, this acre ceases, during the continuance of the lease, to be parcel of the manor, for a freehold in possession cannot be parcel of a freehold in reversion. *Vin. Abrid.*

Co. 4. 122. Perk. Sect. 116. Co. 10. 106, 107. 11. 47.

[a] Plow. 190.

[b] Co. super Lit. 46. See also Co. 9, in Lane's case, which doth seem to warrant this opinion also. Dyer, the grant is good in a common person's case. Bro. Grant.

Manor, 220.] But if one grant common, by the name of the reversion of the common, it seems this [grant] is not good. And yet if one have common and grant it for life, and during that * estate he doth grant the common by the name of *totum illam communiam suam, &c.* some do hold this grant to be good, [subject to the life estate.] *P. 246.

Co. 6. 65. 45 E. 3. 6. Bro. Grant, 7. Perk. Sect. 116.

Any thing may be granted by the name whereby it is and hath been usually called of latter times, within nine or ten years or thereabouts, albeit it be an improper name, and not the ancient name of the thing, but a name newly gotten. [Even a shorter period will suffice, if the name be fixed; as if a man grant all that close called *A.*, which it is intended and agreed shall be henceforth called *B.*, and on the next day he further grants all that close called *B.*, the close would certainly pass.] And so a manor may pass by the name of a messuage or farm, or a farm or manor by the name of a messuage, if it be so usually called and reputed (42). So the great houses in London called *Exeter*, and *Dorset* houses, may be granted by those names, [although these names are recently acquired.]

14 H. 8. 1. 27 H. 6. 2.

And if a man grant that which indeed is a pasture ground, by the name of a wood; or grant that which indeed is a wood, by the name of a pasture ground; and the things are called by those names; these are good grants of those things. And if one grant by the name of a great field, that which indeed is but a little close, but it is usually called by the name of a great field; this is a good grant of this thing. So if one grant by the name of a plow land, that which in truth is but an acre of land; or grant by the name of a manor, that which is but a plow land; these grants are good. And so it seems it is *e converso*. But if a man grant a house, or a messuage; by this grant an acre of land will not pass. [Certainly not, if the grant be simply of the messuage or house; but when the grant is of the messuage with the appurtenances, the garden, &c. and several acres of land, if attached to the house for the convenience of the

(42) A *manor* in reputation, but which is not in truth a manor does not pass [*query* if law,] by the name of a manor in a fine or recovery, for they are grounded on original writs, which ought to be certain and not to be taken by intendment; but otherwise, in a grant or feoffment, for there the intent of the parties shall help it. *Johnson* v. *Heydon*, Noy, 7. *Br. Abr. Feoffment*, pl. 14. See further 1 *Lev.* 27.

house, as lawn, pleasure ground, paddocks, &c. would, it is apprehended, pass. See *Com. Dig. Grant*; *Bac. Abr. Grant* (G. J. 4); 1 *Inst.* 56.]

By the grant of services, a rent reserved upon an estate tail will pass. Co. super Lit. 150. Mich. 7 Jac. Curia. B. R.

If a man make a lease of one house to another for years, and the lessee divide it and make two houses of it, and after the lessor doth grant the reversion of it by the name of one house; this is a good grant to pass it; [for as to the lessor it is only one house, though used for the purposes of distinct habitations.] And if one lease three houses to three several men at several times, and they divide them into twenty-nine tenements and households in them all; and the first lessor doth grant them by the name of three messuages: this is a good grant to pass them all. But if he grant by the name of fifteen messuages or tenements only; it seems this is good for no more but for [than] fifteen of the subdivided tenements (43). [Because he undertakes to grant them, not with a view to their ancient and reputed denomination, but by the distinct habitations; and therefore he must be presumed to have a particular intention, and that intention will restrain the effect of his grant.]

If one recite that he hath a rent-charge issuing out of black acre and white acre, and then grant the same rent, and in truth it doth issue out of black acre only; or if he do recite that it doth issue out of one acre when in truth it doth issue out of both; in both these cases the grant is good, notwithstanding these mistakes. [This mistake is fatal, when the recital is a material part of the description. *Bac. Abr. Grant* (H. 1).] Perk. Sect. 72.

If one be patron of the church of *St. Peter* and *Paul* in *D.* and he grant the next presentation of the church of *St. Peter*, or of the church of *St. Paul*; these are void grants to pass the presentation; [unless perhaps it can be averred that the church is known by one name and by the other.] Bro. Grant, 12.

If one grant a rent out of white acre by the name Perk. Sect. 79.

(43) If a man make a lease of eight tenements in *D.* by several leases, and then by deed recite seven of the leases, and grant the reversion of them to *A.* with all his *lands, houses, and edifices in D.*, having no other lands, &c. in *D.* than the eight tenements, the reversion of the eighth tenement not recited shall pass; for the other words, all his lands, &c. cannot otherwise be satisfied. *Hagget* v. *Giles*, 2 *Roll. Abr.*

Per Ch. Justice Hutton & Yelverton, Co. B. Mich. 3 Car. in the case of Edward Crew.

of a rent out of black acre; this grant is void as [*dele*, as] to charge white acre.

If one have a manor called *Steeple Lavington*, and he grant it by the name of *West Lavington*, alias *Steeple Lavington*, it is a good grant by the *alias*, * especially if the grant say "lying in *Lavington*," and the manor of *Steeple Lavington* doth lie in that parish, and the grantor hath no other land there. *P. 247.

Mich. 2 Jac. in Brown's case agreed. [Doddington's case, 2 Co. 33. 6 Taunt. 145.]

If one grant all his lands which he hath in *D.* in this manner, "all my lands in *D.* which I had of the grant of *I. S.*;" this is a good grant of all his lands in *D.* albeit he had them not of the grant of *I. S.* but of the grant of another. [2dly,] but if the words be, "all my lands which I had by the grant of *I. S.* in *D*;" in this case the grant is not good to carry any other lands in *D.* but such as [*read*, any lands in *D.* unless] he had [them] of the grant of *I. S.* So, [3dly,] if one grant in this manner, "all my manor of *Sale*, in *Dale*, which I had by descent," and in truth he had it not by descent, but by purchase; this is a good grant of the manor. So, [4thly,] if one grant all his lands in *Dale*, and say no more; this is a good grant to pass all his lands there. But, [5thly,] if one grant in this manner, "all my lands in *Dale* which I had by descent from my father," and in truth I had them not by descent, but by purchase; this grant is void, and will not pass those lands. So, [6thly,] if I grant in this manner, "all my lands that I had by the attainder of *I. S.*" and in truth I had no land by that means; this grant is void. And, [7thly,] if I grant after this manner, "all my lands in *B.* in the tenure of *D.* which I had of the gift of *I. S.*" and in truth it doth lie in *B.* and is in the tenure of *D.* but it was not purchased of *I. S.*; this is a good grant to pass the land. [For whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected. The grant, in the first, third, and sixth instances will be good, notwithstanding the error, for *falsa demonstratio non nocet. Nil facit error nominis quam de re constat.* If the terms of designation be an essential part of the description, as in the second, fourth and fifth examples, then the grant will fail of effect entirely, or so far as the

Plow. 169. 395. And so it was the opinion of Ch. Justice Popham. 2 Jac. B. R.

[8 East, 183.] Dyer, 87.

Mich. 2 Jac. Adjudged Brown's case.

terms of description cannot be satisfied. When the terms are restrictive and give a qualification, then they shall have effect in restraining the operation of the grant within the extent of the terms of restriction, if there be any parcels to answer the restrictive terms; but if there be not any such parcels to satisfy the terms of restriction, they shall be rejected as insensible. In practice the most advisable mode is to make the description by independent clauses; first taking those parts of the description which are certain, as the name of the tenement, the parish, &c. and then say, "all which, &c. were lately purchased, &c. in the tenure, &c.;" for as the clause is clearly substantive, any error in this part of the description would not vitiate, for *utile per inutile non vitiatur*.]

If a parish lie in two counties, *viz. Berks* and *Wilts*, and one grant in this manner, "all his close called *Callis*, in the parish of *Hurst*, in the county of *Berks*," and in truth the close doth lie in the county of *Wilts*; this is a good grant to pass the close. [Because the close passes by the name, as a full and certain description.] But if one grant in this manner, "all his houses in the parish of *St. Botolph extra Aldgate*, late in the tenure of *R.*" and in truth he hath no houses there, but he hath some houses in *St. Botolph extra Aldersgate*; this is a void grant. [*Query*, if *Aldgate* might not be averred to be *Aldersgate*.] And yet if the grant be in this manner, "all that my house in the occupation of *I. S.* [being the first certainty,] in *St. Andrew*'s parish," whereas in truth it is in the parish of *K.* but in the occupation of *I. S.* it seems this grant is good to pass the house. But if it be thus, "all that my house in *St. Andrew*'s parish in *Holborn*, in the occupation of *I. S.*" and in truth it is in another parish, but in his occupation; this grant is not good to pass the house. [Because the first term of the description is false.]

Dyer, 299. Co. 3. 10.

If one grant in this manner, "my manor of *Dale*, which appeareth by office found to be of the value of 10 *l. per annum*," and in truth in the office it is found at 20 *l. per annum*; this grant is good notwithstanding this misprision. [Because there is a certainty with a false demonstration.]

Hil. 2 Jac. B. R. per Tanfield.

If one grant in this manner, "all my manor of *W.* late parcel of the possession of the Abbot of *S.*

Pasc. 7 Jac. B. R. Co. 2. 32.

and late in the possession of *K.*" and in truth it was never in the possession of *K.*; this grant is good notwithstanding. [Because the demonstration only is false.] But if the grant be thus, "*omnia illa terras, &c.* * *in tenura* I. S. *jacen in* W. *nuper prioratui de* S. *spectan,*" and in truth the land doth lie in *S.* and not in *W.*; this is no good grant to pass the lands in *S.* [Because the name of the parish is descriptive.] And if the lands do lie in *W.* but are in the tenure of *I. D.* and not in the tenure of *I. S.* the grant is void to pass the lands in the occupation of *I. S.* [*read, I. D.*; because the tenancy of *I. S.* is the material, and an essential part of the description.]

[Hob. 171. Dowtie's case. 3 Rep. 9.]

*P. 248.

Dyer, 376. Bac. Grant, 92.

If one purchase land of *I. S.* in *T.* and have no other land there, and he grant his land in *T.* late the land of *R. S.* or late the land of *S.* and mistake or omit the christian name; this grant is good, notwithstanding this mistake. [Because the former part of the description is complete and certain, and the demonstration only fails.] And so also it is where there is a blank left for the christian name. [But an omission may be fatal, as in the instance of a grant to *C.* of all the lands I had by descent from ——, leaving a blank, for this omission generates an uncertainty; *Bac. Abr. Grant* (H.); or rather leaves the sense incomplete.] And if in this case he grant all his land in *T.* and say no more, this is a good grant to pass the land. And if one grant "all his lands in *D.* called *N.* which were the lands of *I. S.*" this is a good grant to pass the lands called *N.* though they were never the lands of *I. S.* But if the grant be "of all his lands in *D.* which were the lands of *I. S.*" by this [grant] none but those lands that were the lands of *I. S.* will pass; [for the latter branch of the clause is restrictive, and an essential part of the description.]

Dyer, 80.

If one grant in this manner, "all my meadow in *D.* containing ten acres," whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres. [For the meadow is the substantial part of the grant.] So if one grant thus, "all those forty-seven acres of land by the sleight, whereof fifteen lie in *D.* twenty in *E.* and twenty-five in *F.*" and in truth all of them do lie in *F.* and none of them in

D. or *E.* this is a good grant to carry the whole forty-seven acres; [for the forty-seven acres are the substance of the grant, and the other terms are merely of designation or demonstration.]

If one grant twenty load of wood, and say in his grant, "of which twenty load of wood he had sixteen load by the grant of his father *I. S.*" and in truth *I. S.* did not grant any wood to him at all, or did not grant unto him sixteen load only; this is a good grant of the twenty load of wood, notwithstanding this false recital; [for there is a good description, and *falsa demonstratio non nocet.*] Bro. Grant, 69.

If one grant his manor of *D.* and doth not say in what town or towns it doth lie; this is a good grant [of all the manor.] But it is best to say in what towns the manor doth lie; for [*read*, observe however, that] if it lie in divers places (as it may), and any of the places into which it goeth be omitted, and the rest are set down; no part of the manor lying in the town that is not expressed will pass. Bro. Grant, 53. 7 H. 4. 41. [Doe v. Greathead, 8 East, 91.]

If one grant a manor, and that which in truth is but one manor, by the name of the manor of *A.* and *B.* this is a good grant of the manor. And so also it is if it be two manors, as if a man be seised of the manors of *Ryton* and *Condor* in the county of *Salop*, and he grant in this manner "*totum illud manerium de Ryton et Condor cum pertinen. in com. Salopiæ*;" this is a good grant of both the manors. Otherwise it is in case of the king. Co. 1. 46. Prerogative.

If one have a farm of land, meadow, &c. by lease, called *Hodges*, lying within the parishes of *St. Stephen* and *St. Peter* in *St. Albans*; and he, reciting the said lease, grant to *C.* his term and interest in the house, lands, &c. called *Hodges*, in the parish of *St. Peter* * and *St. Albans*; this grant is good only for so much as doth lie in the parish of *St. Peter*, and not for that which doth lie in *St. Stephen's*. But if he grant the farm, and doth not say in what parish it doth lie; this is a good grant of the whole farm, as in the case before of a manor that doth lie in divers parishes. And if in the case here, the farm lie within the parish of *St. Peter* only; the grant is good for the whole farm. If one recite, that whereas he hath such lands by forfeiture, or whereas such a one Curia Co. B. Pasc. 9 Jac. Inter Plat. & Sleep. Bro. Grant. 53. *P. 249.

hath an estate of his land, or whereas the grantee hath paid him 10*l.* or done him such service, or the like, and these things are not true, and afterwards he doth grant the land by apt words; this mistake in these cases will not hurt the grant; [that is, independent of the recital, as a description. But when the description by the recital is rendered material to the grant, then an error in the recital will vitiate the grant. *Bac. Abr. Grant* (H. 1.)] But otherwise it is in case of the king, in some of these cases. Prerogative.

Co. 11. 50. If one have a manor in which he hath parks and fish-ponds, and he grant the manor for life, except the game and fish, and after grant the reversion of the manor; this is a good grant of the game and fish also.

Co. super Lit. 5. If a grant be of "*centum libratas terræ*, or 50 *libratas terræ*, or of *centum solidat' terræ*," it seems these are good grants, and that hereby doth pass land of that value, and so of more or less. [*Query*, if such grants be not void for uncertainty; and see *Bac. Abr. Grant* (H.)]

Co. super Lit. 4. If a grant be of an acre of land covered with water, this is a good grant.

Dyer, 84. 34 E. 3. If a grant be of a certain portion of land or tithes, or of the fourth part of land or tithes, and there be a sufficient certainty in the description of it, this grant is good. And therefore if the grant be of the fourth part of the tithes, and of the offerings of the church of *St. Peter*, this is a good grant.

Bro. Grant, 101. 121. If one, seised of an advowson in fee, grant to *I. S.* that as oft as the church is void he shall name the clerk to the grantor, and he shall present him to the ordinary; this is a good grant of the advowson. [But without words of limitation, it would be only a grant for life.]

Dyer, 46. Plow. in Hill & Grange's case. A reversion may be granted by the name of a remainder, or a remainder by the name of a reversion, and such a grant is good. As if one grant land to *I. S.* the reversion to *I. D.* this is a good grant of the remainder.

Fitz. Grant, 63. If one make a lease of land to husband and wife for their lives, and after grant the reversion of this by the name of the reversion of the land which the wife doth hold for life; this grant is void, [for there is not any such reversion. *Sed query*, for

there is not a falsity, but merely a description not quite full.] So if one grant to two for life, and after grant the reversion of one of them, this is void, [for the reversion is entire, and the grant uncertain. Had they been tenants in common, the conclusion would have been different; for there is a distinct reversion for each moiety. 3 *Prest. Convey.* p. 487.]

A fulling, or grist mill, may be granted by the name of a mill only, [for it is a mill.] 21 Ass. pl. 23.

Incertainty. If one grant in this manner, " all that his messuage, &c. and all the lands, meadows, and pastures, thereunto belonging;" this is a good grant, and certain enough to pass all the lands, meadows and pastures usually occupied therewith, [and the certainty may be established by extrinsic evidence.] 27 H. 6. 2. Plow. 164. Bro. Lease, 55

*P. 250. * If the lord grant his manor by the name of " his manor, with the reversion of all his tenants;" or by the name of " the reversion of all his tenants bond and free which hold for life or years;" and do not name them by their particular names; these grants are good in these cases and certain enough [to the extent, in the latter case, of the language.] Fitz. Grant, 68. Perk. Sect. 68.

If one grant land, [meaning and professedly aiming to grant some lands in particular,] and say not in what parish or county or village it doth lie; yet if there be any other matter to describe it; it seems the grant is good enough, and it may be averred [and consequently proved] where it lieth. But if there be no circumstantial matter in the grant to denote and decypher out where it doth lie; it seems the grant is void for uncertainty (44). And therefore if one grant his manor of *Dale*, or his lands in the occupation of *I. S.* or his lands that descended to *I. S.* or his lands that did belong to the priory of *S.* or the like; these are good grants and certain enough. *Id certum est quod certum reddi potest.* [But a grant of all my land whatsoever, is good to pass all the land I have, for *qui omne dicit nihil excipit.*] Bro. Grant, 53 Co. 9. 47.

(44) So in like manner where there is any uncertainty in the limitation of the estate, as where *A.* possessed of lands for a term of two thousand years, grants to *B.* and his wife *without mentioning any term*, to the use of *C.* for his life, and to the heirs of his body; and in default of issue to *B.* for one thousand eight hundred years; the first limitation held to be void for uncertainty, it mentioning to grant to *B.* and *ux.* and not saying for what estate or term. See *Kersley* v. *Duck*, 2 *Vern.* 684. [*Sed query.*]

Perk. Sect. 73. If there be tenant for life of three houses, and four acres of land, and he in reversion grant the reversion of two [of the] houses and of two [of the] acres of this land; this is a good grant, and hath sufficient certainty in it; [to be rendered complete by election. But election must be made in the lifetime of the grantor and of the grantee. So any two of the houses, or any two of the acres, in particular, may be granted by a proper description.]

Perk. Sect. 67. If a grant be incertain altogether, and have not sufficient certainty in it, and cannot be made certain by some matter *ex post facto*, it is void. And therefore if there be lord and tenant of three acres of land by fealty and 12*d.* rent, and the lord grant "the services of the third [*read*, one] acre," [without ascertaining it] to a stranger; this grant is

Perk. Sect. 68. merely void. So if husband and wife hold an acre of land jointly of *I. S.* for their lives, and *I. S.* grant the reversion of the acre of land which the husband alone doth hold for his life; this grant is void. [Because there are not any lands which answer the description, since there are not any lands which in construction of law the husband holdeth for his life, since the tenancy is in himself and his wife. This is the ground, if there be any, of this case.] So if there be lord and three joint-tenants, and the lord grant the services of one of them to a stranger; this grant is void. [One reason at least is, that the services are entire, while the grant refers to the service of one of the tenants as a

6 H. 6. 12. several service.] So if one have twenty tenants that do pay him 12*d.* a-piece rent, and he grant 5*s.* yearly out of these rents, and doth not say of which tenants, this grant is void for incertainty. [*Query.* The objection seems to be, that a rent cannot be issuing out of a rent; and that the grant does not confer a title to any of the rents in particular. Some in particular might have been transferred, although they could not collectively be charged with a new rent.] So

14 E. 3. 17. Bro. Grant, 52. if conusance of pleas be granted, and it is not said before whom; this [grant] is utterly void. So if one have two tenements, and doth grant the reversion of one of them, and doth not say which; this is void for incertainty. [*Query*, if this grant may not be made good by election; and see *infra*.] So if one grant

estovers to another, and say not what, nor how [to be taken;] this [grant] is void. So if one grant me so many of his trees, or of his horses, as may be reasonably spared; this grant is void (45). And yet if one grant me so many of his trees as *I. S.* shall think fit; it seems this grant is good. [To be rendered certain by the determination of *I. S.*] And if one grant me one hundred load of wood to be taken by the assignment of the grantor, or to be taken by the assignment of *I. S.*; these are good grants. So if one grant me three acres of wood toward the north side of the wood; this is a good grant, and certain enough. [Being the land on the extreme part of the north side; or to be, as circumstances may require, rendered certain by election.] Dyer, 91. Co. 5. 24.

If one grant to one of the children of *I. S.* and *I. S.* hath more * than one, [*Bac. Abr. Grant*, (H.)] and he doth not describe which he doth intend; this grant is void for incertainty, [and cannot be rendered good by any evidence, for the ambiguity is patent, and parol evidence is inadmissible.] Bro. Done, 31.

*P. 251.

If one grant to me a rent, or a robe; twenty shillings, or forty shillings; or common of pasture, or rent; in the disjunctive, which is at first very incertain; yet this grant may become good; for if I make my election, or he pay the rent, or perform the grant in either part, the grant is now become good. So if one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to *I. S.*; in this case, if *I. S.* make his election which acre he will have, the grant of the remainder to him will be good. [As to the point, that it may be made good by election, *query*; and see *supra*, 250.] So it is when a man hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them; in this case I may choose which I will have; and in these cases, when I have made my election, and not before, the grant is good. And if, in these cases, the grantee doth not make his election during his life, [and also the life of the grantor. *Bac. Abr. Grant* (H. 3.)] it seems the grant will never be good. If one be seised of land, and 9 E. 4. 36. Perk. Sect. 74. Perk. Sect. 76. Bro. Grant, 77

(45) For there is no standard to reduce the grant to a certainty. *Hob.* 168. *Moor*, 880. *Bac. Abr. Grant* (H).

lease it for years, rendering 10*s.* rent, and after he doth grant a rent of 10*s.* out of this land to a stranger; in this case, albeit there be some incertainty in the grant, yet this is a good grant of a rent of 10*s*; but it shall be taken a grant of a new and not of the old rent, and therefore shall not take effect until the particular estate be ended. [This is the most beneficial construction for the grantee, in one respect, since he cannot distrain for the rent on the particular tenant. But *query* if the rent shall not accumulate so as to charge the reversion with a distress for the arrears when the reversion falls into possession.]

See more, to this point, in *Deeds* and their *exposition, ch.* 5, *numb.* 15; and *Fine, ch.* 2, *numb.* 7, (46).

5. In respect of matter in some other parts of the grant.

1. In the commencement of the estate.

In some cases, albeit there be in a grant a good grantor, and a good grantee, and a thing granted, and all these are duly and certainly described, yet the grant may be void for some fault in some other thing touching the grant: as, 1. In the commencement of the estate. For if a man be possessed of a term of years, albeit it be one hundred years, or upwards, and grant to another all the residue of this term of years that shall be to come at the time of his death; this grant is void for incertainty. [Because the law will not presume that any part of the term will exist at the death of the grantor; or, possibly, because the estate is left in the grantor during his life. This is a perplexing case; very difficult to be ascribed to any clear and determinate ground of law. *Jermyn* v. *Orchard, Show. Par. Cases*, 199.] And yet if a man, possessed of such a [*viz.* a long] term in land, grant the land to another, to have and to hold to him after the death of the grantor for fifty years, or for two hundred years, [by way of underlease;] these are good grants; and in the first case, the grantee shall have fifty years, if there be so many to come of the term of one hundred years at the death of the grantor; and in the last case, the grantee shall have the land for the whole one hundred years, or so many of them as are to come at the death of the grantor. [If in either instance the grant would necessarily operate as an

Bro. Grant, 154. Co. 1. 155. Plow. 530.

(46) And further, as to mistakes and misrecital in grants, in respect of names or things, in *Bac. Abr. Grants* (H.) *Vin. Abr. Grants* (D.)

assignment, to take effect after the death of the grantor; and therefore, how can it be supported consistently with the authorities?] So if one grant any thing that doth lie in livery or in grant, and that is in *esse* at the time of the grant, [1 *Prest. Est.* 217, *ch. Freehold,*] in fee simple, fee tail, or for life, and the estate is to begin at a day to come; this for the most part is void. Howbeit, in some cases, the livery of seisin, [*i. e.* if made after the day. *Supra, ch. Feoffment*; or the delivery of the deed of grant after the day,] will help it. But a lease for years to begin in *futuro* is good enough, [as an *interesse termini.* So a rent, &c. on its first creation, may be granted for an estate to commence in *futuro.* Also under the learning of springing uses, executory devises, and the doctrine of trusts, an estate of freehold may be limited to take effect in *futuro*; and in all these cases the freehold remains with the former owner, or any person to whom it is limited; and in case of an excutory devise in the heir; or if devised by a residuary clause or otherwise, then in the devisee till it can vest. See 1 *Prest. Est. ch. Freehold.*] And if a lease be made to one for years, or for years determinable upon lives, * and after a lease is made to another of the same thing, to have and to hold from the end of the former lease; this is a good lease, and the commencement certain enough. [And if there be not any such lease, or the lease to which reference is made be void, the second lease will take effect immediately. *Bac. on Leases,* (N); *Prest. Est. ch. Years.*] So if a lease be made of land to one for life, and after the reversion thereof is granted to another for life, *cum post mortem vel alio modo vacare contigerit*; this is good. [And it amounts to a present and immediate grant of the reversion as a vested interest, subject only to the life estate. So where *A.* was tenant for life, and the reversion was granted to *B.* for life, and after the several deceases of *A.* and *B.* to *C.*, it was held that *C.* had a present and immediate estate, since in effect the grant to him was of an estate immediately expectant on the several estates of *A.* and *B.* See *Weale* v. *Lower, Pollex.* 55; *Badger* v. *Lloyd,* 1 *Lord Raym.* 523; 1 *Prest. Est.* 90. But where *A.* was tenant in tail *male,* and the reversioner devised

Dyer, 58. Co. 5. 1.

Uncertainty.

Pasc. 7 Jac. Dennis's case.

*P. 252.

Craddock's case. Pasc. 7 Jac. Co. B.

the land from and after the failure of the issue of *A. generally*; this gift was held to be a future devise, too remote and void. *Lady Lanesborough* v. *Fox, Cases T. Talb.* 262.] So if a lease be made to one for twenty years if he live so long, and after a lease is made to another *habendum* after the end of the term granted to the lessee, for twenty years, to be accounted from the date of the deed last made; this is a good grant for twenty years after the first lease ended; and the words "to be accounted, &c." shall be rejected. [*Query* this case, since by the end might be understood the determination by death before twenty-one years.] And if one grant a rent to me, *habendum* from the time of my full age for my life, and I am of full age at the time of the grant, this grant is good [immediately, and] for my life. If a woman sole have a lease for years and take a husband, and then he in reversion grant the land to another, *habendum* after the term granted to the husband, &c. where in truth it was never granted to the husband but by an act of law, *viz.* the marriage; yet this is [by a reasonable intendment] a good lease. 2. In the limitation of the estate. For if a grant be to two *et heredibus*, without *suis*, this is void for incertainty. [And yet a devise to two and heirs, without saying their heirs, would be a joint-tenancy in fee in both.] And yet a grant to one *et heredibus*, is good; [for the law will supply *suis* in construction.] And if a man grant two acres, to have and to hold the one in fee simple and the other in fee tail; or the one in fee simple and the other for life; and doth not set down which in fee simple, &c. in certain; yet this grant is good, and the grantee hath the election [to decide which acre shall be held in fee, and which acre shall be held for the particular estate.] And yet if one grant two acres to two men, *habendum* the one to the one, and the other to the other, and say not which either of them shall have; this is void for incertainty. [But the grant would have been good if it had given an election to either of them, to fix on the acre he should have. *Bac. Abr. Grant* (H. 3.)] And if one have a reversion of land after a lease for years, and grant the land *habendum* the reversion, or grant the reversion *habendum* the land; this is

Co. 9.

Plow. 192. Co. 6. 36.

22 H. 6. 15. Plow. 28.

Perk. Sect. 75. 77. Plow. 152.

Co. 10. 197. Plow. 147.

2. *In the limitation of the estate; or in the habendum of the grant.*

Incertainty.

good. [For the grant and the *habendum* are consistent, since the grant of the land is in law the grant of the reversion of the land.]

6. In respect of the end or ground of the grant.

In some case, a grant or gift may be void, at least to some persons and purposes, when there are none of the defects aforesaid in it; as when it is made upon a corrupt contract; or to the end to defraud creditors of their debts, or purchasers of their lands bought, or the like; [so of grants on usurious contracts, &c. &c.;] whereof see before in *Deed, ch.* 4, *numb.* 5.

7. In respect of the omission of some ceremony, &c.

And in some cases, albeit there be no other fault in the grant, yet it may become void for want of some other matter that ought to be done, as enrolment, livery of seisin, attornment, &c.; [the necessity of attornment is superseded by the 4 and 5 Ann, c. 16;] for where these things are requisite, the grant is not good until they be had; neither for that thing which will not pass without that ceremony, nor yet for that which, [being parcel appendant or appurtenant,] otherwise would pass by the deed. And therefore if a feoffment be made of a manor to which an advowson is appendant, and no livery is made, so that the manor doth not pass, the advowson will not pass neither. [This is true, because the advowson is annexed to the manor, and there was not any intent to sever them. But when a deed may operate in one mode as a grant, and in another mode as a bargain and sale, or as a lease and release, or feoffment or covenant to stand seised, the grantee may render it effectual by using it as an instrument in that mode in which it may operate. *Roe* v. *Tranmer*, *Wils.* 75; *Willes*, 682. And if there be distinct farms, tenements, &c. the deed may operate, as to one farm or one tenement, as a grant; although, as to the other farm or tenement, the deed cannot operate for want of the ceremony of livery, &c.] Where a grant may be void by the refusal, [disagreement,] or waiver of the grantee, see before in *Deed*, *numb.* 6, *chap.* 4.

21 H. 7. 5. Co. super Lit.

*P. 253.

5. What shall be said a good grant in the nature of a release or discharge; or not.

* If one make a feoffment with warranty, and after the feoffee doth grant to the feoffor, that neither he nor his heirs shall vouch the warrantor or his heirs upon the warranty; this is a good discharge of the benefit of voucher, and doth bar the

7 H. 6. 43. 21 H. 7. 23. Perk. Sect. 69. Bro. Grant, 175. Kelw. 88.

feoffee of it; [*viz.* his right to vouch.] And yet he may bring a *warrantia chartæ* still, [or may use the warranty by way of rebutter or defence.] So if one grant to me a rent-charge, and afterwards I grant to him that he shall not be sued for this rent; this is a good grant to bar me of bringing an annuity for the rent; and yet I may distrain for the rent still. And so *e converso*, if I grant to the grantor, that he shall not be distrained for the rent; by this I am barred of a distress, but not of bringing an annuity for the rent. [But *query* whether an annual sum, after it has become a rent, can be re-converted into an annuity?] So if the lord doth grant to his tenant, holding by knight's service, that his heirs shall not be in ward, &c.; or a man doth grant to his debtor that he will not sue him for the debt at all, or until such a time, [*omit*, or until such a time;] or one grant to his lessee for life or years that he shall not be impeached for waste; all these are good discharges, and may be pleaded by way of bar to avoid *circuity of action*. [In the instance of a grant of exemption from impeachment for waste, the instrument operates as a grant, and not as a release. But if no distress would lie for the rent, then when the right of suing is released, the annuity would be released; so when there is a remedy by distress only, the release of that remedy would extinguish the rent. 1 *Term Rep.* 446. See *Salk.* 573, that if the grant or covenant be not to sue for a time, even one thousand years, the deed will not operate as a release. And when several are jointly and severally bound, a covenant not to sue one will be a covenant only, and not a release. *Dean* v. *Newhall*, 8 *Term Rep.* 168; *Fitzgerald* v. *Trent*, 11 *Mod.* 254; *Lacy* v. *Kenaston*, 1 *Lord Raym.* 590. But a release to one would be a release to both; see *ch. Release.*]

And now because attornment, as hath been showed, is necessary in some cases to the perfection of some conveyances and grants of things that lie in grant and not in livery, we must therefore here, ere we can go further, as a necessary appendix to grants, add the learning of attornment, which followeth next in order (47).

(47) This chapter on grants does not particularly contain any rules for their construction; it refers in several parts to the chapters on the exposition of deeds: that chapter contains some general rules for the construction of all parts of all kinds of deeds; and in addition

CHAP. XIII.

Of an Attornment.

1. *Quid.* AN attornment is the agreement of the tenant to the grant of the seigniory, [*i. e.* to become tenant to a new lord of the seigniory;] or of a rent; or the agreement of the donee in tail, or tenant for

Co. super Lit. 309. Terms of the Law. Plow. 25. Lit. Sect. 551.

---

thereto, it may not be altogether unacceptable to the reader to have subjoined some cases, which serve to establish the rules of construction of grants in general.

Where there is sufficient matter to guide the *intent* of the party, in such manner that lay persons may understand it; or sufficient matter is contained in the deed to *show the intent*; there the deed, and the words therein, shall be taken so as to make the deed good, rather than destroy it. *Windham* v. *Windham, And.* 60.

But in construing the deed according to the *intent*, the construction must be upon the whole deed, and not one part taken, and another left out. *Baldwin* v. *Martin, And.* 225.

A deed ought to be so expounded, that *all parts of it may stand together*; and it being a common assurance, the judges shall break the deed in pieces to fulfil the *intents* of the parties. *Per Archer*, J. *Cart.* 98, cites 9 *Co.* 47.

As far as it may stand with the rule of law, it is honourable for all judges to judge according to the *intention* of the parties, and so they ought to do. *Co. Lit.* 314 b.

Ld. Ch. J. *Willes*, in delivering the opinion of the judges in the case of *Smith* v. *Parkhurst*, mentions these two maxims, "That such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of deeds should take effect;" and "that such a construction should be made of the words in a deed as is most agreeable to the intent of the grantor:" and expresses himself in these remarkable words. These maxims are founded upon the greatest authority, *Coke*, *Plowden*, and Lord Chief Justice *Hale*; and the law commends the *astutia*, the cunning of judges, in construing words in such a manner as shall best *answer the intent*; the art of construing words in such a manner as shall *destroy* the *intent*, may show the ingenuity of counsel, but is very ill-becoming a judge. 3 *Atk.* 136.

In expounding a grant according to the *intent*, it must be done according to the *intent at the time of the grant*; as, if I grant an annuity to *I. S.* until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterwards is made an archdeacon, yet if I offer him a competent benefice according to his estate at the time of the grant, the annuity doth cease. *Cro. Eliz.* 35.

The law, in the true construction of grants, hath respect to the *estate of the grantor; to the ability of the grantee; to the consideration which leads the estate*; and to the *recompence and loss which is sustained. Per Doderidge*, J, in *Gough* v. *Howard*, 3 *Buls.* 125.

When there are two *clauses* in a deed, of which *the latter* is *contradictory* to the former; there the former shall stand. *Per Nicholas*, J. *Hard.* 94. [In wills the rule is reversed.]

An *insensible clause* doth not make the residue of the deed vicious, which is in[*omit*,in]sensible of itself. *Pordage* v. *Cole*, 1 *Saund.* 320.

One clause may be explained by another. 7 *Rep.* 41 a, *Beresford's case.*

Clauses in company have other constructions than when they are alone. *Hob.* 275, *Earl of Clanrickard's case.*

The law will construe that part of a grant to *precede*, which ought to precede. 10 *Rep.* 28, *Sutton's Hospital case.*

No construction shall be made contrary to the very express words of the grant. *Winch.* 47, *Bishop of Glouceter* v. *Wood.* [For that would be to make a new grant, not to expound the grant already made.]

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est. 2 *Saund.* 167, *Lanyon* v. *Carne. Wing. Max.* 24.

When the words are *capable of different expositions*, that [exposition] shall be taken

life, or years, to a grant of a reversion or of a remainder made to another, [*i. e.* to become connected with him in the relation of landlord and tenant of the tenement.] As where the lord, or one that hath a rent out of land, doth grant over his seigniory, or his rent to another; or one that hath a reversion or a remainder, after an estate for life or years, doth sell or give the same away to another; in these cases the tenant of the land must have notice of this sale or gift, and of the alteration of the party to whom he must attend in his services; and he must give his consent to the same gift or grant, or else generally the same is not good. And this yielding of consent is called an attornment (1). And it [attornment] is either actual or verbal, or actual and verbal both.

---

which supports the declaration or agreement, and not that which defeats it. 1 *Salk.* 324, *Wyatt* v. *Aland.*

Construction of words shall be taken according to the vulgar and usual sense and *manner of speech in those places, where the words are spoken.* 1 *Buls.* 175, *Hewett* v. *Painter.*

Words in grants shall be construed according to a reasonable and easy sense, and *not strained* to things unlikely and unusual. *Hob.* 304, in case of *London* v. *The Collegiate Church of Southwell.*

Verba posteriora, propter certitudinem addita, ad priora, quæ certitudine indigent sunt referenda. *Wing.* 167. See the instances there put to support this maxim.

General words do not imply any *certainty*, nor shall *conclude* any common person to say, that he has nothing there; and the difference between general *grants* and particular appears in *Pl. C.* 191, *Wrotesley's case.*

Words subsequent may qualify and abridge, but *not destroy* the generality of the words *precedent.* 8 *Rep.* 154 b, in *Altham's case.*

The rule, that the *general words subsequent* shall be *restrained by the precedent particular words*, is good and general; especially where the particular words comprehend and express a thing of an *inferior nature* to the general words subsequent; and that the general words are put without *their dividing differences*; for there indeed the generality of them shall be controlled by the bounds of the particular precedent words. But where the general words do put the proper difference of particulars, and besides *take a higher species than the particulars* mentioned before; as where the devise was of all his plate and jewels, and all other his estate real and personal, &c. there the *general words shall overreach the particulars before*, as if in the *Archbishop of Canterbury's case*, in 2 *Rep.* the words had been, "and all the ecclesiastical persons of superior or inferior rank;" they would have taken in archbishops, bishops, &c. *Per Holt*, Ch. J. 6 *Mod.* 107, *Countess of Bridgwater* v. *Duke of Bolton.*

When *words* contained in a deed go to *several senses* and purposes, the deed shall be taken according to the sense of the words, without taking or expounding any word to be *vain* or *confounding the sense* of it, as if in the deed be contained *dedi, remisi, &c.*; this may be a deed of grant, feoffment, release, or confirmation, or all these, as the case requires. 2 *And.* 20, *Earl of Pembroke* v. *Barkly.*

When *words of diverse natures* are inserted in a conveyance, the grantee has election to use which of them he will. 2 *Brownl.* 292, *Smallman* v. *Powis.* [*Fitzwilliam's case*, 6 *Co.* 32.]

Talis interpretatio semper fienda est, ut evitetur absurdum et inconveniens, et ne judicium sit illusorium. 1 *Co.* 52. 2. *Wing.* 21.

(1) Attornment is now rendered unnecessary by the statute of 4 Ann, c. 16, § 9, which enacts, that all grants or conveyances, by fine or otherwise, of any manors or rents, or of reversions or remainders, shall be effectual without the attornment of any of the tenants; but it is thereby provided, that no tenant shall be prejudiced by payment of rent to any

2. *Quotuplex.*

That which is actual is either implied and in law, or expressed and in *fait*, [truly and indeed.] Of all which there are divers examples hereafter following.

3. *The effect of it.*

*P. 254.

*The end, effect, or fruit of this agreement, is to perfect a grant, and to make a good conveyance of an estate; for, where this is needful, no rent nor reversion will pass without it; neither can the grantee of the seigniory, rent, or reversion, bring any action of waste, for waste done in the land; nor distrain for any rent or service upon the land, before this is done. But this is only a bare assent, and therefore it shall not, nor will enure, or work, to pass any interest, to make a bad grant good, to enfranchise a villain, nor to give a man a tenancy by disseisin, intrusion, or abatement, neither shall it work by way of estoppel. And therefore, if a man gain a rent issuing out of land, by coercion of distress or otherwise, and the tenant of the land attorn to him; this will not amend his estate; [*viz.* give him any seisin or incipient title.] But otherwise a grant and the attornment of the tenant do as effectually pass the freehold and inheritance of the reversion [or remainder] of land, [*viz.* land held for an estate in reversion or remainder,] as a feoffment and livery of seisin of land do pass the possession of land.

Lit. Sect. 551. Co. super Lit. 302. Lit. Bro. Sect. 267. 129. 379. 39 H. 6. 24. Co. super Lit. 323. 315. Lit. Sect. 606.

4. *Where and in what cases the attornment of the tenant is necessary; or not; and how; and to what intents.*

In most cases, where the grantee hath means to compel the tenant to attorn, there the attornment of the tenant is at least to some purposes needful; for howsoever it be true, that if a seigniory, rent, services, reversion, or remainder, be granted by fine, in this case the rent, seigniory, &c. doth pass; so as the grantee may enter for a forfeiture upon the alienation of the tenant, being tenant for life, years, by statute, or elegit, or upon

Lit. Sect. 579. 580, 581. Co. 6. 68. Co. super Lit. 309. 314. 320.

---

grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee. And by statute 11 Geo. 2, c. 19, § 11, reciting that the possession of estates is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors, who are thereby put out of the possession of their respective estates, and put to the difficulty and expense of recovering the same by action at law, it is thereby therefore enacted, that all such attornments shall be void, and the possession not altered: but it is thereby provided, that the said act shall not extend to affect any attornment made pursuant to any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagees, after the mortgage is become forfeited. [See the case of *Moss* v. *Gallimore*, *Dougl. Rep.* 266, and the argument of *Bower* thereon; also *Powell on Mortgages*, 77.]

an escheat of the tenant [*read*, tenement;] or may seise a ward, or heriot, if it happen before any attornment be made; and if the reversion of [*read*, on] a lease for years be granted by fine, and the lessee be ousted and the lessor disseised, the conusee, [as having had an actual seisin by force of the fine,] may have an assise; and therefore, as to all these purposes, the attornment of the tenant is not needful: yet the grantee, his heir, or assignee cannot distrain the tenant for rent, or bring any action that doth lie in privity between him and the tenant, as waste upon a waste done by the tenant, [or a] writ of entry *ad communem legem*, or *in casu proviso*, or *in consimili casu*, upon the alienation of the tenant, [or an] escheat upon the dying of the tenant without heirs, or ward upon the death of the tenant his heir [being then] within age, or writ of customs and services, until he have the attornment of the tenant; and therefore, as to all these purposes, the attornment of the tenant is necessary. And hence it is, that the conusee of a fine hath means appointed him by the law to compel the tenant to attorn: for in case where the lord doth grant his seigniory to another, and the tenant will not attorn, the conusee, before the fine be ingrossed, may have a writ called a *per quæ servitia*, and thereby compel him to attorn. [*Booth's Real Actions*, 249.] And in case where a man doth grant a rent to another, and the tenant of the land out of which the rent doth issue will not attorn, the conusee of the rent may have a writ called a *quem redditum reddit*, and thereby compel him to attorn. And in case where a man doth grant a reversion, or a remainder of [*read*, being] his estate after [and expectant on the estate of] tenant for life to another, * and the tenant [for life] will not attorn, he, [the] conusee of the reversion or remainder, may have a writ called a *quid juris clamat*, and thereby compel the tenant for life to attorn. And if the conusee of the fine die before he have the attornment of the tenant, his heir, albeit he come to the thing descended by act of law, yet shall be in no better case then [*read*, than] his ancestor was; [*viz.* though he has the estate he cannot treat the tenant as liable to distress, &c.] And if the conusee of a fine, by which he hath a reversion granted to him,

Per quæ servitia.

Old N. B. 170. Co. super Lit. 252.

Quem redditum reddit.

Idem.

*P. 255.

Idem. Co. super Lit. 310. Co. super Lit. 321.

Quid juris clamat.

Co. 6. 68. Lit. Sect. 584. 583.

[do,] before he hath gotten the attornment of the tenant, bargain and sell the reversion by deed indented and inrolled; the bargainee shall be in no better case than the bargainor was. And if a reversion be granted by fine, and the conusee before attornment enter and make a feoffment, [thereby committing a disseisin,] and the lessee re-enter; in this case the feoffee, [though he will retain the inheritance by virtue of the feoffment] cannot distrain for the rent. And yet if there be lord, mesne and tenant, and the mesne grant the services of his tenant by fine to another in fee; and after[wards] the grantee die without heir, and by this means the services of the mesne escheat; in this case the lord, [as coming in by act of law,] may distrain for them without any attornment of the tenant.

In these following cases, attornment in law, or in deed, is [*i. e.* was at the common law,] absolutely, and to all intents, necessary, *viz.* [a] Where one doth make a lease for life, or years, to one, and after doth grant the reversion or remainder after the same lease ended, [*i. e.* subject to the same lease,] to another by deed, in fee simple, fee tail, [or] for life, or [for] years, [as an immediate estate, as distinguished from an *interesse termini*;] in this case the lessee for life, or years, must attorn. [b] So where the lord doth grant his seigniory or the services of his tenant by deed, in fee simple, or otherwise in fee tail, for life, or [for] years, to a stranger; in this case the tenant must attorn. So where the lord of a manor doth make a feoffment of his manor; in this case the services of the tenants will not pass without their attornment, [*i. e.* the attornment of the tenants.] [d] So if another man have a rent-service, rent-charge, or rent-seck, issuing out of my land, and he doth grant this rent to a stranger; in this case I must attorn to this grant to the stranger. And if in these cases the tenant doth not attorn, the grant of the reversion, &c. is merely void; [*i. e.* no estate passeth till attornment. And the grant may become void by the death of the grantor, or of the grantee, prior to attornment.]

[a] Co. 2. 66. Lit. Sect. 551. 567. 571. Co. super Lit. 316.

[b] Lit. Sect. 551. Co. super Lit. 315. Perk. Sect. 696.

[c] Co. 6. 68. Doct. & Stud. 36. Lit. Sect. 553.

[d] Co. super Lit. 312. Lit. Sect. 573.

If a reversion be granted after an estate of a tenant by statute merchant, staple, or elegit, or after an estate that any one hath until debts be

Co. super Lit. 315.

paid, or the like; in these cases the tenants must attorn, or this grant will not be good, [*viz.* complete.]

Co. 2. 35. Lit. Bro. Sect. 298. Dyer, 307. Co. super Lit. 312. Lit. Bro. Sect. 151. 279. Bro. Attor. 59. Dyer, 26. Lit. Bro. 349.

If one make a lease for years of land rendering rent, and after he doth grant the reversion to another for years, to begin after the death of the grantor; in this case it is needful that the lessee for years in possession do attorn to make this grant good, *i. e.* [before the estate can vest.] But if one make a lease of his land to one for ten years, and after make a lease of it to another, to have and to hold from the end of the said term of ten years for the term of twenty years, in this case, [of an *interesse termini*, which cannot ever make the first lessee a tenant to the second lessee,] it seems it is not needful that the first lessee doth attorn, but the grant is good enough without it. If one make a lease to another * for twenty years, and he make a lease over to a third for ten years rendering a rent, and then doth grant the reversion to a stranger; in this case it is needful that the lessee for ten years do attorn: but if the lease for ten years be made without any reservation of rent, *contra*; [*sed query*, for a reversion passes.] For it is a rule, that where there is no tenure, attendancy, remainder, rent, or service to be paid or done, there attornment is not necessary. And hence it is, that where one doth grant common of pasture appendant or appurtenant, or estovers out of land, there needs no[t any] attornment of the tenant to make this grant good. And if a rent or common be granted to one for life, and after the reversion of it be-granted to another; that [*omit*, that] in this case there needs no attornment to make this second grant good. And if one make a lease to one for ten years, and then make a lease to another for twenty years; in this case the second lease is good for the ten years to come after the first ten years ended, without any attornment of the first lessee; [but to pass the reversion immediately during the first ten years, there must have been attornment. See *Co. Lit.* 315 b. 317 a.; and 3 *Prest. Convey.* p. 214.]

*P. 256.

And so it was agreed in M. 37. 38 Eliz. I. R.

rk. Sect. 249. b.

If a lord exchange the services of his tenant with another for land; in this case the attornment of the tenant, by whom the service is to be done, is necessary to perfect this exchange.

If there be lord and tenant in fee simple, and the tenant doth make a lease to another man of the tenancy for life, and the lord doth grant the seigniory to the tenant for life in fee; in this case the tenant in reversion, [for the privity is between him and the lord, and not between the lord and the lessee for life,] must attorn to the tenant for life upon this grant of the reversion, or the grant is not good [as a grant, though during the life estate it may operate as a release of the services.] Lit. Sect. 564.

If I be seised of a reversion after an estate for years, and I grant it to the use [see p. 258] of myself for life, and after to the use of another and his heirs in fee, and after I grant my reversion for life to another; in this case it is needful that the tenant for years attorn to this grant, [because the privity is between him and me; if the owner of the fee had made the grant, the tenant for life must have attorned, as connected in privity with the owner of the fee.] Hil. 8 Jac.

If a lease be made to *I. S.* for his life, and afterwards another lease is made of the same land to *I. D.* for his life; in this case it seems that *I. S.* must attorn to this second grant, [for *I. S.* is to become tenant to *I. D.*] or that the grant will not be good. Dyer, 118.

An estate of a seigniory cannot be gained by a disseisin, abatement, or intrusion, without an attornment. And therefore if one disseise another of a manor which is part in demesne, and part in services, the services are not gained until the tenants attorn [to the disseisor.] Lit. Sect. 587.

In all cases for the most part where there is no[t any] means provided by law to compel the tenant to attorn, there their attornment in law, or in deed, is not necessary, unless there be some special default in the grantee. *Quod remedio destituitur, ipsa re valet, si culpa absit.* And therefore an attornment is not necessary in these cases following, *viz.* * Where one doth grant a rent, reversion, remainder, service, or seigniory to another by way of devise by a last will and testament, or by letters patents from the king, or where such *P. 257. * things are granted by matter of record from a subject to the king. So when the thing granted doth pass by way of use, and doth vest by force of the statute of uses: as if one that is seised of land Co. 6. 68. Lit. Sect. 580. 583. 586. Co. super Lit. 321. 314. * F. N. B. 121. M. Co. 6. 68. super Lit. 321. 2. 35.

in fee doth make a lease of it for life, or years, to *I. S.* and after levieth a fine; or doth covenant to stand seised of the reversion of this land (or of the land itself, which is all one) to the use of another; or doth bargain and sell the reversion in fee, or for years; in these cases the tenant need not to attorn. But if *A.* [by deed of grant,] grant a reversion to *B.* to the use of *C.*, and the deed is not enrolled, [*i. e.* does not operate as a bargain and sale,] or the use arise not upon consideration of blood, [*i. e.* by way of covenant to stand seised to uses,] &c.; in this case, if the tenant doth not attorn [to the *cestui que* use, p. 260,] the reversion will not pass [to *B.* so as to supply a seisin to the use in favour of *C.*] If one, by a common recovery suffered, grant a reversion to the use of himself, his wife, or children; in this case there needs no attornment of the tenant by the statute of 27 Hen. 8, cap. 4. So where one doth come to any such thing by title or seigniory paramount, as by escheat, surrender, or forfeiture, or by descent, [under a title which did not require attornment to its perfection;] in all these cases, and the rest before, the attornment of the tenant is to no purpose, neither to pass the thing as to the estate; nor to make a privity to distrain or bring action of debt. And therefore if there be lord, mesne, and tenant, and the mesne grant the services of his tenant by fine to another in fee, and after the grantee dieth without heir; in this case the services of the mesnalty shall come to the lord paramount, and he may distrain for them, or bring any action that lieth in privity for them, without any attornment. So if lessee for life of a manor surrender his estate to the lessor; there needs no attornment of the tenants of the manor to make this estate to pass. So if the reversion of a tenant for life be granted to another in fee, and the grantee die without heir, so that the reversion doth escheat; in this case the lord may distrain, or bring any action of waste, &c. without any attornment. So if a reversion descend to an heir from his ancestor; in this case it will vest in the heir without attornment, and attornment in this case is not necessary, [even to entitle the heir to distrain; for the law gives a perfect title to the heir, and he is in under the old title, and a continuance of the same seisin;

Agreed in the court of Wards, Hil. 18 Jac.

Calvin's case. Pasch. 7 Jac. B. R.

Lit. Sect. 583. 5 H. 7. 18, 19. Co. super Lit. 321.

and if attornment were necessary, it would give the tenant the option of repudiating the heir. And there is the continuance of the same seisin, and a change of person only, and not of estate.]

So if the conusee of a statute merchant extend a seigniory, or rent, for debt; the seigniory or rent shall be vested in him, [though not in his assignee,] without any attornment of the tenant. Co. super Lit. 321.

If a copyholder in fee make a lease for years, by licence of the lord, rendering rent; and after surrender the reversion to the use of *I. S.*; in this case, it seems, an attornment of tenant is not needful; and *I. S.* shall have the rent without any attornment. Per three justices, Trin. 4 Jac. B. R.

If one grant the reversion of copyhold lands for life, or years; or grant the seigniory of copyhold lands of inheritance; in these cases there needs no attornment of the tenants to make the grants good. And so also is the law for an estate at will by the common law, [because the grantor might determine the tenancy.] Curia M. 37 & 38 Eliz. B. R. Co. 2. 35. super Lit. 311.

*P. 258. * If a lease be made to one for life, the remainder to another in tail, the remainder over to the right heirs of the tenant for life, [so that the tenant for life also has the fee,] and the tenant for life doth grant his remainder in fee; in this case there needs no attornment of the tenant in tail, but the remainder will pass by the deed presently without any attornment at all. Lit. Sect. 578.

If one lease for life, the remainder for life, and after the lessor release all his right in the land to him in remainder for life; in this case there needs no attornment of the lessee for life to perfect this release, [because there is a privity between the releasor and the releasee.] Lit. Sect. 57

If two or more joint-tenants make a lease for life, rendering rent, and one of them doth release the rent to the other; in this case there needs no attornment to make the rent to pass, [for there is not any change of lord, but merely a reduction in the number of the lords.] Lit. Sect. 574

In all cases where the grant is in the personalty, there needs no attornment. And therefore in grants of annuities, which do charge the person of the grantor only, and not his land, there needs no attornment. [So grants of copyholds are perfect Agreed in Co nock's case, 3 Jac. Co. B.

without admission of the grantees.] And in all cases where there is an attornment in law, there needs no attornment in deed.

Lit. Sect. 555. If there be lord, mesne, and tenant, and the lord grant the fee of the seigniory; in this case the mesne, and not the tenant, must attorn, [for the privity is between the mesne and the superior lord.] 5. *By whom an attornment may and must be made; or not.*

Co. super Lit. 319. If one make a lease for life, and then grant the reversion for life; and the lessee attorn, and after the lord grant the seigniory; in this case it seems the grantee, [on account of the immediate privity,] and not the first lessee for life, must attorn.

Lit. Sect. 554. 556. Co. super Lit. 311. If there be lord and tenant, and the tenant make a gift in tail, or lease for life, of the land, and after the lord grant the services to a stranger; in this case the tenant [*read*, in fee] for himself, and not the tenant in tail, or for life, must attorn: for [the tenant in fee is immediate tenant to the lord, and the tenant for life is tenant to his reversioner. And] it is a maxim in law, that no man shall attorn to any grant of any seigniory, rent, service, reversion, or remainder, but he that is immediately privy to the grantor. But to the grant of a rent-seck, or rent-charge, issuing out of such land as before, the under-tenant in tail, or for life, [*viz.* the person who has the possession, and is liable to the distress,] and not the immediate tenant himself, must attorn.

Lit. Sect. 556. If there be tenant for life, the remainder in fee, and the lord grant the services to a stranger; in this case the tenant for life, and not him in remainder, must attorn, [because the particular estate and the remainders are parts of the same estate, and the tenant for life becomes immediate tenant to the lord.]

dem. If there be tenant for life, the remainder in tail, and he in the reversion after [and expectant on] their estates doth grant his reversion to a stranger; in this case, if either of them need to attorn, it must be the tenant for life.

a. super Lit. 312. Lit. Sect. 558. If a woman that hath a husband be [the person, who if sole ought] to attorn, the husband may and must do it for her; and the attornment of the husband for the wife, whether it be expressed or implied, will bind the wife. Husband and wife.

Lit. Sect. 571. * If one make a lease for years of land, the *P. 259.

remainder for life, and the lessor doth grant the reversion; in this case the tenant for life or years, [*i. e.*] either of them, may attorn. Co. super Lit. 316, 317. Co. super Lit. 312.

If a rent-charge be issuing out of land, and the tenant be disseised of the land; in this case the disseisor, [as having the estate or seisin, and whose possession is to be charged with the distress,] must attorn to a grantee of the land [*read*, rent.] But in case of the grant of a rent-service, the disseisee may attorn if he will, for the privity is between the lord and the disseisee only, [till the lord has accepted the disseisor as tenant; and therefore until acceptance of the disseisor, the lord may claim the escheat, because the disseisee is dead without heirs. *Co. Lit.* 268 b.] [Bredman's case, 6 Rep. 58 b.]

If a man make a lease for life to *I. S.* of land, and after grant a rent-charge out of it to *I. D.* and after he grant over this rent to another; in this case the lessor, and not *I. S.* must attorn, [because *I. S.* has a title prior to the rent; and his estate is not chargeable.] Ibid.

The tenant in dower after she hath assigned over her estate, and not the assignee, must attorn to the grant of the reversion, [for she remains tenant in privity.] And yet some hold that the assignee also may attorn. The same law is also of the tenant by the courtesy, [and for the same reason:] but it is not so in other cases; for if the reversion of lessee for life be granted, and lessee for life assign over his estate, the assignee, and not the lessee, must attorn. Co. super Lit. 316. 8 E. 4. 10.

If lessee for life assign over his estate upon condition, and then [before the estate is defeated by the condition] the reversion is granted; in this case the assignee, and not the lessee for life, must attorn. Co. super Lit. 315.

If a tenant in fee simple, that ought to attorn to a grant of a seigniory or rent, die before he make an attornment, his heir must attorn, and an attornment made by him is good. So if he [tenant in fee simple, or the heir] grant away his land before he make his attornment, his grantee may attorn, and an attornment made by him will be good enough. Co. super Lit. 315. Perk. Sect. 231.

If a lord of a manor make a lease of his manor for life or years, and the freeholders and others, [who render services, rents, &c. to the lord,] do Co. super Lit. 311.

attorn to the lessee, and after he [the lord] grant away the reversion of the manor to a stranger; in this case the lessee for life, or years, must attorn, and this will bind all the freeholders; [for the particular estate and the reversion are parts of the same seisin, and the privity between the reversioner and his lessee is more regarded than the connexion between the tenants, and the lord, having the reversion of the manor.]

Ibid. If there be lord and tenant by homage, fealty and rent, and the tenant is disseised, and then the lord granteth the rent to another; in this case the disseisor, [as having the possession chargeable with the rent,] and not the disseisee, must attorn; but if he [the lord] grant the whole seigniory, the disseisee [as tenant *de jure*] may attorn. [In some books it is stated, that a disseisin of the tenant is a disseisin of the lord; but this cannot be correct.]

Co. super Lit. 315. A voluntary attornment, where it is needful, may be made by an infant, or one that is deaf and dumb (who may do it by signs). But one that is *non compos mentis*, [or deaf, dumb, and blind,] cannot make an attornment, [for such person cannot express any assent.]

Infant.

Non compos mentis.

Co. super Lit. 310. 312. The attornment must always be made to the grantee of the reversion, rent, &c. according to the grant; whether the attornment be express or implied. But if divers do [as joint-tenants] take by the grant, the attornment may be made to one of them, and this shall avail the rest; as if a reversion or a rent be granted to two or more, and the tenant attorn to one of them, this is good to vest and settle the thing * granted in them all according to the grant. [And if a grant be made to two as joint-tenants, and after the death of one of them attornment is made to the survivor, the title to the entirety will be perfected in him. *Carter's Rep.* 5.] And if a lease be made by deed of a reversion to *A.* for life, the remainder in fee to *B.* and the tenant attorn to *A.* this is a good attornment to settle the remainder in *B.* But if the tenant attorn to *B.* during the life of *A.* this is not good for *A.*; [on principle, a contrary conclusion might have been expected;] howbeit, if the tenant for life die before the attornment be made; in this case the attornment may be made, and this shall be suf-

6. *To whom an attornment may and must be made; or not.*

*P. 260.

ficient to perfect the grant of the remainder to *B.* [This proposition is not law; (*Co. Litt.* 310,) unless the grant was by fine (2 *Rep.* 67,) since there cannot be a remainder without a particular estate. So if a feoffment be made to *A.* with remainder to *B.* the livery must be to *A.* and cannot be to *B.*; but a devise may be good, although the particular estate may fail. *Carter's Rep.* 4.]

If I grant a reversion to one man, and before the attornment of the tenant had to perfect the grant, [so as to give actual seisin] he doth [*read*, I do] sell this reversion to a third man; in this case the tenant may attorn to the second grantee, and this will make the grant good to him. But if the attornment be made to both the grantees, it [the attornment] is void for uncertainty. Co. 6. 68. 11 H. 7. 12.

An attornment may as well be made to *cestuy que use* of a reversion, as to the grantee of the reversion himself. And it seems it must be made to him, and not to the grantee of the reversion. For it was agreed in the court of wards, *Hil.* 18 *Jac.* that if a reversion be granted to *B.* to the use of *C.* that [*omit*, that] the attornment must be made to *C.* and not to *B.* who is but an instrument, [conduit pipe, and merely a grantee to uses; and yet, according to the common law, the attornment ought to have been to the grantee.] Co. super Lit. 310. Marding's case.

7. *When and at what time the attornment must be made.*

In all cases regularly where attornment is necessary, it must be made in the lifetime of the parties, grantor and grantee, or exchangor or exchangee; for if either of them, [being a sole grantor or grantee,] die before the attornment be made, the grant or exchange is void. And therefore if a manor be granted, and livery of seisin be given upon the demesnes thereof, and one of the tenants die before attornment be made by him, of [the seigniory or services of] his tenement will not pass, and the grant, as to that part, will be void; for in this case all the tenants, but tenant at will, [and copyholders.] must attorn; [*i. e.* none of the tenants, except those who attorn, will become tenants to the grantee.] And albeit the grant of the reversion be [for years, and] to begin at a day to come, and after the death of either of the parties, yet must the attornment be made in the lifetime of the parties, or otherwise the grant will not be good. And yet an attornment may be made after Co. 1. 151. super Lit. 318. Lit. Sect. 551. Perk. Sect. 163. 231. Co. super Lit. 315. 2. 35.

the death of the tenant, by his heir; and after the conveyance of the tenant, by his assignee. [*Supra*, p. 259.]

Co. 2. 35. If a lease be made of a reversion to begin at a day to come; in this case the attornment may be made before or after the day, so it be made in the lifetime of the parties, [lessor and lessee.]

Co. super Lit. 310. If one grant his reversion of white acre or black acre, and the tenant attorn to the grant, before the grantee have made his election which acre he will have, this is a good attornment, [as against the tenant.]

Co. super Lit. 309. 310. 8. 62. 4. 61. Kelw. 163. If a man grant his reversion by deed to one, and after, and before the tenant do attorn, he levy a fine or make a feoffment of the land to another; in this case it seems the attornment after [the fine] comes too late; but if the fine or feoffment be* but of part of the land granted before in reversion; in this case the first grant, [namely,] after attornment, shall be good for the residue. And if a woman sole grant a reversion, and after, and before attornment, she marry with a stranger; and after the tenant attorn; in this case the attornment comes too late, for the marriage is a countermand of it. [And if a grant be to a man and a woman, as joint-tenants, and they intermarry, and after marriage there is an attornment to the grant, they shall hold by entireties, although by the purport of the grant they were to be joint-tenants. So if there be a charter of feoffment to them, and livery after the marriage, the husband and wife would be tenants by entireties, because livery was the efficient part of the conveyance; and the deed of feoffment is evidence only of the grant, and not the grant. And if a reversion of an estate for life or years be granted, and the grantor before attornment doth confirm the estate of the tenant for life or years, and so change the estate, and after the tenant attorn; in this case the attornment comes too late [to support the enlargement; for at the period of attornment, no estate existed to be enlarged.]

*P. 261.

Co. super Lit. 309, 310. 315. Lit. Sect. 551. Plow. 344. To the making of a good attornment, where it is needful, divers things are required: 1. It must be made by the person that ought to make it. 2. It must be made to the person that ought to take it. 3. It must be made in time convenient.

8. *The manner of making an attornment; and what shall be said a good attornment; or not.*

4. If it be an express attornment, the tenant must first have notice of the grant of the reversion, rent, &c. to which he must attorn; but otherwise it is of an attornment in law, for there notice, in all cases, is not necessary. 5. And it [the attornment] must be done in that manner the law doth prescribe. And for this, it is to be known that it may be made by words, or by deeds, and without any writing, or by deed or writing (and this is the safest way to do it). And any words, written or spoken by the tenant, that do import an assent and agreement to the grant of the reversion, rent, &c. in such manner as the same is made after notice given to him of the grant, whether it be in the presence or the absence of the grantee of the reversion, rent, &c. will make a good attornment in deed. And therefore if the tenant, after knowledge of the grant, use these words following, or any others to the like effect, to the grantee, *viz.*: I do attorn, or turn tenant, to you, according to the grant; or, I become your tenant; or, I agree to the grant; or, I am well content with the grant; or, God send you joy of it; these are good express attornments. And if the tenant, after knowledge of the grant, pay, do, or deliver all, or any part of the rent, or service, before, or at the time when the same is due, to the grantee, or give a penny, or farthing, an ox, or a knife, or any such like thing, or any other valuable thing, in the name of attornment, or in the name of seisin of the rent; this is a good express attornment. And that attornment, which is made by words, and deed or sign both, is the best; for that doth leave a more deep impression in the mind of the witnesses. But if one have a rent-charge issuing out of my land, and he grant it to a stranger, and I give him an ox to put him in possession of the rent; it seems this is no[t a] good attornment. [1 *Inst.* 314 b.]

Notice.

Lit. Sect. 569. 551. 513. Co. super Lit. 315. 49 E. 3. 15.

If a man grant his reversion of my living, [*viz.* tenement,] to *I. S.*, and his bailiff, that doth use to gather his rents, saith to me, that *I. S.* hath bought it, [the tenement,] and I must hereafter pay my rent to him, and I tell him I am glad of it; this is a good attornment. And that, albeit it be in the *absence of *I. S.* And it is not material

M. 2 Car. in the court of Wards, Co. super Lit. 310. Curia B. R. Hil. 11 Car. B. R. Hilton's case.

*P. 262.

whether the stranger know of the grant [to him,] or not, so [as] the tenant know of it. And an attornment made to the lord's steward in the court, in the absence of the lord, is a good attornment. For it is sufficient, if the tenant have notice, that he attorn to the grant in the presence of any [person] whomsoever, [who may be a witness.] Tenant for life was, the remainder in tail, he in the remainder granted his remainder, the tenant for life, having notice of the grant, saith to a stranger in his absence, [*viz.* of him,] that is the party, [grantee,] I am well pleased that the grant is made to him; it was adjudged to be good.

Co. super Lit. 310. 11 H. 7. 12. If a reversion be granted to one for life, and after the same reversion be granted to him for years, and the tenant attorn to both the grants at once; this attornment is void for incertainty, [since it cannot be ascertained whether the grant for life or years is perfected.] So if one grant his seigniory to *I. S.* bishop of London and his heirs, by one deed, and grant the same to *I. S.* bishop of London and his successors, by another deed, and the tenant attorn to both grants at once; this attornment is void for incertainty. [Because there is not any certainty whether the grant to the bishop, in his individual, or in his political character, shall prevail.] So if a reversion be granted to two several persons by several deeds, and the tenant attorn to both the grants at one time; this attornment is void for incertainty; and neither of the grants are perfected by the attornment in these cases, [for want of certainty.] The implied attornment, which also doth amount to an express attornment, is made divers manner of ways. For

14 H. 8. 15. 24 H. 6. 41. if the tenant, after notice of the grant of the reversion, pay his rent to the grantee, or surrender his estate to the grantee, or pray in aid of the grantee, or accept a grant of the reversion or remainder from him that hath it [by the imperfect grant,] this

Co. super Lit. 312. Calvin's case, adjudged Pasc. 7 Jac. B. R. Co. super Lit. 309. Co. 2. 67. Dyer, 302. is a good attornment in law. But if the tenant, after the grant of the reversion, [and] not having notice of the grant, pay his rent to the grantee as a receiver, bailiff, &c. this is no[t a] good attornment. And therefore if the bailiff of a manor shall purchase the manor, or the reversion of one of the tenements, and the tenant, not knowing of the purchase, pay his rent to him, as he was wont

to do; this is no[t a] good attornment in law. So if a man seised of a seigniory levy a fine of it, and then taketh back an estate in fee, and the tenant, having no notice of all this, doth pay his rent to the conusor, as he was wont to do; this is no[t a] good attornment in law to perfect either of these grants.

If there be lord and tenant, and the tenant let the land to a woman for life, the remainder in fee, and the woman doth take a husband, and after the lord doth grant the services to the husband in fee; in this case this acceptance of the deed, by him that ought to attorn, is a good attornment in law. So if in this case the tenant lease to a man for life, the remainder over, and the lord grant the services to the tenant for life, and he accept thereof; this is a good attornment in law. Lit. Sect. 558, 560, &c.

If the lord by deed grant his seigniory to the tenant of the land and to a stranger, and the *P. 263. tenant doth accept of this deed; this a * good attornment in law, to extinguish a moiety, and to vest the other moiety in the other grantee. So if one make a lease to *I. S.* for life, and after confirm his estate, the remainder over to *I. D.* and the lessee for life doth accept of the deed of this confirmation and grant; this is a good attornment in law, and doth vest the remainder in *I. D.* Co. super Lit. 313. Co. super Lit. 313. Lit. Sect. 573.

If there be lord and tenant, and the tenant take a wife, and after the lord doth grant the services to the wife and her heirs, and the husband doth accept of the deed of this grant; this is a good attornment in law. Lit. Sect. 559.

If the conusee of a fine of services, sue a *scire facias* to have execution of the services, and hath judgment to recover; this is a good attornment in law. Lit. Sect. 564.

If a woman grant a reversion to a man in fee, and after marry with the grantee; this is a good attornment in law to perfect this grant made to the husband. [See *contrasted case*, p. 261.] Co. super Lit. 310.

If a lord grant his seigniory, and there be twenty manner of services, and the tenant, with what intent soever it be, pay or perform in deed any parcel of the services to the grantee; this is a good attornment in law for all the services. Lit. Sect. 563.

If I be seised of land in fee, and make a lease Lit. Sect. 576, 577.

Co. super Lit. 319. Dyer, 212. Co. 6. 68. 5. 113.

for life or years of it, or it be extended by a statute or *elegit*, and then I make a feoffment of this land, and give livery of seisin upon it, and so put out the tenant, and after the tenant (or one of the tenants, if there be many) re-enter; this is a good attornment in law. And so also it seems is the law, if the lessee for life recover in an assize. But if a man make a lease for life, and then the lessor grant the reversion for life, and the lessee [*read*, do not] attorn, and after the lessor enter and make a feoffment in fee, and so disseise the lessee for life, and then the lessee re-enter; this is no good attornment in law by the grantee for life, [to the lease of the reversion for life.] And if the conusee of a reversion by fine disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter; this is no good attornment in law to the feoffee, to enable him to distrain, &c.; [for no man shall take advantage of his own wrong.]

Hil. 8 Jac.

If one grant the reversion of a lease of a term of years, and before any attornment made, the lessee for years doth grant his term to the grantee of the reversion; in this case, this is no good attornment in law, to make the reversion pass. [*Query de hoc*, since the grantee becomes the person who ought to attorn.]

Park. Sect. 231.

If one have land, and a rent issuing out of other land, both in one county, and he grant both by deed, and give livery of seisin of the land in the name both of the land and of the rent; this is no[t a] good attornment in law to make the grant of the rent good; [for there is not any assent by the tenant of the land chargeable with the rent.]

So it was held in Brokenbury and Martial's case, 5 Eliz.

If lessee for life, or years, subscribe his name as a witness to the sealing and delivery of the grant of the reversion, made by the lessor to a stranger; this is no good attornment in law, for he may do this and not have notice: but if he have notice of the grant, and * then put his hand to it; this is an attornment. *Curia B. R. H.* 11 *Car.*

*P. 264.

Co. 2. 68. super Lit. 297. 314. 309. Lit. Sect. 564.

If a reversion be granted of two acres, or for forty years, or if services be granted, and the tenant doth attorn for one acre, or for part of the forty years, or for part of the services; this shall extend to all, and is a good attornment for both the acres, all the forty years, and all the services. And that, albeit the tenant say expressly it shall

Attornment to part of the grant good for the whole.

be good but for a part, and not for the whole. And so also it is of an attornment in law. And therefore if the grantee by fine of services, sue a *scire facias* to have execution of any part of the services, and have judgment to recover any part; or a lessee of three acres surrender one of them to the grantee, of the reversion of all the three acres; this is a good attornment for the whole. But if one attorn for part of the land, or for part of the services, in case of the grant of a reversion of land, or the grant of services, and have no[t any] notice of the grant of any more; this attornment is not good for any part, but void for all, [as a fraud or surprize on the tenant.]

Attornment to one good to others.

If a seigniory, reversion, or the like, be granted to two or more [as joint-tenants,] and the tenant after notice thereof doth attorn to one of them; this is a good attornment to perfect the grant to both or all of them. But if one die before attornment, and the tenant attorn to the survivor or survivors; this shall not avail the heir of him that is dead; but it is good to perfect the grant to the survivor or survivors [of several persons, being joint-tenants, 1 *Inst.* 310 a,] to whom it is made. [*Carter's Rep.* 5.] Co. super Lit. 297. a. 68. 67.

If a reversion be granted to husband and wife, and the tenant attorn to the wife in the absence of the husband; this is a good attornment to perfect the grant to them both. [And if the grant be to a man and woman as joint-tenants, and they intermarry before attornment, they shall, by operation of law, be tenants by entireties. 2 *Rep.* 67.] But if a reversion be granted to two men, and the tenant have notice only of a grant made to one of them, and he attorn to him only; this attornment is void, and not good to perfect the grant to either of them; [for the attornment is not according to the grant.] Calvin's case, Pasc. 7 Jac. B. R. Co. 2. 68.

Attornment by one good for others.

If two joint-tenants be for life, or [for] years, and the reversion of their estate is granted to a stranger, and one of them attorn to the grant of the reversion; this is a good attornment for both of them. The like law is for tenants in common. But if *A. B. C.* and *D.* be lessees for years, and *C.* and *D.* be outlawed, so as they forfeit their parts to the king, and the king become tenant in common with *A.* and *B.* and after the reversion is Co. 2. 66, 67. Lit. Sect. 566. 6 Car. in the Lord Brook's case, in the court of Wards.

granted to a stranger, and *A. B. C.* and *D.* attorn; this is no good attornment to perfect the grant of reversion; for *C.* and *D.* cannot attorn, and the attornment of *A.* and *B.* for the king and themselves is not good.

Attornment made by the husband is good for the wife: whereof see before at *numb.* 5.

Co. 6. 68. 9. 84. super Lit. 315.

In all cases for the most part where attornment is needful, the tenant, whether he be tenant in fee simple, for life, years, by * statute, elegit, or as executor until debts be paid, shall be compelled to attorn. And albeit the tenant be an infant, and come to the land by purchase or descent, yet he may be compelled to attorn; but then, in this case, his attornment shall not prejudice him; for when he is of full age, he may disclaim, or say he doth hold by less services.

9. *Who shall be compelled to attorn; or not; and where.*

*P. 265.

Co. super Lit. 316. 318.

If there be tenant in tail of a reversion, and he grant this over to a stranger; in this case the tenant in possession may be compelled to attorn. But if the reversion, upon the estate of the tenant in tail, or upon the estate of the tenant in tail after possibility of issue extinct, [*Co. Litt.* 316 b.] be granted, such a tenant may not be compelled to attorn; and yet such a tenant may attorn *gratis* if he will. And the assignee of the estate of such a tenant in tail after possibility, &c. is compellable to attorn. And if one make a gift in tail, the remainder in fee, and the seigniory, or a rent-charge issuing out of the land, is granted in fee by fine; in this case the tenant in tail may be compelled to attorn.

Co. 6. 68. super Lit. 318.

In all cases for the most part where attornment is not needful, there is no[t any] means to compel the tenant to attorn. And therefore the tenant cannot be compelled to attorn to him that comes to a reversion or remainder by escheat, forfeiture, &c.

Co. super Lit. 318. 3. 96.

If one grant his reversion of land in mortmain without a licence, the tenant may not be compelled to attorn, until there be a licence had from the king.

Ibid.

Also it is a general rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorn. As if an infant levy a fine, this is defeasible by writ of error during his minority, and therefore the tenant shall not be compelled to attorn. So if the land be holden in

ancient demesne, and he in the reversion levieth a fine of the reversion at the common law; the tenant shall not be compelled to attorn, because the estate that passeth is reversible by a writ of deceit.

10. *How an attornment shall enure and be taken.*

If the grant be absolute, and the attornment be on condition; yet this [attornment] shall enure according to the grant. So if the attornment be but to part of the things or part of the time granted, [after full knowledge of the grant;] this [attornment] shall enure to perfect the grant for all. So if the attornment be made but to one of the grantees, it shall enure to the rest, [whether joint-tenants, or tenants in common.] So if the attornment be made to the particular tenant, it shall enure to him in the remainder, to perfect his estate also. [But it is said, that an attornment to the remainder shall not be an attornment to the particular estate. *Supra*, p. 259, *sed query.*] Co. super Lit. 309, 310. 297. See before.

If the estate of the tenant be with a privilege annexed, as without impeachment of waste, or the like, and the tenant attorn generally without any saving of his privilege; if the attornment be *gratis* and voluntary, whether it be an attornment in law or in deed, this shall not enure to extinguish his privilege: but if the attornment be made by the compulsion of a writ in this * manner, and without this saving, he hath lost his privilege for ever. Co. super Lit. 320.

*P. 266.

If a reversion, &c. be granted to two several men, one after another, and he that hath the latter grant, get the attornment of the tenant to his grant before the other; in this case this shall enure to perfect the latter [grant,] and the first grant now cannot be made good. Co. super Lit. 310.

If a reversion be granted to a man and woman unmarried, and before attornment made they intermarry, and then the tenant attorn; in this case they shall have the estate by moieties, [*read*, entireties.] So under a feoffment to them before marriage; and livery after marriage, they would be tenants by entireties. *Supra*, p. 261.] Co. super Lit. 310.

11. *How an attornment shall relate.*

An attornment as to the party grantor shall have relation to the time of the grant, to make the thing to pass out of the grantor *ab initio*, albeit it be made many years after the grant; and therefore all acts done by him [the grantor] after the Co. super Lit. 310.

time of the grant, and before the attornment, to the prejudice of his own grant, as granting of rents, entering into statutes, or the like, are void as to the land, to charge it: and hence it is that if a reversion be granted to an alien, and before the attornment of the tenant he is made denizen; in this case the king, upon office found, shall have the land; and yet it shall not so relate, as to make the tenant chargeable to the grantee for any mesne arrearages, or for any waste in the lands from the time of the grant to the time of the attornment. But in respect of a stranger it shall not relate at all. And therefore if two deeds be of a reversion at several times, and he whose deed was made last gets attornment first, the reversion doth pass to him; and though the other get attornment afterwards, yet this will not help him by relation; and albeit the former grant of the reversion be in fee, and the latter for life only, yet the law will be all one in both cases. [Till attornment no estate is in the grantee.]

And now having done with this [subject of attornment,] we come to a *Lease*.

CHAP. XIV.

Of a Lease.

Terms of the Law. Co. super Lit. 42. 45. Justice Doddridge's treatise called the Use of the Law. Bro. Leases, 60. 437. Plow. 421. 432. Dyer, 125.

A LEASE doth properly signify a demise or letting of lands, rent, common, or any hereditament, unto another for a lesser time than he that doth let it hath in it. (For when a lessee for life or years doth grant over all his estate or time unto another, this [assurance] is more properly called an assignment than a lease. [*Doug.* 187; 2 *Prest. on Convey.* 7; 2 *Prest. Abstr.* 4. While if any portion of the estate, at the end thereof, be reserved by a tenant for years, the instrument will operate as an underlease. 2 *Prest. Convey.* 124.] And this [lease or underlease,] albeit it may be made and done by other words, yet it is most commonly and aptly made by the words demise, grant, and let. [And though the words assign, &c. be used, 1. Quid. Assignment.

the instrument may operate as an underlease.]

Lessor. And in this case he that letteth is called the lessor, and he to whom it [the land, &c.] is let, [is called]

Lessee. the lessee. This word also is sometimes, although improperly, applied to the estate, *i. e.* the title,

*P. 267. time or interest the lessee hath to the * thing demised; and then it is rather referred to the thing taken or had, and the interest of the taker therein, [or the effect of the act;] but in this place, it is applied rather to the manner or means of attaining

6. Quotuplex. or coming to the thing letten. And in this sense it [a lease] is sometimes made and done by record, as, fine, recovery, &c. and sometimes and most frequently by writing, called a lease by indenture, albeit it may be made also by deed poll. And sometimes also it is (as it may be of land, or any such like thing grantable, without deed for life or never so many years,) by word of mouth, without any writing, and then it is called a lease parol (1). And hence comes the division of a lease [by] parol, and a lease in writing. And all these ways it may be made either for life, *i. e.* for the life of the lessee, or another, or both; or for years, *i. e.* for a certain number of years, as ten, an hundred, a thousand, or ten thousand years, months, weeks or days, as the lessor and lessee do agree. And

Term of years. then the estate is properly called a term of years: for this word term doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time: these leases also for years do some of them commence in *presenti*, and some in *futuro*, [*viz.*] at a day to come, [or on an event]: and the lease that is to

Interesse termini, or future interest. begin in *futuro*, is called an *interesse termini*, or future interest (2); Or at will, *i. e.* when a lease is made of land to be held at the will and pleasure of the lessor, or at the will and pleasure of the lessor and lessee together: and such a lease may be made by word of mouth, as well as the former (3). [And when a lease is at the will of the

(1) But by statute 29 Car. 2, c. 3, leases of lands must be in writing, and signed by the parties themselves or their agents duly authorised; otherwise they will operate only as leases at will, *except* leases not exceeding three years. [See p. 277.]

(2) *Ante*, p. 241. [It is assignable, releasable, but cannot be surrendered; nor will it occasion a merger.]

(3) Mr. Justice *Blackstone*, in a note to the 2d vol. of his *Com.* p. 323, for the learning relative to leases, which he says is very curious and diffusive, refers the student to *Bac. Abr.* tit. *Leases* and *Terms for Years*; where the subject is treated in a perspicuous and

lessor, it is necessarily at the will of the lessee, and *e converso*. *Prest. on Est. ch. Will.*]

3. Things necessarily required in every good lease.

See Grant, Numb. 4. Co. 6. 36. 34, 35. 1. 154, 155. Co. super Lit. 45, 46. Plow. 273. 523.

Regularly these things must concur to the making of every good lease: 1. As in other grants, so in this, there must be a lessor, and he must be a person able, and not restrained to make that lease. 2. There must be a lessee, and he must be capable of the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demisable. 4. If the thing demised be not grantable without a deed, or the party demising not able to grant without deed, the lease must be made by deed. And if so, [*i. e.* if there must be a deed,] then there must be a sufficient description and setting forth of the person of the lessor, lessee, and the thing leased, and all necessary circumstances, as sealing, delivery, &c. [which are] required in other grants, must be observed. 5. If it be a lease for years, it must, [in terms or by construction of law,] have a certain commencement, [time or event for computation, *Prest. on Est. ch. Years*,] at least then when it comes to take effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is exprest, or by reducing it to a certainty upon some contingent precedent by matter *ex post facto*, and then the contingent must happen before the death of the lessor or lessee. [This point is fully explained in *Prest. on Est. ch. Years.*] 6. There must be all needful ceremonies, as livery of seisin, [for leases for lives,] attornment, [now superseded,] and the like, in cases where they are requisite. [Leases under powers do not require livery.] 7. There must be an acceptance, [actual or presumed,] of the thing demised, and of the estate, by the lessee. [And acceptance will be presumed until disagreement be shown.] But whether any rent * be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenant in tail, [so as to bind the

*P. 268.

masterly manner, being supposed to be extracted from a manuscript of Sir *G. Gilbert*. The editor of the 13th edit. of *Co. Lit.* in note 5 to p. 45 a., speaks of the same book with equal commendation. [Mr. *Chambers'* book on leases has assisted in simplifying the learning of this important head of the law. The chapter on estates for years, in the *Essay on Estates*, was also designed to aid the student's career in attaining a knowledge of the more prominent difficulties connected with the commencement and duration of estates for years.]

issue, under the stat. of 32 Hen. 8, c. 28;] husband and wife, [so as to bind the wife and her heirs;] and ecclesiastical persons; [infants, p. 267; leases under powers requiring a reservation of rent.] Of which see *infra*.

4. What shall be said a good and a sufficient lease for life or years; or not.
1. In respect of the persons of the lessor and the lessee, the thing leased, and the estate, property, or possession of the lessor therein.

For the ability and capacity of the lessors and lessees; and what shall be said a good lease or not, in respect of the ability of the lessor (4), and the capacity of the lessee; and the description of their persons; the nature and description of the thing demised; and what misrecital or misnomer will hurt, or not; see *Grant*, *numb.* 4, and *infra*, *numb.* 5, 6, 7.

Leases for life, or years, or at will, may be made of any thing corporeal or incorporeal, that lieth in livery, or grant. Also leases for years may be made of any goods or chattels. See for this, *Grant*, *numb.* 4; [as a lease of sheep for two years.] Bro. Leases, 23.

A man seised of an estate in fee simple, in his own right, of any lands or tenements [in possession,] may by deed or writing in the country, or without writing, by word of mouth, [see note 1, p. 267,] make a lease of it for what lives or years he will (5). And he that is seised of an estate in tail of any lands or tenements, may make any [rightful] lease out of it for his own life, but not longer; unless it be by fine or recovery, or it be such a lease as is warranted by the statute of 32 Hen. 8, (whereof see more *infra*). [This lease for a term of years, or for several lives, without conforming to the statute, will be good as against all persons except the issue in tail and those in remainder. As against his issue, it will not necessarily determine at his death; it must be defeated by their entry or claim. But, as against those in reversion or remainder, unless the lease cause a discontinuance, the lease will *ipso facto* determine on the death and failure of issue of the tenant in tail; because that is the boundary of his estate, and *cessante statu primitivo cessat et derivativus*. A discontinuance may be effected by a lease for lives.] And he that is seised of lands or tenements of any estate for his own, or another's, Co. 7. 12. 1. 44. Plow. 524.

(4) [The stat. 11 Geo. 3, c. 20, enables lunatics entitled to renew leases by their guardians and committees, to accept surrenders of old leases, and grant new ones.]

(5) See the notes before as to the stat. 29 Car. 2, c. 3.

life, may make what lease for years he will of it, and it will be good as long as the lease for life doth last; [and it will determine on his death, unless the lease be made by virtue of and pursuant to a power of leasing, or unless the lease be by a wrongful alienation, devesting the remainder and reversion, as is the case when tenant for his own life makes to another, by livery of seisin, a lease for the life of such other person, or a lease for several lives; thus devesting the seisin.] And he that is possessed of lands or tenements for years may make a lease of it for all or part of the years, and these are good leases. [When all the years are included in the instrument, then it will operate as an assignment, and not as an underlease. *Jermyn* v. *Orchard, Show. Parl. Cas.* 199.] The tenants for life or years may also assign over all their estates, if they please. And if such tenants make leases for longer time, as if lessee for years make a lease for life; it seems by this the land will pass for life, if the term of years last so long. But if he give livery of seisin upon it (as he must do to make the lease for life good,) this is a forfeiture of the estate for years (6).

[2 Prest. Abstr. p. 1.]

9 H. 7. 24. 18 Ed. 4. 2. Plow. 545.

Forfeiture. Infant.

If an infant be seised of land in fee simple, and he make a lease for years of it, rendering no rent, this lease is void, [unless the lease be for the purpose only of trying the title by ejectment.] But if there be a rent reserved upon the lease, then the lease is but voidable, and may, by the acceptance of the rent by the infant after his full age, be made good (7).

Acceptance.

Lit. cap. Tenant in Common. F. N. B. 62. G.

Joint-tenants. Tenants in common.

Joint-tenants, tenants in common, and parceners, may make leases for life, or years, of their own parts and purparties, at their pleasures, and these leases will bind their companions. And one coparcener,

(6) See accordingly, *ante*, in p. 242.

(7) In 3 *Burr.* 1606, it is said to have been long settled, "that an infant *may* make a lease *without* rent to try his title." See also *Co. Lit.* 308 a; 1 *Roll. Abr.* 729; see further as to leases by infants, the disagreements of the books respecting them discussed, and the authorities relating thereto, *Bac. Abr. Leases* (B.); *Leases by Guardian*, ibid. (I. 9.) *Vin. Abr. Enfant* (B.) By the stat. 29 Geo. 2, c. 31, *infants, lunatics*, and *femes covert*, may apply to the courts of Chancery or Exchequer, or to the courts of equity of the counties palatine of *Chester, Lancaster*, and *Durham*; or to the courts of Great Session of *Wales*; by petition or motion, in a summary way; and by the order of those courts respectively, such persons may by deed only, without levying a fine, surrender leases for lives or years, and take new leases for lives or years of the premises comprised therein.

or tenant in common, may make a lease of his part to his companion if he will (8).

If a feoffment be made upon condition, and before the time of performance of the condition, the feoffor and feoffee do join to make a lease for life or years of the land; this is a good lease; [*viz.* the lease of the feoffee and the confirmation of the feoffor.]

*P. 269. * A man that hath an estate in land to him and his wife, and his heirs, may make what lease he will of the land, and this [lease] will be good against all men but [except] his wife only [if dowable,] and that [lease will be defeasible] for her time [only] (9). Bro. Leases, 58.

[Lessor and Lessee.] If there be lessor in fee, and lessee for ten years; in this case they two may join together and make a lease for lives, or for any term of years; and this is [a] good [lease.] Co. 10. 49.

[Disseisee.] A disseisee cannot make a lease of that land whereof he is disseised, until he make his entry, or recover the possession [*viz.* seisin] of the land Plow. 133.

[Dowress.] again. So neither can a woman, that hath recovered the third part of her husband's land in a writ of dower, make any lease of it before she be in possession [*i. e.* seisin] by execution. And yet Bro. Scire Facias, 36. Co. super Lit. 46.

[*Interesse termini.*] if a lease be made to me for years, I may [as having an *interesse termini*] make a lease of part, or an assignment of all the term, before I have made my entry into the land demised. So if the Plow. 137. 142

[Heir before entry.] father die, and the son make a lease to a stranger of the land descended to him, before his entry; this is a good lease, [for he has a seisin in law

[After.] though not a seisin in fact.] But if a stranger had

[Abatement.] entered and abated into the land, and then the son had made the lease, *contra*; [for the lease would have been after a disseisin.]

By special power or proviso to make leases. In some cases, also, such persons as are not seised in fee simple, &c. nor able to derive such estates for life or years out of their own estates, Co. 5. 5. Dyer, 357. Co. 6. 2. 8. 7a. 1. 175.

(8) If joint-tenants join in a lease, this shall be but one lease; for they have but one freehold: but if tenants in common join in a lease, it shall be several leases of their several interests. 2 *Roll. Abr.* 64. *Com. Dig. Estates* (G. 6.) See more amply in *Bac. Abr. Leases* (I. 5.)

(9) If a man is possessed of a beneficial lease for a term of years, in right of his wife, as executrix to her former husband, he may grant and convey the same. *Thrustout* v. *Coppin*, 2 *Wils. Rep.* 277. [But if the wife die before he has disposed of the term, the term will vest in the representative of the testator, and not in the surviving husband.]

See in leases made by tenant in tail, infra.

[or to bind those estates as against their issue,] may lawfully, notwithstanding, make such leases for life, &c. And this is sometimes by some special act of parliament enabling them so to do. And hence it is also that a tenant in tail may, [as against his issue,] make leases for three lives or twenty-one years, [under certain restrictions,] and sometimes it is by some special power or authority that is given or reserved by and to the party himself that had the fee simple in him, or given to some other to do it in his name,] as his act, or given to the donee of the power; and it may be to a person who has a particular estate, or to some person who has not any estate whatever,] and leases thus made, may be good (10). And therefore if any act of parliament enables a tenant in tail, or a tenant for life, to make leases for three lives, or twenty-one years; leases that are so made in pursuit of [*viz.* pursuant and conformable to] that authority, are good. And if a man be seised of land in fee, and convey it to the use of himself for life, or in tail, with divers remainders over, with a proviso that it shall be lawful for him, or any such tenant in tail, to make leases for twenty-one years; in this case he, or they, may make such leases, and they will be good, [as against all persons claiming under the settlement.] But in both these cases care must be had to pursue the authority strictly, *i. e.* that the leases

(10) See *Cardigan* v. *Montague*, in Chancery, in 1755, and cited 1 *Burr.* 122. But in making leases pursuant to powers, all the requisites particularly specified in the power must be strictly observed; and such leases must contain all such beneficial clauses and reservations as ought to be for the benefit of the remainder-man. In the case of the *Earl of Cardigan* v. *Montague*, 6th June 1755, (mentioned by Lord *Mansfield* in 1 *Burr.* 122,) a decretal order on the master's report. The Duke of *Montague*, tenant for life, without impeachment of waste, had power to lease, reserving ancient rent where usually demised. He made twenty-four leases. The master's report, as to many of the leases, which he reported bad, was submitted to; as where ancient covenants, "to grind at mills, or to pay land-tax," were not in the new lease; where some part not within the power is included in the lease; where many manors were included in the lease, reserving a sum certain as the best rent, which laid the remainder-man under difficulties to find out whether it was the best rent or not. As to five of them which the master reported to be good, exceptions were taken. Their validity turned upon this case, the words in the power were, "reserving ancient, usual, and accustomed rents, heriots, *boons*, and services." In the former leases the tenants covenanted "to keep in repair," that covenant was omitted in these. The Lord *Chancellor* was of opinion, that that covenant was a *boon*, and *beneficial to the remainder-man*, and held *these leases void for want of it*. He took some days to consider, and declared, he was clear upon the argument, but took time, because there was no case in point, the more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the the remainder-man in as *beneficial a manner* as ancient owners held it.

made, be according to the power and direction given by the statute or proviso; for if it differ and vary ever so little from the sense and meaning [*viz.* in substance, or in any required circumstance,] of the same, the lease will not be good. And therefore in the case before of a power to make leases for twenty-one years, if the party make more leases for twenty-one years at one time than one, they are all void but the first; because it is against the intent of the parties, though it be not against the words (11). [The power to lease for twenty-one years is exercised by the first lease of that description, and all the subsequent leases, made during the continuance of the first lease, are void, since the power is exhausted by the first lease. But this conclusion is not applicable to those cases in which the second lease can be construed as a virtual surrender of the first lease, since, in point of law, there would be, first, a surrender, and secondly, a new lease.] And so if the power be to make leases for three lives; he cannot by this make a lease for ninety-nine years if three lives so long live, [or *vice versâ*.] But if the power be thus, provided, &c.
*P. 270. that he may make any lease in * possession or reversion, so as it doth not exceed the number of three lives or twenty-one years; in this case a lease may be made for ninety-nine years if three lives live so long; [for it doth not exceed three

(11) The limitation and modifying of estates, by virtue of powers, came from equity into the common law, with the statute of uses. The *intent* of parties, who gave the power, ought to govern every construction. He to whom it is given, has a right to enjoy the full exercise of it: they, over whose estate it is given, have a right to say, "it shall not be exceeded." The conditions shall not be evaded; it shall be *strictly pursued* in form and substance: and all acts done under a special authority, *not* agreeable thereto, nor warranted thereby, must be *void*. Of all kinds of powers, the most frequent is that "to *make leases*." For the encouragement of farmers, to occupy, stock, and improve the land, it is necessary they should have some *permanent* interest. Unless the owner of the estate for life was enabled to make a *permanent* lease, he could not enjoy it to the best advantage, *during* his own time: and they who came *after*, must suffer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor; that the annual revenue shall not be diminished; nor those in succession or remainder, at all prejudiced in point of remedy, or other circumstance of full and ample enjoyment. *Per* Lord *Mansfield*, 1 *Burr.* 120. If a man hath power to lease for ten years, and he leaseth for twenty years; the lease for twenty years shall be good for ten years of the twenty, in equity. 1 *Chan. Ca.* 23. 8 *Cha. Rep.* 11, third edit. *Perry* v. *Bowen*, *Nel.* 87. See more amply how a power to make leases shall be expounded, *Com. Dig. Poiar* (B.) *Bac. Abr. Leases* (I. 10 and 11.) *Denn* v. *Fearnside*, 1 *Wils. Rep.* pt. 1, p. 176. *Fearne on Con. Rem.* 3d edit. 90. *Pugh et Ux* v. *Duke of Leeds*, *Cowp.* 714. But if such tenant for life, &c. grant his estate, *query* the extinction of the power. See *Hardres*, 413. *Savil* v. *Blucket*, 1 *P. Wms.* 777; and the MS. references there.

lives.] But where uses are raised by way of covenant, and in the deed there is a proviso, that the covenantor for divers good considerations [generally, without prescribing that the lessees should be of the blood of the covenantor,] may make leases for years; in this case this power is void, and therefore no lease can be made hereupon: neither will any averment, [or the eventual existence of consanguinity,] help in this case. And if a man have a letter of attorney, or other authority to make leases for another, and he doth make them accordingly; such leases are good. But herein also caution must be had of three things: 1. That the authority be good. 2. That he that is the deputy or attorney do pursue the authority strictly. 3. That he do it in the name of his master, and not in the name of his own name (12.) [This is necessary only when the lease is to be made under that species of authority denominated a letter of attorney. When it is to be made under an authority in a will, &c. it must be made in the name of the person who is donee of the power or authority.]

Averment.

Co. 9. 76.

Co. 6. 72. 14 H. 8. 13.

A lease made for a thousand days, months, or weeks, is as good, for so long as it endureth, [*i. e.* for the limited time,] as a lease for an hundred or a thousand years. So a lease for half a year, or a whole year, is good. So if a lease be made from day to day, or from week to week, for four years; this is good lease for four years, *et sic de similibus.* [*Prest. on Estates, ch. Years.*] So if one make a lease for ten years, and so from ten years to ten years, during an hundred years, or until an hundred years are incurred; this is a good lease for an hundred years. [But a lease for three years, and so from three years to three years, for ten years, is a good lease only for nine years, since the tenth year cannot be brought into the computation.] So if one make a lease from three years to three years, during the life of *I. S.*; in this case, if livery of seisin be not given, this is a good lease for six years; but if livery be given, it is a good lease for the life of *I. S.* (13). And if a

2. *In respect of the manner of the agreement, and the words whereby the same is set down; and what words will make an estate for life or years.*

Plow. 422.

Livery of seisin.

Plow. 272. Bro. Leases, 49.

Dyer, 24.

Livery of seisin.

(12) See accordingly, and further in 1 *Wood*, 684. A lease made by an attorney in his own name, and the covenants to pay the rent, are void. *Frontin* v. *Small*, 2 *Lord Raym.* 1419. S. C. *Str.* 765.

(13) Lease for one year, and so for two or three years, or any further term of years, as lessor and lessee shall think fit and agree, after the expiration of the said term of one year;

lease be made from my death until *anno Domino* 1650; this is a good lease, [to commence from my death, and to continue until the year 1650 commences.]

Livery of seisin. If I say to *I. S.* being in my house, "here, *I. S.* I demise to you my house and land so long as I live;" this is a good lease for life to him, if livery of seisin be made. *Et sic de similibus.* [And the lands are held for an estate in possession. At this day, however, there must be a writing, in consequence of the 29 Car. 2, c. 3.] Co. 6. 26.

Livery of seisin. If one make me a lease of land until an 100*l.* be paid me, and make livery of seisin upon it; this is a good lease for life, determinable upon the payment of the 100*l.* But, if no livery be made, it is no good lease, [unless the lands lie in grant. But if the land be in grant, and the lease be made by deed, the lease would be good for life; and had the word *heirs* been added, a determinable fee would have passed. *Prest. on Est. ch. Fee. Life.*] 21 Ass. pl.

Executors. If one make a lease to me for my life, and for four, ten, or twenty years after; this is a good lease for life first, if livery of seisin be made, [or the lands lie in grant, and there be a grant by deed,] and then a good lease for years, for so many years as are agreed upon afterwards, which my executors shall have; [and the estate for years may not merge in the estate of freehold, because the estate of freehold precedes, and the estate for years cannot merge in a precedent estate. 3 *Prest. Convey.* 166. But if an estate be made to a man for years, remainder to him for life, the estate for years will *instanter* merge in the estate for life. 3 *Prest. Convey.* 166.] And if no livery of seisin be made, yet it seems it is a good lease for so many years after my death. [So under a lease to a person for life, remainder to his executors for years, the term will vest in the lessee, unless the limitation be by way of use, and shewing an intention to make the executors, as such, purchasers. *Cranmer's case, Dyer* 309. *Spark* v. *Spark, Cro. Eliz.* 666. *Bac. Abr. Remainders* (B. 2.)] Bro. Leases, 27. 51.

If an indenture of lease be made between *A.* of the one part, and *B. C.* and *D.* of the other part, Co. 1. 153. Dyer, 253.

---

this is a good lease for two years, and after every subsequent year begun, is not determinable till that be ended. 1 *Wils. Rep.* pt. 1, p. 262.

and therein *A.* doth demise land to *B.* to have and to hold to him for eighty years, if *B.* shall live so long, and if he die, or alien the premises within the term, then that his estate shall cease, and then the lessor doth grant the land to *C.* for so many years of the said term as shall be then to come after * the death or alienation of *B.* if he live so long; in this case this is a good lease to *B.* for so many years as he shall live of the eighty years; but the lease to *C.* after is not good, for the term is ended by the death of *B.*; but if the words of the second demise be, to have and to hold during the residue of the eighty years, and not during the residue of the term; in this case the second demise is good to *C.* also. [This distinction is, now it is apprehended, overruled by the determination in *Plowden* v. *Cartwright*, 1 *Burr.* 282.] *P. 271.

Co. 1. 155. Dyer, 150. 253. If one make me a lease for sixty years if I live so long; provided that if I die within the term, that my executors shall have it during the residue of the sixty years; in this case this is a good lease for the sixty years determinable upon my death, but not a good lease for the residue of the sixty years after my death. [*Plowden* v. *Cartwright*, 1 *Burr.* 282, seems to have overruled this distinction.] And yet it may amount to a good covenant for that time.

Evan's case, Trin. 5 Jac. B. R. If *A.* covenant to levy a fine to *B.* and his heirs; provided that if he pay to *B.* and his heirs 10*l.* at the end of thirteen years, that then the fine shall be to the use of *A.* and his heirs; and *A.* doth covenant with *B.* by the same deed, that *B.* his heirs, executors, and assigns, shall quietly hold the premises from Michaelmas next for thirteen years, and yearly from thenceforth for ever, if the 10*l.* be not paid according to the intent; in this case this covenant doth not make a good lease for [the thirteen years, for want of ownership at the date of the contract,] and it is but a covenant. Covenant. Covenant.

Plow. 272. Lit. Sect. If one make a lease for a certain number of years, and it is further agreed that upon some contingent the lessee shall have the fee simple, and livery of seisin is given hereupon; in this case the lease for years doth continue good for the time agreed upon. [See *chap. Condition.*]

Co. 2. 24. 10. 87. A lease for years cannot, by the agreement of the parties, be made to the heirs of the lessee, nor entailed to the heirs of his body. And therefore

if a lease be made to *I. S.* and his heirs, or to *I. S.* and the heirs male of his body; yet the executors of *I. S.* and not his heirs, [or heirs male,] shall have it, and the executors may sell the term. [*Bac. Abr. Remainder* (B. 2.) They might be purchasers under an appropriate gift.]

Executors.

If two agree by word, that one of them shall have such a piece of land for twenty years; this is a good and perfect lease that is made by this agreement, albeit they do agree to have a writing made of it afterwards; for in this case the writing is but the confirmation of it. [To guard against the mischief of these and the like cases, there must now, by the statute law, (29 Car. 2, c. 3,) be a writing.] But if the agreement be, that such a writing shall be made, or that a lease shall be made of such a thing between them and put in writing, so that the agreement hath reference to the writing, and implieth an intent not to perfect the agreement until the writing be made; in this case the lease is not a perfect lease until the writing be made. [This circumstance still has its influence in deciding whether ambiguous words amount to an immediate lease, or to a contract only for a lease. 2 *Prest. Convey.* 174. But the law prefers that an instrument should operate as a lease when the language is ambiguous, and words of express demise would prevail against a clause, showing an intention to have a formal lease. 2 *Prest. Convey.* 176.] Per Justice Jones, at the assizes at Glouc.

Albeit the most usual and proper [mode of] making of a lease is by the words, demise, grant, and to farm, let, and with an *habendum* for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease (14). And * therefore a lease may be made by the word, give, betake, or the like. The word *locavit* [hired] also is a good word. And the use in the Exchequer is to make leases by the word *committimus*, which is a good word to make a lease. [d] And if *A.* do but grant and covenant with *B.* that *B.* shall enjoy such a piece of land for twenty years; this is a good lease for twenty years (15). [e] So if *A.* promise to *B.* to suffer him Co. super Lit. 5. F. N. B. 270, e. Bro. Leases, 71.

*P. 272.

[d] Bro. Leases 60.

[e] Mich. 9 Jac. B. R. Coria.

(14) See before in page 230, and notes thereto.

(15) It is said to be a general rule, *that the word covenant will make a lease, though the word grant be omitted,* and much more when the words are *to hold, enjoy, &c.* *Gilb. Ten*

to enjoy such a piece of land for twenty years; this is a good lease for twenty years. [f] So if *A.* licence *B.* to enjoy such a piece of land for twenty years; this is a good lease for twenty years (16). And therefore it is the common course, if a man make a feoffment in fee, or other estate, upon condition, that if such a thing be, or be not done at such a time, that the feoffor, &c. shall re-enter, to the end that in this case the feoffor, &c. may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the uncertainty of the time (whereunto care must be had) do not make it void. [The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case.] And therefore if *A.* bargain and sell his land to *B.*, on condition to re-enter if he pay him 100*l.* and *B.* doth covenant with *A.* that he will not take the profits until default of payment, or that *A.* shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease, [for want of a more formal contract, and also for want of certainty of time.] And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money; in this case albeit the time be certain, yet this is no good lease, but a covenant only, [since the words are negative only, and not affirmative.] If one give a bond for the quiet holding of a close for three years; it seems this is no lease in law. See the opinion [*read*, enactment] of the parliament for *bonds* and *covenants* both, stat. 14 Eliz. cap. 11 (17), [as to ecclesiastical persons, bodies, &c.]

[f] 5 H. 7. 1. Agreed by all the judges, Mich. 20 Jac. et per Justice Bridgman. And 8 Car. B. R.

A lease for years may begin at a day to come, as at Michaelmas next, or three or ten years after, or after the death of the lessor or of *I. S.* [or any event,] and it is as good as where it doth begin

Co. 5. 1. super Lit. 48. Plow. 156. 197.

3. *In respect of the commencement, and continuance, and end of the term or estate.*

---

of Covenants, 26. 2 *Mod.* 80. See further in *Cro. Jac.* 659. *Cro. Car.* 207. *Hob.* 35. 3 *Bulst.* 252.

(16) And may be pleaded as such, though it may be also pleaded as a licence; and if it be pleaded as a licence for years and traversed, the lessee may give the licence in evidence to prove it. *Bac. Abr. Leases* (K.)

(17) See more fully by what words leases may be made, *Co. Lit.* 45 b. 301 b. 1 *Wood*, 370. *Vin. Abr. Estates* (T. a.) (X. a.)

Incertainty

presently. But a lease for life of any thing whatsoever, whether it lie in livery or in grant, if it be *in esse* before, cannot begin at a day to come, [because the freehold may not be placed in abeyance. 1 *Prest. on Estates*, 117.] And therefore if a lease be made, *habendum* from Michaelmas next, or from the day of the making of it, [see *Pugh* v. *Duke of Leeds*, *Cowp.* 714;] or after the death of the lessor, or after the death of *I. S.* to the lessee for life; this lease is not good, [unless there be some subsisting estate which fills the intermediate space, as in *Weale* v. *Lower*, *Pollexf.* 55. *Badger* v. *Loyd*, *Lord Raym.* 523. 1 *Prest. on Estates*, 231. 2 *Prest. Convey.* 158.] But in case of a lease of land made thus, it is sometimes holpen by the livery of seisin, [because the livery is made after the day.] For which see *Livery of Seisin, chap.* 9, *numb.* 11. [But attornment after the day, or an event, would not have given validity to a deed of grant exposed to this objection.] But all leases for years, whether they begin *in presenti*, or *in futuro*, must be certain, that is, they must have a certain beginning, and certain ending, and so the continuance of the term must be certain, otherwise they are not good. [See the rules, 1 *Prest. on Estates*, 201.] And yet if the years be certain, when the lease is to take effect in interest or possession, it is sufficient; for until that time it may depend upon an uncertainty, *viz.* upon a * possible contingent precedent before it begin in possession or interest, or upon a limitation or condition subsequent: but in case when it is to be reduced to a certainty upon a contingent [*read*, contingency] precedent, the contingent must happen in the lives of the parties. [This rule is expressed too generally; for a lease from the death of *A.* till a given day (*infra*, 269,) is good, though the certainty of the continuance cannot be ascertained till the death of *A.* and *A.* may survive the lessor and lessee. The text is intended to be applied to a lease for so many years as *I. S.* shall name, in which case he must name before the death of the lessor or lessee.] And albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it is sufficient: *Id certum est quod certum reddi potest.* As for examples, if *A.* seised of lands in fee, grant to *B.*

Co. super Lit. 45. Co. l. 14.

*P. 273.

Co. super Lit. 45. Plow. 83. 384.

Co. 6. 35. 1. 155. that when *B.* shall pay to *A.* 20*s.* that from thenceforth he shall hold the land for twenty-one years, and after *B.* doth pay the 20*s.*; in this case, *B.* shall have a good lease for twenty-one years from thenceforth (18). And if *A.* grant to *B.* that if his tenant for life shall die, that *B.* shall have the land for ten years; this is a good lease. And if one make a lease for years after the death of *C.* if *C.* die within ten years; this is a good lease if *C.* die within the ten years, otherwise not.

Plow. 270. But if *A.* be seised of land in fee, and lease it to *B.* for ten years, and it is agreed between them that *B.* shall pay to *A.* 100*l.* at the end of the said ten years, and that if he do so and shall pay the said 100*l.* and an 100*l.* at the end of every ten years, that then the said *B.* shall have a perpetual demise and grant of the premises from ten years to ten years, continually following, *extra memoriam hominum, &c.*; in this case, this, albeit it be a good lease for the first ten years, yet it is void for all the rest for uncertainty, [because there is not any limit to the continuance. *Sed query*, why this lease may not be supported as well as a lease from year to year, so long as the parties shall agree.]

Hil. 16. Jac. in the Exchequer. And if a lease be made to begin from the nativity of Christ, and he doth not say which nativity, as next, &c. it is void for uncertainty, [unless, as is probable, the courts would supply next by construction.]

Plow. 192. 523. And yet if a lease for years be made of land in lease for life, to have and to hold from the death of the tenant for life; this is a good lease: so if it be, to have and to hold from Michaelmas next after the death of the tenant for life, or from Michaelmas next after the determination of the estate of the

Co. 6. 36. tenant for life; these are good leases. So if there be a former lease in being for life or years, and another lease for years is made of the land, to have and to hold from the end of the former estate, by surrender, forfeiture, or otherwise, for twenty years; or to have and to hold from the surrender, forfeiture, or other determination of the former lease, if there be any, and if there be none,

(18) Or where a man makes a lease from the Feast of *St. Michael*, for so many years as *I. S.* shall name. If *I. S.* name a certain term (in the life of the lessor) it is then a good lease by matter *ex post facto*. So it is of all leases which are to commence on a condition precedent. 6 *Co.* 35 b.

for twenty years; these and such like leases are good, and this commencement is certain enough; [and yet it is to commence on either of two events, so as to involve the question of the validity of the former lease in the question of commencement of the second lease, but this circumstance merely throws on the party, who contends for the fact that the lease was good or that it was bad, the establishment of that fact.] And if one make a lease to begin after the death of *I. S.* and to continue until Michaelmas, which shall be in *anno Domini* 1650, this is a good lease; [and yet till the death of *I. S.* it cannot be ascertained for what number of years the lease will confer a right of enjoyment. But in leases for years it is sufficient, that at the time of the commencement in interest, the time of duration be ascertainable. *Prest. on Estates, ch. Years.*]

Plow. 533. & 17 Jac. B. R. re.

If a man have a lease of land for an hundred years, and he make a lease of this land to another, to have and to hold to him for forty years, to begin after his death; this is a good lease for the whole forty years, if there shall be so many of the hundred years to come at the time of the death of the lessor. [May not this assurance be eventually an assignment, instead of an underlease, as intended.] But if the lessor grant the land to * another, to have and to hold to him for and during all the residue of the term of an hundred years that shall be to come at the time of the death of the grantor; this is void for uncertainty. [See *Jermyn* v. *Orchard, Show. Par. Cases,* 199.] And yet if in this case he grant all his estate, or all his term, or all his interest, in the premises of the deed, and then say, to have and to hold the land, &c. to the grantee for all the residue of the term of an hundred years that shall be to come at the time of his death; by this [grant] the whole estate and interest of the grantor in the land doth pass presently by these words in the premises of the deed, [and the *habendum* is rejected as repugnant.] And if in this case the lessee for an hundred years make a[n under]lease of the land, to have and to hold after his death for an hundred years; this will be a good [under]lease for as many of the first hundred years as shall be to come at the time of his death.

Lit. Bro. Sect. 437. Bro. Grant, 154. Co. 1. 2. 155. Plow. 520, 521. See Exposition of Deeds.

*P. 274.

Per Justice Bridgman.

If *A.* make a lease to *B.* for ninety years, to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others; and afterwards makes another lease of the land, *habendum* after the determination or redemption of the former lease; it seems this is a good lease and certain enough. But if a lease be made to *A.* for eighty years if he live so long, and if he die within the said term or alien the premises, that then his estate shall cease; and then he doth further by the same deed grant and let the premises for so many years as shall then remain unexpired after the death of *A.* or alienation to *B.* for the residue of the said term of eighty years, if he shall live so long; in this case, the lease to *B.* is void; for after the death of *A.* the term is at end; but if he say for the residue of the eighty years, it is otherwise. [The case of *Plowden* v. *Cartwright*, 1 *Burr.* 282, seems to have over-ruled this distinction.]

Co. 4. 163. Dyer, 253.

Plow. 273. 523. 522. F. N. B. 6. N. 14 H. 8. 11. Co. 6. 35.

If *A.* doth make a lease of land to *B.* for so many years as *B.* hath in the manor of *Dale*, and *B.* hath then a lease for ten years of the manor of *Dale*; in this case, this is a good lease for ten years; [because, by reference to the former lease, there is a sufficient certainty.] But if *A.* make a lease of land to *B.* for so many years as the land *B.* hath in execution shall be in execution, this lease is void for uncertainty; [because *B.* hath an estate of uncertain duration only, and not for a definite period, or a period capable of any computation by years, &c.] And if a lease be made during the minority of *I. S.* or until *I. S.* shall come to the age of twenty-one years, these are good leases; and if *I. S.* die before he come to his full age, the lease is ended; [because, by extrinsic evidence, it may be ascertained on what day *I. S.* was born; and by computation, the number of years, months, and days for which the land is to be held, may be decided.] But if a lease be made to another until a child that is now in its mother's belly shall come to the age of twenty-one years, this lease is not good; [because the time of its birth, and consequently the duration of the term, cannot be fixed. But if the lease had been to hold from and after the birth of the infant for twenty-one years, the lease would have been certain and good.] And if a lease be made for so many

years as *I. S.* shall name; in this case, if *I. S.* do name a certain number of years in the lifetime of the party lessor, [and also it is apprehended of the lessee, for the term must commence in the lessee, or fail of effect;] this is a good lease. But if a lease be made for so many years as the executor of the lessor, or of the lessee, shall name; this lease is void, [since either the lessor or lessee must die before the lease can be perfect, and after the death of the lessor or lessee, the lease will not admit of perfection, and therefore it is void *ab initio*. This rule is peculiar to those instances, in which the number of years is not fixed in the lifetime of the parties. It does not apply to those cases in which the number of years is fixed; and the time or event of commencement, or of computation, and consequently of determination, is left for ascertainment.]

If a man make a lease for twenty-one years, if *I. S.* live so long; or if the coverture between *I. S.* and *D. S.* shall so long continue; or if *I. S.* shall continue to be parson of *Dale* so long; these, and such like leases, are good; [for there is a certainty of the extreme time of continuance, although that time may be abridged by the events fixed for the collateral determination of the term.] But if *A.* make a lease to *B.* for so many years as *A.* * and *B.* or either of them shall live, not naming any certain number of years; this cannot be a good lease for years. So if the parson of *Dale* make a lease of his glebe for so many years as he shall be parson there; this is not certain, neither can it be made so by any means. And yet if a parson shall make a lease from three years to three years, so long as he shall be parson; this is a good lease for six years if he continue parson so long, and for the residue void for uncertainty. So if I make [to] another a lease of land until he be promoted to a benefice; this is no good lease for years, but [as a lease for years is] void for uncertainty. [As to all these cases, if the unstrument may operate by reason of livery of seisin, or may take effect as a grant of the remainder or reversion, it may pass an estate of freehold, and by so many years will be understood so much time.] (19).

Co. super Lit. 45. Plow. 27.

*P. 275.

(19) In what cases leases shall be void for uncertainty, see 1 *Mod.* 180. 1 *Str.* 651. 1 *Lord Raym.* 737. *Vin. Abr. Estate* (Y. a.) As to the commencement of a lease, *ante* 46.

Co. 6. 35. 14 H. 8. 10. Plow. 274.

If I have a rent-charge of 20 *l. per annum*, and let it to another until he have levied an hundred pounds, this is a good lease for five years. But if I have a piece of land of the value of 20 *l. per annum*, and I make a lease of it to another until he shall levy out of the profits thereof an 100 *l.*, this is no good lease for years, but void for uncertainty. [The reason is, that the income is certain in one, and uncertain in the other case.]

Plow. 27. Co. 6. 35.

But here note in all these cases of uncertain leases made with such limitations as aforesaid, as until such a thing be done, or so long as such a thing continue, &c. that if livery of seisin be made upon them, [or if the thing lie in grant and there be a deed,] they may be good leases for life determinable on these contingents, albeit they be no good leases for years. [*Prest. Est. ch. Life.*] Note.

Co. super Lit. 46. 10 Ed. 3. 26.

And in some special cases a lease may be good notwithstanding some uncertainty [in point of title] in the continuance of it, for a lease may cease for a time and revive again, as if tenant in tail make a lease for years, reserving 20*s.* and after take a wife and die without issue; in this case, as to him in reversion, the lease is merely void; but if he [in reversion] endow the wife of the tenant in tail of the land, as to the wife it is revived again; [for the wife comes in in consequence of the seisin of her husband, and as against her the lease is good, though it was void as against those in remainder or reversion, and voidable by the issue. Indeed, as between husband and his wife entitled to dower, the wife will be dowable though the estate tail determine by failure of issue, provided any issue by her might have inherited to the estate tail of which her husband was seised. This case is an exception to the rule, *cessante statu primitivo cessat et derivativus.*] So if tenant in tail make a lease for years rendering rent, and die without issue, his wife *enceint* with a son, and he in reversion enter; in this case, as against him, the lease is void: but after the son is born the lease is good again, if it be within the statute; [*read*, and though it be avoided by those in remainder or reversion, it will be good as against

page 105, and the references in the note thereto; and more amply as to the certainty requisite in leases for years, with respect to their beginning, continuance, and ending, in 2 *Bl. Com.* 143. *Bac. Abr. Leases* (L.) *Com. Dig. Estates* (G, 8.)

the issue in tail, unless they elect to avoid it, since it is voidable only, and not void as against them.] So if tenant in fee simple take a wife, and then make a lease for years and dieth, the wife is endowed: in this case she shall avoid the lease, but after her decease the lease shall be in force again; [for though the title of the wife is prior to that of the lessee, yet the title of the heirs, &c. of the husband is subject to the lease.]

4. In respect of another lease then in being of the same thing.

If a lease be made for life, or years, to *A.* and after the lessor doth make a lease for years by word, or in writing, to *B.* regularly, this concurrent lease to *B.* [operating by way of *interesse termini*] is a good lease, at least for so many years of the second lease as shall be to come after the first lease is determined according to the agreement; [*i. e.* to confer a right to the possession from the time at which the possession shall be discharged from the former lease;] as if the first lease to *A.* be for twenty years, and the second lease to *B.* be for thirty years, and both begin at one time; in this case the second lease is good for the last ten years (20). [In the case supposed it is apprehended to be quite clear that the second lease operates as against the reversion, and by way of *interesse termini*, for thirty years, so as to give a right to a term for all that period.] And yet the reversion will not pass without [a deed, nor if there be a deed without] the attornment of the tenant, and therefore if any rent be reserved on the first lease, the second lessee shall not have it until the first lessee doth attorn. [This proposition is confused. It assumes that the lease is to operate as a grant of the immediate reversion, and the second lease could not be good, as to the reversion, unless it be made by a grant by deed.] But if the second lease [being an *interesse termini*] be for the same or a less * time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years to begin at the same time; these second leases are for the most part void; [*i. e.* they never will, in all probability, have any effect on

Plow. 433. 421. 273. Co. 1. 155. Bro. Leases, 73. 10. Plow. 521. Co. 4. 58.

*P. 276.

(20) See the case of *Davison* on demise of *Bromley* v. *Stanley*, 4 *Burr.* 2210. The question in that case was, "whether an acceptance of a *second* lease operated as a surrender of the *former* lease." And it was agreed, that the acceptance of a second *good* lease will operate as a surrender of a former. But the reason does not hold, in the case of accepting a new *void* lease, or one that the lessee cannot enjoy.

Dyer, 58. 356. Plow. 421, 422. Co. 1. 155.

the possession; but accident, as merger, surrender, &c. may give them effect.] And yet herein a difference is taken between leases made by matter of record and by writing, [*read*, deed,] and leases that are made by word of mouth, [or mere writing;] for if the second lease be made by fine, deed indented, or poll, albeit it be but for the same or for a lesser time, and albeit it be a lease of the land itself, and not of the reversion, yet it will pass [the reversion for the term, and] the rent reserved upon the first lease, if the first lessee attorn; and so also it will do without attornment, where attornment is not needful. [And now the necessity of attornment is superseded.] But if the second lease be made by word of mouth, it is otherwise; for a reversion and a rent, in this case, will not pass without deed, and therefore a grant by word [or mere writing without deed] doth not pass them. [This proposition seems to prove, that an *interesse termini* may be granted by parol, or now, since the statute of Frauds and Perjuries, 29 Car. 2, c. 3, by mere writing; and that, though the writing purport to be an immediate lease, it will operate, if at all, as an *interesse termini*. The distinction is, that an *interesse termini*, though derived out of a reversion, being a mere contract for the possession, may be, (while a lease of the immediate reversion may not be,) effectual without a deed; and that such reversionary lease shall be deemed an *interesse termini* only when, for want of a deed, it cannot operate as a grant of the reversion. This distinction reconciles the cases, by bringing them to a point of difference.] And if the second lease be by fine or deed indented, then also, [if it do not operate by passing some interest, *Weale* v. *Lower*, *Pollexf.* 55,] it will work by way of estoppel both against the lessor and against the lessee, so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it; and if there be any rent reserved upon the second lease, the lessee must pay it from the time of the making of the lease (21).

Estoppel.

(21) Estoppels ought to be mutual, otherwise neither party is bound by them; therefore if a man takes a lease for years of his own lands from an infant or feme covert by indenture, this works no estoppel on either part, because the infant or feme, by reason of their disability to contract are not estopped; therefore neither shall the lessee be estopped, because all

And therefore if one make a lease of land to *A.* for ten years, and after make a lease to *B.* of the same land from Michaelmas next for ten years, and before Michaelmas the first lessee doth purchase the fee simple, so that now by this means his term is drowned; in this case the second lease shall begin at Michaelmas. [The term is merged in the reversion in fee; because an *interesse termini* is not considered as a mesne estate; but after Michaelmas, the *interesse termini* would have become a term *de facto*, and prevented a merger by interposing itself as a mesne estate. 3 *Prest. Convey.* 207.] So if one make a lease to *A.* for twenty years, and *A.* make a lease of the land to *B.* for two years [being an underlease,] rendering rent, and after *A.* makes a lease for the rest of his time to *C.* by deed; this lease, [or rather assignment, for in this instance the grant of *A.* operates as an assignment, and not as a lease,] if the lessee for two years do attorn, is a good lease [or rather assignment] of the rent and reversion; and so it is also without attornment, if there be any consideration given for it, [what difference can the consideration make?] for then it is also a good lease for all the rest of the term after the two years. [This proposition is at least questionable, unless the second instrument could operate as an underlease, giving an *interesse termini.*] So if one make a lease to *A.* for twenty years, if he live so long, rendering rent, and after he doth make a lease to *B.* by indenture, [or by deed poll,] for eighty years to begin presently, or grant the reversion to begin at [*i. e.* to hold, for the purposes of computation, from] a day past, or the like; in all these cases, if the first lessee attorn, [the necessity for which attornment is now superseded,] the rent will pass; but if not, it will be a good lease of the land for so many of the years as shall be to come after the first lease ended, [by effluxion of time, or determined or surrendered.] But if the second lease be by parol, [or mere writing,] without a deed, the reversion, as a reversion, will not pass, and the grant will be void if there be nothing else to help it, [as a grant of the rever-

Dyer, 112. Plow. 432.

Co. 4. 53.

Co. 1. 155. Plow. 432. 434. Hil. 6 Jac. Adjudged Finch v. Vaughan.

estoppels ought to be mutual. *Cro. Eliz.* 37. 371. For the rules respecting estoppels, see *Co. Lit.* 352 a; and more amply as to leases for years *by estoppel*, how far, and against whom, such leases are good, in *Bac. Abr. Leases* (O.)

sion; but it will operate to give an *interesse termini*, by way of contract. See 276, *supra*.] And
Dyer, 112. in cases where the second lease is void, albeit the first lessee surrender his estate, or his estate end by a condition; yet the second lease is not hereby made good. [As a general position, and in its terms, this conclusion is correct.] But if the second lease
Co. 2. 35. for years, after another lease for life, or years, be made for money, so as it may be said to pass * by *P. 277. way of bargain and sale; this may help the matter, for in this case, albeit it be by word only, it may pass the reversion and the rent also. [This effect is by force of the statute of Uses, 27 Hen. 8, c. 10, which executes the possession to the use, without regarding the means by which the use arises. Now, however, in consequence of the statute of Frauds and Perjuries, 29 Car. 2, c. 3, there must be a writing if the term be for more than three years, or even for less than three years, and less than two-third parts of the improved value be reserved for rent. 6 *East*, 602; 11 *East*, 362; 2 *Mau. & Sel.* 205:] but in most cases it is good for the remainder of the term after the first lease ended, [operating in the mean time as an *interesse termini*, not as a grant of the reversion.] And if the second lease be to begin after the end of the former lease; in this case the former lease is no impediment at all to the validity of the latter lease, but the latter lease, [as an *interesse termini*,] is good notwithstanding.

Stat. 32 H. 8. cap. 28. Co. super Lit. 44. Any person whatsoever of full age, that hath any estate of inheritance in fee tail in his own right, of any lands, tenements, or hereditaments, may at this day without fine or recovery, [by virtue of the statute law,] make leases of such lands for lives, or years, and such leases shall be good, so as these conditions and incidents following, be therein observed and kept.

5. What leases or other acts may be made or done by a tenant in tail; and what leases made by such a tenant shall be good to bind the issue, or him in remainder, or others, after the death of the tenant in tail; and how they shall bind.

1. Such leases must be by deed indented, and not by deed poll, or by parol.

Co. 5. 6. Dyer, 246. 2. They must be made to begin from the day of the making thereof, or from the making thereof. And therefore a lease made to begin from Michaelmas which shall be three years, [or one day,] after, for twenty-one years; or a lease made to begin after the death of the tenant in tail, for twenty-one years, is not good, [either under this

statute or at the common law.] But if a lease be made for twenty years to begin at Michaelmas next; it seems this is a good lease; [see 3 *Bac. Abr. Leases*; because it is to commence, and also determine, within the limited period of twenty-one years.]

3. If there be an old lease in being of the land, the same must be surrendered, or expired and ended within a year of the time of the making of the new lease; and this surrender must be absolute and not conditional; also it must be real, and not illusory, or in show only. For *factum non dicitur quod non perseverat.* [But see 2 *Stra.* 128, *contra,* and *Com. Dig. Estates* (G. 5.) An extinguishment of the prior term by merger will also produce the like effect. *Grumbrell* v. *Roper,* 3 *Barn. & Ald.* 711.] Co. 5. 2.

4. There must not be a double or concurrent lease in being at one time, as if a lease for years be made according to the statute, he in the reversion cannot afterwards expulse the lessee and make a lease for life or lives, or another lease for years according to the statute, nor *è converso.* But if a lease for years be made to one, and afterwards a lease for life is made to another, and a letter of attorney is made to give livery of seisin upon the lease for life, and before the livery made the first lease is surrendered; in this case the second lease is good. [Because it does not take effect till livery is made, and before the livery the impediment to the second lease is removed.] Co. 5. 2. Spark's case. Trin. 4 Jac. B. R.

5. These leases must not exceed three lives, or twenty-one years from the time of the making of them (22). And therefore if tenant in tail make a lease for twenty-two or for forty years, or for four lives, this lease is void; and that not only for the overplus of time more than three lives or twenty-one years, but for that time of three lives or twenty-one years also, [since the lease is entire, and must either owe its effect to the ownership of the lessor or to the power in the statute, and it is not warranted by the statute.] And it hath been resolved, that if tenant in tail make a lease for ninety-nine years, determinable upon three lives, Co. 5. 6. Dyer, 246.

(22) For the words of the statute are, to make a lease for three lives, *or* twenty-one years, so that either one or the other may be made, but not both. *Co. Lit.* 44 b. See further *Bac. Abr, Leases* (E.) rule 4.

that this is not a good lease. [*Smith* v. *Trinder*, *Cro. Car.* 22; *Bac. Abr. Lease* (E), rule 4, seems to the contrary.] But if a lease be made by a tenant in tail for a lesser time, as for two lives, or for twenty years, this is a good lease. And if a lease be made for four lives, and * it happen that one of the lives die before the tenant in tail die, yet this accident will not make the lease good, but it remains voidable notwithstanding [as against the issue, and void as against those in remainder or reversion. Even a lease made pursuant to the statute is actually void against those in remainder or reversion. But a lease by a tenant in tail, under a power in a will or settlement, will bind those in remainder or reversion, as well as the issue in tail. In all these cases the lease may be valid as against the tenant in tail and his alienees, although it may be void or voidable as against the issue in tail, &c.] *P. 278.

Co. 5. a.

6. These leases must be of lands, tenements, or hereditaments manurable or corporeal, which are necessary to be let, and whereout a rent by law may be issuing and reserved. And therefore if a tenant in tail make a lease of such a thing as doth lie in grant, as an advowson, fair, market, franchise, or the like, out of which a rent cannot be reserved, especially if it be a lease for life; this lease is void, and that albeit the thing have been anciently and accustomably let. And a grant of a rent-charge therefore out of such lands is void [as against the issue, &c.] And if tenant in tail make a lease for three lives of a portion of tithes, rendering rent; this lease is unquestionably void. And so also it seems it is if it be a lease for twenty-one years (23).

Tallentine's case, Pasch. 3 Jac. B. R. Co. 11 60. Trin. 2 Jac. B. R. Adjudged Doddington's case.

Co. 6. 37. Dyer, 271.

7. They must be of such lands, or tenements, which [as] have been most commonly let to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made, so as if it have been let for eleven years, [or more than ten,] at one or

(23) This distinction is no longer of any importance; for the 5th Geo. 3, c. 17, makes leases of *incorporeal hereditaments* by ecclesiastical persons, as good as if the leases were of *corporeal hereditaments*, whether such leases are for lives or years; and gives action of debt to the successor for rent, which (in case of a freehold lease) he could not have brought at the common law. See further in note 3, to 13th edit. *Co. Lit.* 44 b. [The distinction is still of importance as to leases under the statute of 32 Hen. 8, c. 28, by tenants in tail, husbands seised in right of their wives, &c.]

several times within twenty years before the new lease made, it is sufficient. And albeit the letting have been by copy of court roll only, yet such a letting in fee, for life, or years, is a sufficient letting, and so also is a letting at will by the common law. But these lettings to farm must be made by such as are seised of an estate of inheritance, for if it have been only by guardian in chivalry, tenant by the courtesy, in dower, or the like; this will not serve to be a letting within the intent of the statute.

8. There must be reserved upon such leases yearly during the same leases, due and payable to the lessor and his heirs to whom the reversion shall appertain, so much yearly ferm or rent, or more, as hath been most accustomably yielded or paid for the lands, &c. within twenty years next before such lease made. And therefore if the rent be reserved but for part of the time of the new lease, this lease is void. And if the tenant in tail have twenty acres of land that have been accustomably let, and he make a lease of these twenty acres, and of one acre more which hath not been accustomably let, reserving the usual yearly rent, and so much more as to exceed the value of the other acre; this is not a good lease by the statute. So if the tenant in tail of two farms, the one at 20*l.* rent, the other at 10*l.* rent, and he make a lease of both these farms together, at 30*l.* rent; this is not a good lease within the statute. But if besides the annual rent there have been formerly reserved things not annual, as heriots, fines, or other profit upon the death of the farmers, or profit out of another's soil, as pasturage for a colt, &c. if upon the new lease the yearly rent be reserved, albeit these * collateral reservations be omitted, yet these leases are good. And so also if there be more rent reserved upon the new lease than the rent that hath been anciently paid [for the same identical parcels,] the lease is good notwithstanding. And yet if tenant in tail of land let a part of it that hath been accustomably let, and reserve the rent *pro rata*, or more than after the rate; this is not a good lease. [To remedy this inconvenience as to ecclesiastical persons, the stat. of 39 & 40 Geo. 3, c. 41, § 3 & 6, was passed; before that statute when bishops leases were subdivided as to owner-

Co. 5. 6. 6. 37.

Co. 6. 37, 38. Trin. 3 Jac. B. R. adjudged.

Adjudged Trin. 18 Jac. B. R. Co. 5. 6.

*P. 279.

ship, it was common to take the lease in the name of a trustee, and declare trusts, as to enjoyment, apportionment of rent, renewal, &c. &c. The like precaution may be adopted in regard to the lease of tenant in tail, &c. when it may be deemed expedient.] And yet if two coparceners have twenty acres of land of equal value between them in tail, and these have been usually let, and they make partition of these lands, so as each of them hath ten acres; in this case they may make leases of their several parts, reserving the half [in amount] of the accustomable rent. And if upon the old lease the rent were payable at four days in the year, and by the new lease it is reserved to be paid at one day, this is not a good lease. But if the rent upon the old lease be payable in gold, and the new rent be payable in silver, it seems the lease is not good. And if a tenant in tail be of a manor, that hath been usually demised for 10*l.* rent, and after a tenancy escheat, and then he doth make a lease of the manor, rendering 10*l.* rent by the year; in this case, this is a good lease; but if the lessor purchase a tenancy, then it seems it is otherwise. [The reason of the distinction is not sufficiently obvious, considering the manor to be the subject of the demise.]

Co 5. 5. And yet Co. super Lit. 44 b. is contra.

Trin. 3 Jac. B. R. Cornwall's case.

Co. 5. 5.

Co. 5. 6.

9. Such leases must not be without impeachment of waste. And therefore if tenant in tail make a lease of his land entailed without impeachment of waste, this lease is void, [as a lease under the statute, but as against the issue in tail it is only voidable; and if it created a discontinuance, then as against those in remainder or reversion also, it is only voidable.] And if a lease be made for life, the remainder for life, &c. this is not a good lease; for in this case, during the remainders, the tenant for life cannot be punished for waste done. But if such a tenant of land make a lease of it to *I. S.* for the lives of three others; this is a good lease, albeit it may afterwards become [subject to] an occupancy (24).

Waste.

Co. 6. 37. and Meer's case, adjudged.

(24) The learned author of the commentary, in the 2d vol. p. 319, mentions these *nine* requisites, as necessary to be observed in leases by tenants in tail, husbands seised in right of their wives, and persons seised in fee simple in right of their churches; and adds, these are the guards, imposed by the statute 32 Hen. 8, c. 28, (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence given by that statute.

10. Such leases must not be against any special act of parliament. And therefore if a woman that is tenant in tail of the gift of her deceased husband, or of any of his ancestors, while she is sole, or after with another husband, make any such lease warranted by this statute, yet this lease is not good, [even as against the issue.] Stat. 11 H. 7. 20. Co. 3. 51.

11. They must have all due ceremonies and circumstances for the perfection of them, as other such like leases have, as livery of seisin, and the like, where they are needful; [and in this respect they differ from leases under powers, since to the perfection of such leases no livery is requisite. In one case the lease is strictly and properly a lease, in the other case it is an appointment.] And then only when leases have these conditions, ard are made according to these provisions, are they said to be within this statute of 32 Hen. 8, and such only as do bind the tenant in tail himself, and the issue in tail; for otherwise if it be not warranted by this statute, albeit it will bind the tenant in tail himself that made it, yet it will not bind his issue; but as to him [the issue] it will be void, or voidable at the least: for if tenant in tail of land make a lease of it for an hundred years without any rent reserved thereupon, this lease as to the issue in tail is void: [it is apprehended only voidable. See *Machell* v. *Clarke*, 2 *Lord Raym.* 778;] but if he make a lease of his land for an hundred years * rendering rent, and have issue and die, in this case the lease is only voidable by the issue at his pleasure; and therefore if the issue accept the rent after the death of the tenant in tail, by this means the lease is affirmed and become good [for his time.] But howsoever the lease be made, it will not bind [future issue, nor] him that comes in of a remainder over, nor him that is the donor; [nor those who claim under them, because the lease is a derivative interest, and ceases with the determination of the estate tail.] And therefore if a tenant in tail make a lease warranted by the statute, and after die without issue, so that the land doth remain over to another, or revert to the donor; in these cases neither he in the remainder, nor the donor shall be bound by this lease, for as to them the lease is void, [or rather determined.] And yet by a common recovery the tenant in tail may make leases of, or lay charges

Co. 7. 7. & 34. Dyer, 7, 8. The Woman's Lawyer, 173. Plow. 436.

Plow. 498.

*P. 280.

Acceptance.

upon the land to bind the donor and him in remainder also, [*i. e.* tenant in tail in possession, or tenant in tail in remainder, with the concurrence of the person who has the immediate freehold may suffer a valid recovery, and such recovery will bar the owners of the remainder and reversion expectant on the estate tail, and, as a consequence, will give validity to the leases, charges, &c. 1 *Prest. Convey.* 243.] But otherwise it is of a fine; for if tenant in tail make a lease for years by fine, this will not bar the donor, nor the remainder in any case where it is in a stranger; [nor even under the statutes of nonclaim, since there is not any discontinuance. A lease for life creating a discontinuance, might eventually become a bar; but a lease for three lives warranted by the statute, will not be a discontinuance.] And yet if the remainder be in the tenant in tail himself, and he make a lease for years by deed according to the statute or by fine; this lease is good [as against him and his general heirs, as distinguished from his issue,] and shall bind his own remainder (25). [The like point is law of a reversion; and see *Symonds* v. *Cudmore*, 4 *Mod.* 1.]

6. What leases, or other acts, may be made or done by the husband with the lands he hath in fee simple or fee tail in the right of his wife, or jointly with her; and what leases made by him of such lands are good; or not; and how.

Stat. 32 H. 8. cap. 28. Co. super Lit. 44.

The husband may at this day without fine or recovery make leases of the lands, tenements, or hereditaments, whereof he hath any estate of inheritance in fee simple, or fee tail, in the right of his wife, or jointly with his wife, made before or after the coverture, so as there be in such leases observed the eleven conditions or limitations before required in the leases made by tenant in tail; and so that the wife do join in the same deed, and be made party thereunto, and do seal and deliver the same deed herself in person. For if a man and his wife make a letter of attorney to another to deliver the lease upon the land; this lease is not a good lease from the wife, warranted by the statute. And yet then as in other like cases of leases not warranted by this statute, it is a good lease against the husband. And when the lease is such a lease

Pasc. 7 Jac. B. R.

(25) See accordingly *verbatim* in 1 *Wood*, 686-7. As to the doctrine of leases by tenant in tail, see *Bac. Abr. Leases* (D.), under the three following heads:—1st. What leases tenant in tail might have made by the common law. 2nd. What leases he may now make to bind his issue since the statute 38 Hen. 8, c. 28. 3rd. In what cases the issue in tail or strangers shall be bound by voidable leases made by tenant in tail. And further in *Vin. Abr. Estate* I. a 2.) *Com. Dig. Estates* (B. 32.)

[*Bac. Leases*, 43.] 5. That they do not exceed three lives or twenty-one years, but they may be for a less time. 6. That they be of lands or tenements manurable or corporeal. [Altered by stat. of 39 and 40 Geo. 3, c. 41.] 7. That they be made of lands that have been commonly let to farm by the space of [the greater part of] twenty years before. [This qualification also belongs to leases of tenants in tail, and husbands seised in right of their wives.] 8. That there be reserved upon them the ancient and accustomed rent payable to the lessor and his successors during the time (28). 9. That they be not made without impeachment of waste. 10. That there be livery of seisin upon them, &c. where it is requisite. 11. If the lease be made according to the exception of the statute of 1 Eliz. and 13 Eliz. and not warranted by the statute of 32 Hen. 8. as in the case of a concurrent lease, and it be made by a bishop, or any sole corporation, it must be confirmed by the deans and chapters, or others, that have interest. And if a parson, or vicar, make a lease, it is not good but during the parson or vicar's residence, according to the statute of 13 Eliz. c. 20, and in this case there needs no confirmation at all. [But as to allotments, see the statute of 41 Geo. 3, c. 109, §. 38 (29).] 12. Some of the leases that are made by the colleges and houses of the university, &c. must have some [a given proportion] rent-corn reserved upon them. But bishops, deans, parsons, and such like spiritual persons, cannot grant the next advowsons of churches, neither can they grant rents out of their spiritual livings, but the same charges will be void after their death. And if a bishop suffer an annuity to be recovered against him by a pretence of title of prescription, on a judgment after a verdict or confession; or a parson in such a case pray in aid of the patron, and so suffer an annuity to be recovered; this will not bind the successor. And yet a bishop, or any

Co. 11. 66. 5. 2.

Stat. 18 El. cap. 20. Co. 5. 15. 11. 66. 10. 58. Dyer, 370. And most of these points were agreed by Just. Jones and Just. Whitlock at Lent Assizes at Glou. 6 Car.

(28) Lease by bishop, and more than the old rent reserved, held good by *North*, C. J. *Wyndham* and *Atkyns*. But the case was argued when *Vaughan* was Chief Justice, and he and *Ellis* were of a different opinion. See the case of *Threadneedle* v. *Lynham*, 2 *Mod.* 57.

(29) By the stat. 22 Car. 2, c. 11, § 75, intituled "An additional act for rebuilding the city of *London*, &c." *parsons* and *vicars* in *London* were empowered to lease their glebe for forty years with the consent of the patron and ordinary. See fully as to leases by *parsons* and *vicars*, in *Bac. Abr. Leases* (F.)

such spiritual person, may grant ancient offices of trust, of necessity, or conveniency, as the offices of chancellor, register, steward, bailiff, or the like, with the ancient fees incident thereunto, for the life or lives of the grantees; and such grants are good, albeit they be made by the bishops of the new erected bishoprics, and that there be not in them the conditions and properties required in the leases before mentioned, so as they be confirmed by the dean and chapter. [*Sir John Trelawney* v. *Bishop of Winchester*, 1 *Burr. Rep.* 221.] But they may not grant any new office, nor yet add any new fee to the old offices. And therefore if a bishop grant an annuity *pro consilio impenso et impendendo* where none was before; this [grant] will not bind the successor. And yet if there be an old fee, and there is a new fee added to it; in this case it seems it is good for the old fee, albeit it be void for the new fee. Neither may they grant their offices otherwise than they have been granted. And therefore where the ancient grants of the office have been to one, it cannot be now granted to two. And where the ancient grants have been to two jointly, they may not be now granted in remainder one after another. Neither may the grants of these offices be longer than for* the life or lives of the grantees. And in case where the grant is void, the confirmation of the dean and chapter will not make it good (30). *P. 283.

Co. super Lit. 45. 3. 9. 3. 59. 10. 59. 11. 73. 78. 5. 5.

Note.

But here note, that albeit in all these cases of leases and grants, not warranted by the statutes aforesaid, the statutes say the leases shall be void; yet this is to be understood as against the successors, and not against the lessors themselves; for the leases are good so long as the lessors live, or at least so long as they continue in the place; [*i. e.* they are good as against the lessors, being sole corporations; and against corporations aggregate, while the heads, [being the lessors,] shall continue in office.] And therefore if such a lease be made by a dean and chapter, or other corporation aggregate, it is good as against the dean or other head of the corporation, so long as he doth continue

(30) As to the grant of offices, see before in page 239, and the books referred to in [a] note thereto.

in his place (31). And if a bishop make any lease or other grant, not warranted by the statute of 1 Eliz.; or a dean and chapter, master and fellows of a college, or the like, make leases not warranted by the statute of 13 Eliz. cap. 10, these leases are good against themselves, albeit they are void against their successors. So as [*omit*, as] if a private act of parliament doth entail land upon a man, and appoint him what estates he shall make, and that if he make any other estates they shall be void; in this case they shall not be void as to the tenant in tail himself that doth make them.

Leases of benefices with cure are no longer good than the parson is resident, [except they are made to a resident curate, &c. The statute of 13 Eliz. c. 10, was modified by 39 & 40 Geo. 3, c. 41.] Stat. 13 El. c. 20.

Leases made by colleges must have reserved upon them the third part of the rent in corn, [malt, &c. or the value thereof.] See the statute of 18 Eliz. c. 20, (32).

8. What shall be said a good lease at will; or not.

If one make a lease to another, during the will and pleasure of him that letteth, or him that taketh, or both (for so in effect is every lease at will); this is a good lease at will (33). [And a lease for a running period, *viz.* three, seven, or eleven years, without prescribing at whose option it shall determine, will be determinable at the option of either party. *Co. Litt.* 56 b; *Prest. Estates*, 643; *Bac. Abr. Leases* (L. 3.) *Dan.* v. *Spurrier*, 3 *Bos. & Pul.* 399, decides that the option is in the lessee.] So if one make a feoffment in fee, or lease for life, &c. and doth not make livery of seisin, and so perfect Co. super Lit. 55. 56. 270. 14 H. 8. 12.

(31) See the case of *Lloyd* v. *Gregory*, *Cro. Car.* 502, and the observation thereon in note 4, to 13th edit. *Co. Lit.* 45 a.

(32) See the observations made on the restrictive statutes of 1 Eliz. c. 19, 13 Eliz. c. 10, 14 Eliz. c. 11 & 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, in 2 *Bl. Com.* 321; and further, as to the doctrine of leases for lives or years by ecclesiastical persons, in *Vin. Abr. Estate* (R. a. 6.) *Confirmation* (E.) *Bac. Abr. Leases* (E.) *Com. Dig. Estates* (G. 5.)

(33) If land be leased to *A.* for a year, and so from year to year as long as both parties shall agree; this is a lease for two years certain; and if the lessee hold on after two years, he is not lessee at will (as the old opinion was) but for a year certain, for his holding on is an agreement to the original contract. [*Prest. Est. ch. Years.*] But if the original contract were only for a year, or if it were at 8*l. per annum* rent, without mentioning any time certain, it would be a tenancy at will after the expiration of the year, unless there were some evidence, by a regular payment of rent annually or half yearly, that the intent of the parties was that he should be tenant for a year. *Buller's Intr. to Law of Nisi Prius*, 3d edit. 84.

the estate; the feoffee or lessee hath only an estate at will; [and after entry, and before livery (*Litt.* § 70; 3 *Prest. Abstr.* 45,) he is held to be tenant at will, that he may not be supposed to gain a freehold by wrong.] But if a bargain and sale be made of land [in fee, &c.] and the same is void; or a corporation grant land [in fee, &c.] and the grant is void; by this there is no lease at will made (34.) [But if the bargainee, &c. enter by force of this bargain and sale, he gains the fee by disseisin, as an incipient title, capable of confirmation, and also sufficient to support a fine, and to bar by nonclaim, &c.]

Co. super Lit. 45. 3. 59. 65. 7. 8.

Leases for lives, or years, are of three natures; some be good in law, some be voidable by entry, and some void without entry. And of such as be good in law, some be good at the common law, as leases made by tenant in fee simple, notwithstanding they be for longer time than three lives, or twenty-one years; some by act of parliament, as leases made by tenant in tail; leases made by a bishop seised in fee in the right of his church, alone, without the chapter; leases made by a man seised in fee simple or fee tail of land in the right of his wife, together with his wife, for twenty-one years, or three lives, according to the statutes. And of such leases as be void also, some are void at the common law; and that sometimes *in presenti*, as in the cases before of leases for years that have no certainty in them, or leases for lives made without livery of * seisin, [or other efficient ceremony,] and the like. And some are void in *futuro*, as if a tenant in tail make a lease for years warranted, or not warranted, by the statute, and after die without issue; this lease is void as to him in reversion or remainder: *Cessante statu primitivo cessat derivativus.* [They determine by the failure of issue. As against the issue they are either good or defeasible; as against the lessor and lessee they are indefeasible; and as against those in remainder or reversion they are not of any effect. There is a peculiarity in leases by tenant in tail. Originally leases for years are determinable with the estate of the lessor;

9. *Where a lease for life or years shall be void* ipso facto *by the death of the lessor or by other means; or not; but voidable by entry, &c. and how.*

*P. 284.

(34) See further as to the doctrine of estates at will, 2 *Bl. Com.* 145. *Vln. Abr. Estate* (S. b.) to (C. c. 8.) *Com. Dig. Estates* (H.)

yet leases for years by tenant for life, or in tail, may become absolute by confirmation. *Co. Litt.* 45 b, 296 a, 300 b. And leases by tenant in tail may become indefeasible as against the issue, by means of a fine with proclamations, or a recovery duly suffered, and may become absolute and binding on the entire fee simple, when the estate tail is, by a common recovery, enlarged into a fee simple.] So if a prebend, parson, or vicar, make a lease for years not warranted by the statutes; this is void [or rather determined] by the death of the lessor, and the successor need not make any entry or claim to avoid it (35). So if a tenant for life make a lease for years, and after die; in this case the lease for years is void, [*i. e.* actually determined.] And
Acceptance. therefore in all these, and such like cases, no acceptance of rent after will affirm such leases; [for a lease, which is void or determined, cannot be confirmed; but by acceptance of rent the lessee may become tenant from year to year.] But otherwise it is in cases of leases for years made by bishops, albeit they be confirmed by dean and chapter, and of leases made by deans and chapters, or tenants in tail, as to their successors and issues, when the leases are not warranted by the statutes, [for the estates of the lessors are continued to the successors:] and otherwise it is also in the case of leases for life, made by these or any of the former lessors; for in all cases of leases for life it must be avoided by entry, &c. and therefore such leases are not void but voidable, *viz.* the leases of bishops and deans after their death by their successors, and that by the statute law; and the leases of tenants in tail by their issues after their death, and that by the common law; [or (as far as the conditional fees of the common law
Acceptance. were determined) by the statute *de donis.*] And in these, and such like cases, the acceptance of the rent by the issue or successor will make good the lease, at least for their time. [The proposition, that in all cases of leases for life, it must be avoided by entry, as it is inserted in this place, is not law, or at least is too general. It would require a very minute criticism to state the law on this point, with all the distinctions

(35) As to void or voidable leases by ecclesiastical persons, see *Bac. Abr. Leases* (H.)

which belong to it. The rule *cessante statu* is the primary rule. The next inquiry is, whether the estate of the lessor is or is not determined. The third inquiry must be, whether the lease is actually determined from the absence of any continuing estate; or whether it is defeasible only by wife, &c. in case a husband make a lease for life, (which would have been a discontinuance, as against his wife,) and put her and her heirs to their remedy *by action*; now, by the statute law, an entry is substituted for the action. But an ejectment, with the confession of lease, entry, and ouster, will in all cases (except to avoid a fine with proclamations,) be equivalent to an actual entry. [Except in this case of a lease, by husband, operating by way of discontinuance, leases for years, and leases for lives, do, in respect of the necessity of entry, or claim to avoid them, stand on the same footing.]

Co. 3. 65. If a lease be made for years, on condition that upon such a contingent it shall be void; in this case, as soon as the thing doth happen, the lease [being a contract for the possession] is void [*i. e.* determined] *ipso facto* without any re-entry, &c. [This rule is no longer general: it is now optional with the reversioner whether he will or will not take advantage of the condition, if the condition be introduced for his benefit. If the stipulation in the lease, be for the sake of the lessee, then the event forms a collateral determination to the estate, or is part of the limitation, rather than a condition.] But if a lease for life be made on such a condition, in this case the lessor must enter, &c. before the lease will be void. [This proposition is correct. 3 *Prest. Abstr.* 284. 399. But an estate of freehold, as already noticed under the chapter on conditions, may be determined *ipso facto* by a conditional limitation, either under the learning of executory devises or shifting uses. A distinction was formerly taken in reference to leases for years, between conditions that the term should be void, and conditions giving a right of entry. It was assumed, that conditions of the former description defeated the estate *ipso facto*. That distinction is overruled, except in those cases in which the clause of cesser is, in law, a collateral determination to the estate, rather than a condition. A clause that if some event shall happen, as that

A. shall die in the lifetime of *B.* then the term shall cease, is a clause of collateral determination, and not properly a condition. 1 *Prest. Estates*, 80. From the chapter on defeasances it will also be collected, that terms of years may be, while terms for lives or estates of freehold may not be, defeasanced, after they are created, and consequently cannot be subjected to a new condition.]

CHAP. XV.

[*This chapter should have been intituled, General Observations on, &c.*]

Of a Feoffment, Gift, Grant, and Lease.

1. *Where and by what means a feoffment, gift, grant, or lease, and the estate thereby made, being good at first becometh void by matter ex post facto, and may be avoided; or not; and how.*

A FEOFFMENT, gift, grant, or lease in writing, may become void by rasure, interlining, and the like, as hath been showed before in deed, *supra* (1). And a feoffment, gift, grant, or lease, and the estate thereby made, may become void by forfeiture, or upon a breach of a condition, or [determined] by a limitation [of estate or of uses.] For which see *Condition* (2) and *Uses*. Also they may become void, [or rather fail of effect,] by disagreement or refusal; and this may be either by the disagreement of the party himself to whom it is made, or by the disagreement of another—of the party himself; for no estate can be made to a man of any thing in fee simple, for * life, or otherwise, against his will; and therefore, by his disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void; by the disagreement of another; as the husband, in case of a feoffment, &c. made to his wife, may by disagreement avoid it. [But if a feoffment is made to two as joint-tenants, and one only disagree, the entirety will vest in the other. But under the like circumstances, the disagreement by one of two tenants in common, will avoid the grant as to his share. So if in the case of a

Co. 3. 26, 27. 5. 119. Doct. & Stud. 119. Perk. Sect. 44, 45. Fitz. Done, 4, 5. Bro. Done, 23. 30. 59.

*P. 285.

(1) See before in page 66.
(2) See before in page 151.

common law grant, the person to whom the particular estate is limited refuses, the remainder will be void. It is otherwise on a conveyance to uses, and in devises, for the limitations over will be effectual, notwithstanding the particular estate may, by disagreement or otherwise, fail of effect.] And for the first of these the law is thus, that all such acts as give estates directly or by way of use are good at first; and the thing granted, when the deed of grant is delivered to his use, shall vest in the grantee, before he hath notice of the grant, or agree to accept of the thing granted; so that if lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or lease; or goods or chattels be given or granted to a man; in these cases, the things granted shall be said to be in the grantee, and the grant good, before notice and agreement, until disagreement. [The law presumes that every grant, &c. is for the benefit of the grantee, &c.; and therefore till the contrary is shown, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void *ab initio*, as if no grant had been made. See *Thompson* v. *Leach*, 2 *Ventr.* 198; 3 *Mod.* 296: and in intendment of law the freehold never passed from the grantor.] And before agreement the grantee may waive it, and so avoid the estate, and the deed also whereby the estate is made. [But after agreement, the estate cannot be waived, except in the case of a married woman or an infant; and a married woman when free from coverture, or in case of her death before agreement, then her heir; and an infant, notwithstanding an agreement during minority, may disagree when he is adult, &c. or his heirs may disagree, unless the estate was accepted by the ancestor, when adult.] And if it be but a lease for years that is made, he may waive and avoid that by word of mouth in the country, as well as a gift of goods, or an obligation delivered to his use. But if it be an estate of freehold that is made by feoffment, &c. it seems he cannot waive and avoid that but in a court of record. [This conclusion is too general. It is observable, that by the rules of the common law, an estate could not vest in a man without livery to him or his attorney; and acceptance of livery by

surrender his term to the lessor; in this case, albeit the term be extinct, yet the rent doth continue, and the stranger shall have it during the term. So if *A.* have a rent-charge out of the land of *B.* and acknowledge a statute to *C.* and then release the rent to *B.*; in this case, albeit the rent be gone as to *A.* and *B.* yet it is in *esse* as to the conusee, and he may extend it.

If a man be seised of a great wood, and grant to *I. S.* six hundred cords of wood out of the same wood, to be taken by the assignment of *A.* [being a mere regulation, and not the substance of the grant;] in this case if *A.* will not upon request assign where the wood shall be taken, yet the deed will not lose its effect, but *I. S.* may take it without assignment. [2 *Lev.* 142; 1 *Vent.* 271; *Com. Dig. Grant* (F.); 9 *Vin. Abr.* 360.] Co. 5. 24.

If *A.* be lessee for life on condition to have fee, and he make a lease to *B.* for years, and after he perform the condition, and so his estate for life is turned into a fee simple; in this case the lease for years is good still notwithstanding: but otherwise it is in case of the king. Co. 7. 14.

If *A.* tenant in tail enfeoff *B.* on condition to the use of *A.* in fee, and *A.* had granted a rent-charge or acknowledged a statute, which by the statute of 1 Ric. 3, cap. 5, was extended, and after *A.* had performed the condition; in this case, albeit the estate had been changed, yet the interest of the grantee or conusee had continued, [being served out of both the interests of *A.*] Co. 1. 147, 148. 11 H. 7. 21.

If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *A.* in fee, and *A.* doth grant a rent-charge or acknowledge a statute and die; in this case and hereby, the grant is not become void; but if *B.* die without issue, the heir of *A.* shall be charged, [in respect of the remainder in fee; for the grant was supplied by the ownership, under the several estates for life and in fee, and the charge will be suspended after the death of *A.* and until the determination of the estate tail. And if tenant in tail, with remainder to himself in fee, charge the land and die, without barring the entail, this charge will be void as against the issue in tail, though it continue as against those who have the remainder in fee; and if the issue in tail suffer a common recovery, he will bar the remainder in 5 Ed. 4. 2. Pethouse and Crane's case, Mic. 36, 37 El. Co. B.

fee, and put an end to the charge; but if he levy a fine, and by that means bar the estate tail, and the ownership under that estate merges in the remainder in fee, the possession will be chargeable with the rent, since the estate in remainder, which was remote, is now become an estate in possession. *Symonds* v. *Cudmore*, 4 *Mod.* 1. *Shelburne* v. *Biddulph*, 4 *Bro. Parl. Cases*, 594. *Kynaston* v. *Clarke*, 2 *Atk.* 204. 3 *Prest. Convey.* 347. So of a reversion.]

Dav. Rep. 1. If a corody be granted for a service to be done, the omission of the service doth determine the corody.

30 E. 4. ult. Dyer, 13. 126. If one grant lands with his daughter in frank-marriage, or goods with his daughter in marriage, and after the marriage is dissolved, and * they are divorced; in this case the grant is now become of no force: *Cessante causa cessat effectus.* *P. 287.

Bro. Grant, 103. If one man grant to another an office of charge only, to which there is no benefit or fee incident; in this case he may avoid and determine his own grant at his pleasure, without any cause given. But if there be any fee or profit incident to the office, then he may not avoid the grant of it, or put out the officer, without some cause of forfeiture: and if he do, the grantee may have an assise. And yet in this case also he may put him out of the office, albeit he may not deprive him of the fee or profit incident thereunto. 2. *Where a man may avoid his own grant; or not; and when.*

Bro. Grant. If one grant a ward to another to marry, or for his service; it seems he may not afterwards avoid this grant. But if one grant him to another for instruction or education, *contra.*

Bro. Grant. 128. If one make a lease for years of his land rendering rent, and after grant the rent to *I. S.* and the termor attorn, and after the lessor accept of a surrender of the estate of the termor; yet this doth not avoid the grant of the rent, but the same shall continue still, [as a rent in gross. But in case the lessor had a derivative estate and had surrendered, or had merged his estate before he had granted the rent, then the rent would have been extinguished, or rather would never have existed. *Symonds* v. *Cudmore*, 4 *Mod.* 1.]

Lit. Sect. 477. If a disseisor grant a rent, common, or other profit apprender out of the land, and after the disseisee doth enter [thus avoiding the disseisin,] and enfeoff him of the land [thus giving him a

good title;] in this case the rent is avoided, and the common is gone. [But equity would, it is apprehended, relieve.] But if the disseisee release to the disseisor [thus rendering the estate of the disseisor indefeasible,] in this case [t]he [disseisor] shall not avoid his own grant. [The entry, to make a feoffment, &c. is an avoidance of the seisin and title of the disseisor, while a release adds the right to the wrongful seisin, so that the seisin continues, and will support the grant.]

An infant, and other disabled persons, may impeach and avoid their own grants in divers cases, which see before in *Grant* (4).

3. Where and by what means a feoffment, gift, grant or lease, or the estate thereby made, being void or voidable at the first, may become good by matter ex post facto; *or not.*

A deed of feoffment, &c. in some cases is holpen, and a fault therein cured, by the making of livery of seisin. For which see *Feoffment* and *Lease*. But an attornment will not help the grant of a reversion, &c. for it is a maxim in law, that attornment cannot make a void grant good. [This difference is founded on these grounds: In feoffments livery is the operative part, and the charter of feoffment is merely evidence of the transaction; while, in grants, the grant is the operative part of the assurance, and the attornment, (a ceremony now superseded by the 4 & 5 Ann, c. 16,) was merely the perfecting of that assurance.]

If a tenant in tail make a lease for life, or years, of land, and this lease is voidable, and after the tenant in tail doth suffer a common recovery of the land, to whomsoever it be; by this [recovery] the lease is affirmed and made good during the term, as well against the issues and heirs by the entail, as against him in reversion or remainder: and so it is of a charge of a rent upon the land. And if tenant in tail make a lease of the land or charge it, and after levy a fine [with proclamations] of the land to a stranger, by this [fine] the lease or charge is become good against the issue in tail also (5), [or rather during the ownership derived from the estate tail. And although the estate of the lessee

Co. 1. Capel's case. Dyer, 373. Co. 1. 48. 76.

(4) See before in pages 7. 54. 231. 232. and the notes and references thereto.

(5) See accordingly the case of *Beck*, on demise of *Hawkins* v. *Welsh*, in 1 *Wils. Rep.* pt. 1, p. 276, where the court resolved, that if tenant in tail makes a lease or mortgage for years, or charges the land with any other incumbrances, and afterwards suffers a common recovery, *that* shall let *in* all the incumbrances; and the reason is, that whatever act binds the tenant in tail himself, shall bind the recoverors, or the person or persons to whose use the recovery is suffered; for he who recovereth cannot say that *he* against whom he recovered had but an estate in tail. [So if a tenant in tail make a settlement, under which he

was originally determinable on the failure of issue, as forming the boundary of the estate tail; yet when the estate tail is enlarged into a fee simple, by the operation of a common recovery, the lease will be discharged from its determinable quality.]

So held in the Exchequer, Hil. 16 Jac.

If a tenant in tail make a lease for forty years rendering rent, and die, and his issue doth lease to another by indenture for twenty-one years rendering rent, to begin after the expiration, forfeiture, or surrender of the first lease; it is said this doth affirm the first lease. *Sed quære.*

Acceptance of rent reserved on a lease for life or years, which is voidable only and not void, may make the lease good (6).

Bro. Defeasance, 17.

* A feoffment, gift, &c. that is made by duress or menace, and therefore voidable, may by another deed of defeasance, afterwards made between the same parties, become good. *P. 288.

Also grants, leases, and the estates thereby made that are not good, may be made good and perfected by release or confirmation. For which see *Release* and *Confirmation.*

Co. super Lit. 46, 7, 8.

A feoffment may be good against some persons, and void against others, but cannot cease, and revive, and be good and void at several times; [so as to give a desultory inheritance, as an estate to one man every Monday, and to another man every Tuesday. 1 *Prest. Estates*, 218. 255;] as a lease for years, or a grant of rent [on its creation,] &c. may in many cases; for a grant [of a thing created *de novo*] may be suspended, and a lease for years may cease and revive again: as if tenant in tail make a lease for years, rendering 20*s.* rent, and after taketh a wife and dieth without issue, and he in reversion or remainder endoweth his wife (as he may;) in this case the lease, as against the woman, is revived, albeit it be void as to him in reversion or remainder. So if tenant in tail make a lease for years and die without issue, his wife *enceint* with a son, and he in reversion enter, and after the

4. *Where and when a feoffment, gift, grant, or lease may be good for one time, and void for another, and good against one person, but void against another; and good in part; and void in part; or not.*

takes back an estate for life, and afterwards suffers a common recovery to different uses, this recovery will confirm the former settlement. *Cheney* v. *Hall, Ambl.* 526. *Stapelton* v. *Stapelton*, 1 *Atk.* 2. 1 *Prest. Convey.* 16. 142.]

(6) See accordingly *Rickman* v. *Garth, Cro. Jac.* 173. *Pennant's case*, 3 *Co.* 65; and further, as to affirmance by acceptance of rent, in *Com. Dig. Condition* (P.) *Nels. Abr.* tit. *Acceptance* (A.)

son (being heir to the entail) is born; in this case the lease which was before avoided by him in reversion, if it be such a lease as is warranted by the statute, is good against the issue in tail, and therefore is revived again, [and if not warranted, is a lease voidable only, and not void as against the issue.] So if the king make a gift in tail to *W.* to hold by knight's service, and *W.* doth make a lease to *A.* for thirty years reserving rent, and then *W.* dieth, his son and heir of full age; in this case, as to the king, this lease is void, but after livery sued out, the lessee may enter again; and if the issue accept the rent, the lease is affirmed [by the issue for his time.] So if tenant in tail make a lease not warranted by the statute and die, and his heir is in ward; in this case the guardian, in the behalf of the heir, may avoid the lease during the wardship; but afterwards the heir may affirm it again, if he accepts of the rent. [Is this point law?] So if tenant in fee simple take a wife, and then make a lease for years and dieth, and the wife is endowed, she shall avoid the lease for her estate, but after her death the lease will be in force again. [But if a tenant in fee, &c. make a feoffment, and his wife is endowed, yet the feoffment will remain in force as against all persons except the wife. So if a man has several estates, as an estate tail and a remainder in fee, or an estate for life and a remote remainder, the determination or avoidance of one estate, will not be a determination or avoidance of the other estate.] But if the patron grant the next avoidance, and after the parson, patron and ordinary, before the statutes, had made a lease of the glebe for years, and after the parson had died, and the grantee of the next avoidance had presented a clerk to the church, who had been admitted, instituted, and inducted, and had died within the term, and the patron had presented a new clerk to the church, who had been admitted, instituted, and inducted; in this case the lease had not revived again. No more than [*read*, so] if a feme covert levy a fine alone, and the husband doth enter and avoid the fine, the estate shall [*read*, not] revive against the wife after his death; for it is avoided as to her also, as well as to the husband by his entry. See more in *Deed, supra, cap.* 4,

numb. 7. [In this case the assurance is avoided; in the other case the estate, and not the assurance, is partially avoided or defeated.]

Co. super Lit. 45. Co. 7, 8. Dyer, 337. 239.

5. *Who may avoid a feoffment, gift, grant, or lease, that is voidable; or not; and how.* *P. 289.

Where a feoffment, gift, grant, or lease is voidable, in some * cases it may be avoided by the party himself that made it, and not by others, albeit they be privies, as heirs, executors, or administrators; and in some cases it is voidable by others, and not by the party himself; and in some cases it is voidable by the party himself and by others. And in some cases it is voidable only at some times; and in some cases it is voidable at all times: as for example, an infant, if he grant by fine, must avoid it during his minority if he live to be of full age, [at least he must bring his writ of error, and have his minority recorded before he is of age. 1 *Inst.* 131 a, 380 b; 12 *Rep.* 123; 1 *Prest. Abstr.* 318, 319;] otherwise he himself or any other shall never avoid it (7). But if he grant by deed, this [grant] may be avoided at any time by himself, his heirs, executors or administrators, or his guardian in his right, as the case is. [And grants which are voidable only, may be affirmed by acceptance of rent, confirmation, &c.] But a lord by escheat cannot avoid a voidable estate made by his tenant being an infant. [As he has a tenant by the grant, he is not injured by the alienation.] And if a woman covert do any such act by deed, it may be avoided by her husband during the coverture, or herself after the coverture, or her heirs, &c. that are privies after her death. [*Query*, if any estate passes by the grant, not being a fine, &c. of a feme covert, without the concurrence of her husband. It is apprehended no estate passes. Even livery by her alone would be void. So if a husband aliens his wife's freehold, the alienation is good against him, though voidable by his wife or her heirs.] And if a man *non sanæ memoriæ* do any such act, it may not be avoided by himself that is the party denying it, but it may be avoided by his heirs, &c. that are privies. [The rule was, (*Beverley's case, Moor. Rep*, 241), that a person cannot stultify himself. This rule seems to have been abandoned in *Thompson* v. *Leach*, 3 *Mod.* 296.] And if tenant in tail make a voidable lease

Infant.

Woman covert.

Co. super Lit. 7, 8.

Non sanæ memoriæ.

Tenant in tail.

(7) See before in the chapter on fines, p. 7, and [a] note thereto.

not warranted by the statute, he may not avoid it himself, but his issue may, [unless they be barred; and each issue in succession may, while the lease continues, affirm the lease for his time. But a lease avoided by the issue, in any line of the succession, is avoided for ever.] And if he be ward by reason of a tenure in *capite* or knight service, the guardian of the issue, during his time, may avoid it [*pro interesse suo*, without avoiding it altogether, or as against the issue. The proposition in p. 288, should be applied to a guardian in chivalry, who has an interest of his own, and not to a guardian in socage, who has not any interest of his own, but is merely the trustee of the infant.] And if a corporation spiritual, sole or aggregate, make leases not warranted by the statutes, they may not avoid it themselves, [while the same head continues,] but their successors, after their death, translation, or other remotion [*read*, removal,] may avoid it; or if a bishop make such a voidable lease, the king, when the bishopric doth come into his hands, may avoid it.

Corporations.

And now we pass to another sort of assurances, that are for some special purposes, and in some special cases only; wherein we shall first begin with an *Exchange*.

CHAP. XVI.

Of an Exchange.

1. Exchange or eschange. Quid.

AN exchange is the mutual grant of equal interests, [or rather estates of the like denomination,] the one in exchange for the other. Or it is, where a man is seised or possessed of land in fee simple, fee tail, for life, or years, or is possessed of goods, and another is seised or possessed of other lands, or possessed of other goods in the like manner, and they do exchange their lands or goods the one for the other. And in this there is a double grant; for each of them doth grant that which is his to the other.

Terms of the Law, tit. Exchange. Finchesley, 87.

This manner of conveyance (which heretofore

Co. super Lit. 50. Perk. Sect. 253

was very frequent) (1), is sometimes made by word without any writing (2); and sometimes it is made by deed or in writing, [see note 2;] and which way soever it be made, it must be made by this word exchange; which is a word so * appropriated to this thing, as the word frank-marriage is to a gift in frank-marriage; neither of which can be made [*read*, compensated or expressed,] or described by any circumlocution (3). *P. 290.

Co. 4. 121. 15 E. 4. 3. 9 E. 4. 21. Bro. Exchange in toto. Fitz. Exchange in toto.

2. *The effect and fruit of it.*

The fruit and effect of an exchange is, that it doth give the interest, and alter the property, of the things exchanged, to either party, according to the agreement. And if the exchange be of lands or tenements of any estate of inheritance or freehold, whether it be by word or deed, it hath a condition and a warranty in law incident and annexed to it, as a thing made by the word exchange, and *tacite* implied in every grant of exchange; a condition to give a [right of] re-entry upon all the land given in exchange, [so as to defeat the exchange entirely,] if he be put out of all or part of the land taken in exchange, [and there be a wish to defeat the exchange entirely;] and a warranty, to enable him to vouch, and to recover over in value so much of his own land again given in exchange, as shall be recovered from him of the land taken in exchange, if he be sued for it, [and consequently to leave the exchange in operation as to the residue of the lands;] so that upon every exchange, either party, if he be put out of, or lose by action, the land he taketh in exchange, hath a double remedy against the other; and yet this remedy doth go only in the privity, and shall not go to an

Condition.

Warranty.

(1) This appears from the numerous precedents inserted in *Madox's Form. Angl.* under the title *Exchange*, from page 154 to 173; but though exchanges are not now so frequent, yet precedents of them are properly inserted in the latter authors in the branch of conveyancing. See 1 *Horsman*, 362. 3 *Wood*, 243.

(2) Before the statute 29 Car. 2, c. 3, for preventing frauds and perjuries; but now, by force of that statute, a writing is made necessary if the exchange is of freeholds, or of terms for years exceeding three years.

(3) See accordingly 2 *Bl. Com.* 323; 1 *Wood*, 736; 3 *Wils. Rep.* 491. Five things are necessary to the perfection of an exchange: 1st. That the *estates* given be *equal*. 2dly. That this *word (excambium, exchange) be used*, which is so individually requisite as it cannot be supplied by any other word, or described by any circumlocution. 3dly. That there be an execution by entry or claim in the life of the parties. 4thly. That if it be of things that lie in grant, it must be *by deed*. 5thly. If the lands be in several counties, there ought to be a deed *indented*; or if the thing lies in grant, albeit they be in one county. *Co. Lit.* 51 b; *Vin. Abr. Exchange* (A. 2.)

Assignee. assignee (4). [So that under the one remedy, namely, re-entry, he may defeat the exchange altogether, and as to all the lands given in exchange; and under the other remedy, *viz.* by voucher, he may, in case of eviction, recover an equivalent for the lands which are evicted, without putting an end to the exchange. *Bustard's case*, 4 *Co.* 121. By rebutter he merely defends his title. In practice the owner is, on a sale within sixty years from the exchange, required to show a title to the lands given in exchange, as well as to the lands which he has contracted to sell, or to procure a release or extinguishment of the warranty; and on the principles of law, evidence that all or any part of the lands given in exchange have been aliened in fee by the grantee thereof, ought also to be deemed a sufficient answer to the right of investigating the title to the other lands; but that all or part of the lands received on the exchange have been aliened in fee, will not relieve the title from the difficulty. This rule creates great inconvenience, and is attended with a heavy expence. The rule of practice to which reference has been made does not extend to exchanges under inclosure acts; for under these acts there is a communication, to the lands received in exchange, of the title to the lands given in exchange; so that the exchanging parties respectively hold the lands they receive in exchange under the same precise title as they held the lands given in exchange. *Prest. Abstr.* 162. The maxim that *ipsæ et enim leges cupiunt ut jure regantur*, is admirably exemplified in these rules concerning exchanges.] As if *A.* exchange land with *B.*, and *B.* be put out of all or part of the land upon a title paramount, by

(4) Exchange importeth in the law a condition of re-entry, and a warranty voucher, and recompence of the other land that was given in exchange. An assignee cannot re-enter, nor vouch, but rebut; exchanger may re-enter upon an assignee. *Noy's Max.* 61. [In the case of the *Earl of Coventry* v. *Coventry*, Lord *Hardwicke* said, "It is not clear in the law of exchanges, if there is an alienation by one of the parties, and there is an eviction, *whether the heir at law or the alienee* should enter." See 2 *Atk.* 369. See *post*, note 18, to p. 298, where this case is cited; but according to the text, *infra*, and in fo. 298, it is clear *the alienee cannot enter, the privity being destroyed*; and the text is supported by the doctrine expressed by Lord C. J. *De Grey*, in 3 *Wils.* 496, in the case of the *Provost of Eton* v. *Bishop of Winchester*; who there says, "the *warranty* arising from an *exchange* is only *lineal warranty*, arising from operation of law, for the law will not raise a *collateral warranty*, because of the hard consequences attending it; an alienee can neither enter nor vouch, but he may make use of the warranty in law by way of *rebutter*." To that case frequent reference is made in this chapter in the Touchstone.]

a recovery in a real action or otherwise, in this case *B.* may either enter upon his own land again which he gave in exchange, or else, if it be in an action brought, he may vouch *A.* upon the warranty in law, and shall recover as much in value against him of the land he gave, as he hath lost of the land he took in exchange. [And this proposition may with equal reason be extended to the heirs.] But if *B.* alien his land taken in exchange to *C.* and *C.* be put out of all or [any] part of the land upon a title paramount; *C.* in this case, [as being an assignee,] can neither enter upon the land given [Assignee.] to *A.* in exchange upon [*i. e.* by virtue of] the condition in law, nor vouch *A.* to warranty and recover over in value upon the warranty in law. And yet *A.* in this case [and his heirs] shall have the like remedy against *C.* the alienee, upon the condition and warranty both, as he had against *B.* But if *A.* himself implead *C.* for the land he gave to *B.* in exchange, *C.* may make use of this warranty in law by way of rebutter against *A.* And in all Rebutter. these cases, where one of the parties is put out of all or part of the land, or out of part of the estate, by entry, and the other party enter upon the other's land upon the condition in law, he may enter upon the whole land, and avoid the whole exchange; but if he be impleaded for a part only, or for the whole, and a part only be recovered from him, [and he vouches on the implied warranty;] in this case he shall recover so much in value of the other land only as he hath lost, and no more: as if an exchange be of three acres for three acres, and after one of the parties is put out of one of the acres by the entry of a stranger; in this case he may enter upon the whole three acres he had given in exchange, and so avoid the whole exchange if he will. And if *A.* and *B.* be joint-tenants of three acres for life, and the fee simple to the heirs of *A.*, and *A.* exchange this land with *C.* for three acres in fee, and then die, and *B.* enter and * avoid the *P. 291. exchange for his life (as he may,) in this case *C.* may avoid the whole exchange, and enter upon his own three acres again. So if he in reversion disseise his tenant for life, and then exchange the land, and after the tenant for life enter; in this case the other party may defeat the whole exchange. But in this case of an exchange of three acres for three

acres, if one of the acres were gained by disseisin, and the disseisee bring an action and doth recover it against the disseisor; in this case, if he vouch over the other party to the exchange, he [the party vouching] shall recover so much in value only, [and not in quantity,] of the three acres he gave in exchange, as the acre he hath lost, and no more (5).

3. How an exchange must be made: and what shall be said a good exchange, or not.

1. In respect of the parties thereunto, and their estates.

To the perfection of an exchange, and to make things to pass by this kind of conveyance, these things are requisite: 1. That the persons or parties thereunto be able to give and take, and not disabled by any special impediment. And for this [purpose] it must be known, that such persons as may be grantors and grantees may make exchanges, and such persons as are disabled to grant are disabled to make exchanges. See Grant, numb. 4.

[King.] An exchange made between the king and a subject is good, albeit the king hold his land in one capacity and the subject [hold his land] in another [capacity]. Co. super Lit. 51.

Infant. An exchange made between an infant and another, [of things lying in livery,] is not void, but voidable only; for the infant at his full age may affirm or avoid it at his election (6). Idem. [Zouch v. Parsons, 3 Burr. 1174.]

Tenant in tail. An exchange made between a tenant in tail and another, is not void but voidable, for it is good against himself during his life; and his issue, [*viz.* each successive issue,] at his full age may [unless barred by fine, &c. the statute of limitations, &c.] affirm or avoid it at his election. [But if it be avoided by any series of the issue, it will be wholly and for ever avoided.] Bro. Exchange, 9. Perk. Sect. 279.

Non sanæ memoriæ. An exchange made between a man *non sanæ memoriæ* and another, is not void but voidable; [*query*; and see *Thompson* v. *Leach*, 3 *Mod.* 301;] for it is good against him, but his heir may avoid or affirm it at his election. Bro. Exchange, 9.

Husband in right of his wife. A man that doth hold land in fee simple, fee tail or for life, in the right of his wife, may exchange this land, and the exchange will be good as long as he and his wife do live. And he with his wife may exchange it for longer time, and the exchange is good against him; but his wife after his death may affirm or avoid it if she will. [*Query*, if not good Bro. idem. Perk. Sect. 279.

(5) See accordingly *verbatim* in 1 *Wood*, 737.
(6) See note 3, to 13th edit. *Co. Lit.* 51 b.; and *Com. Dig. Enfant* (B. 3.)

till the estate of the husband is avoided by the entry of the wife or her heirs; and see *Vin. Abr. Baron and Feme*, 55. According to *Perkins*, § 279, the exchange is good till avoided by the entry of the wife or *her* heirs.]

Perk. Sect. 288. One parson or vicar may exchange his church or benefice with another, and this exchange is good, [for the possession only, and not for the legal incumbency; for how can the acts of the incumbents affect the interests of the patrons?] Parson.

Perk. Sect. 280. 273. The disseisor and disseisee may join together and exchange the land whereof the disseisin was made, with a stranger for other land: but if it be made out of the land, and before the entry of the disseisee, it shall not bind the disseisee, for he may avoid it. [His concurrence, if in a deed, would, it is apprehended, amount to a release or confirmation.] And a disseisor cannot exchange the land he hath gotten by disseisin with the disseisee for other land; for this exchange is void, unless it be by indenture or fine, that it may work by way of estoppel. [The principle of this case is very questionable. The disseisor hath a defeasible *estate*. The disseisee agrees to accept that estate in exchange for another estate. Having done this, what pretence is there on his part to annul it? *Perkins* does not quote any authority for his conclusion.]

Perk. Sect. 279. The lessor and lessee may join together and exchange the land leased for other land, and this is good: for it shall be said to be the surrender of the lessee to the lessor, and the exchange of the lessor; and therefore the lessee (as it seems) shall have nothing to do * with the land taken in exchange. *Sed query* of that. [By appropriate language the exchange might, it should seem, be made so as to continue the exchanged lands in the lessee for a corresponding term.] Surrender [under an exchange by a lessee and lessor.] *P. 292.

Perk. Sect. 277. 281. Joint-tenants for life, the fee to one of them, may exchange their land with a stranger for other land, to hold in the same nature, and the exchange is good. [And why may not the like rule be extended to a lessee for years? And the rule, that an exchange cannot be made between three parties, so that *A.* cannot grant to *B.* and *B.* grant to *C.* in exchange for lands of *A.* given to *B.* (*Provost of Eton* v. *Bishop of Winchester*, 3 *Wils. Rep.* 496,) has not any application; for there are only two, and not three parties, though there Joint-tenants. Tenants in common.

be three persons.] But joint-tenants, tenants in common, and coparceners, cannot exchange the lands they do so hold one with another, before they have made partition. [What objection is there to the exchange of one undivided moiety of part of the lands, for an undivided moiety of other parts of the same lands, as between coparceners and tenants in common? As between joint-tenants, the unity of their seisin may prevent the operation of an exchange. 1 *Madd. Rep.* 223. A power to make an exchange does not warrant a partition. *Sed query. Att. Gen.* v. *Hamilton*, 1 *Madd. Rep.* 223; *Sugd. Powers.* 472.]

If *A.* and *B.* be joint-tenants for life, the fee to *A.*, and *A.* exchange the whole land with another for other land, this is good only for his moiety, as some have said: but it seems, notwithstanding, it is good for the whole, until it be avoided by the other joint-tenant (7). Perk. Sect. 277.

2. In respect of the matter whereof it is made, or the nature of the thing exchanged; and of what things and estates an exchange may be made.

The second thing required in a good exchange is, that the things exchanged be such as [*omit* as] whereof an exchange may be made. And for this [point] it must be known, that an exchange may be made of things of the same nature, as of a temporal thing for a temporal thing, a spiritual thing for a spiritual, as a house for a house, land for land, a manor for a manor, a church for a church, rent for rent, common for common, a horse for a horse, one piece of plate for another, or the like: or it may be made of things of a divers nature, as of a temporal thing for a spiritual [thing], of a house for land or rent, a chamber in a house for common, or for a reversion, seigniory, or advowson, of land or rent for a right of land or release of right, of an advowson for land, of a rent for a way, of a horse for a piece of plate, of a gown for a horse, or the like; [and why may not one right in some lands be released for a right in other lands, so as to effectuate a partition between joint-tenants.] And exchanges made of these things, albeit the things exchanged do lie in divers counties, are good. Also a seigniory by homage and fealty or the like, which is not valuable, may be exchanged for land, rent, or any other such like thing. So may a seigniory by divine service. But a seigniory in frankalmoigne cannot Perk. Sect. 259, 261, 262, 266, 258. Lit. Sect. 62. Co. super Lit. 51, 52. Perk. Sect. 259, 260, 258.

(7) See further when an exchange shall be good, *Com. Dig. Exchange* (A.)

be exchanged with any but [*i. e.* other person than] the tenant of the land that doth hold by the tenure. [So that the exchange must operate by way of release or extinguishment of the seigniory.] And houses, manors, lands, rents, commons, seigniories, reversions, and the like, may be exchanged in fee simple, feetail, for life, or years. So that an exchange may be of an inheritance for an inheritance, of a frank-tenement for a frank-tenement, and of chattels real for chattels real, [and of personal property for personal property.]

Perk. Sect. 244. Idem. 263. 3 E. 4. 10. 9 E. 4. 21. 9 E. 4 21. Perk. Sect. 262. If one grant white acre in exchange for black acre lying within the same county, or [if the different lands lie] in two counties, this is a good exchange. So if I grant a rent-charge issuing out of my land [being a thing not in *esse*, but created *de novo*] in exchange to *I. S.* for an acre of his land, &c.; this is a good exchange. So if I have a rent issuing out of the land of *I. S.* and I grant this to *I. K.* in exchange for land or other rent; this exchange is good, when the tenant hath attorned to the grant of the rent. So if one have a rent out of my land in fee, and I have the land in fee, and I grant the land in exchange for the rent, it seems this is a good exchange, [though the rent will be extinguished.] But if one grant me a manor or land, and I in exchange for the same manor or land, grant unto him a rent *de novo* issuing out of the same land or manor, this cannot take effect as an exchange; [for, at the time of the grant, there is not any mutuality; since there is not any existing rent.] So if one release his estovers that he hath in such a wood, and deliver the release in exchange for land given * to him in exchange for the same release; this is a good exchange. [d] If there be a disseisor and disseisee, and the disseisee release his right to the disseisor in exchange for other land; this is a good exchange. [e] So if the disseisor of an acre of land enfeoff a stranger of the same acre of land, and the feoffee give to the disseisee an acre of land in fee, in exchange for a release of all his right in the acre of land of which he was disseised; this is a good exchange. [f] But if the disseisee grant his right to a stranger, that hath nothing in the land, in exchange for an acre of land; this exchange is not good; neither shall the stranger take any thing by

Perk. Sect. 266. Fitz. Exchange, 16.

*P. 293.

[d] Perk. Sect. 271. [Release of action for land.]

[e] Idem, 282.

[f] Idem, Sect. 271.

this grant; [because a right of entry, or of action, is not transferrable.] [g] If there be lord and tenant by fealty, and 12*d.* rent, and the lord exchange the seigniory with the tenant for the tenancy, or *e converso*, by deed indented; this is held by some to be a good exchange. [h] If I have a rent issuing out of the land of *I. S.* and I grant or release the same rent to *I. S.* in exchange for other land; this is a good exchange. So if I release the same rent unto him in exchange for a way over his ground; this is a good exchange. [i] If I be seised of lands to which *I. S.* hath a right of action, and I give to him other land for a release of his right; this is a good exchange. And the same law is of an exchange of land, and an advowson, by deed indented, for a release of right in another advowson to an usurper, when his incumbent hath been in possession of the church six months. [k] If two parsons of a church make an exchange of their benefices by words of exchange, and each of them resign his benefice into the hands of the bishop to the same intent, and the patrons present accordingly, and the presentations are *per viam permutationis*; this is a good exchange. [But do the consequences of exchange attach? it is apprehended they do not.] [l] If three acres of land, with an advowson appendant, be given in exchange by *T. K.* to *I. S.* for a chamber to be assigned by the said *I. S.* at the election of *T. K.* and he assign two chambers, and *T. K.* choose and enter upon one, and *I. S.* enter upon the land; this exchange is good notwithstanding the [original] uncertainty, [since by the election there is a certainty, and till the election the exchange is not complete.] So if *I. S.* give his manor of *A.* to *T. K.* in exchange for his manor of *B.* or for his manor of *C.* and he enter upon one of these manors, and *T. K.* enter upon the manor of *A.*; this exchange is good. Out of all which these things (by the way) may be observed: 1. That the things exchanged need not to be in *esse* at the time of exchange made; for a man may grant a rent *de novo* out of his land in exchange for a manor. And yet if I grant to another the manor of *A.* for the manor of *B.* which he is to have after his father's death by descent, it seems this exchange is void. [Certainly; for until the descent

[Seigniory for tenancy.]

[Rent for land.]

[Rent for way.]

[Release of right for land.]

[Right of advowson for advowson.]

[Presentation for presentation.]

[Land, &c. for a chamber, to be taken by election.]

[g] Perk. Sect. 260.

[h] Perk. Sect. 267.

[i] Perk. Sect 268, 269.

[k] Perk. Sect. 257.

[l] Perk. Sect. 264, 265.

Co. super Lit. 50. Perk. Sect. 265.

has taken place, there is not any estate or interest in me. There is merely the hope or chance of succession, *(i. e.)* a mere possibility.] There needs no transmutation of possession; for a release of rent, estovers, or right of land for land, is good. 3. The things exchanged need not to be of one nature, so as they concern lands or tenements; for land may be exchanged for rent, common, or any other inheritance which doth concern lands or tenements; or spiritual for temporal things, as * tithes, a tenure by divine service, for land, or a temporal seigniory, [and rent may be exchanged for rent.] But annuities, and such like things, which charge the person only, and do not concern lands or tenements, or goods and chattels, cannot be exchanged for land (9).

*P. 294.

Perk. Sect. 244. Co. super Lit. 51, 52. Lit. Sect. 62. Co. 9. 14. Perk. Sect. 247, 248, 249, 250. 246.

3. In respect of the manner of the making of the exchange; and where it shall be good without deed, or not.

The third thing required in a good exchange is, that it be made in that manner and order that [*read*, which the] law doth require; wherein these things are to be known: 1. That if all or part of the things whereof the exchange is made do lie in several counties; or if all, or part of the things, whereof the exchange is, be such as lie in grant and not in livery, albeit it be in the same county; in these cases, the exchange must be made by deed indented in writing. [Certainly there must be a deed; but it is not easy to discover the necessity for an indenture.] But where the exchange is of lands, and of lands lying in the same county, [both lying in livery,] albeit it be of any estate of inheritance or freehold, yet it may be by word of mouth without writing (10). [Now there must be a writing.] And so also may it be when the things exchanged do lie in divers counties, when the exchange is made only for a term of years. And therefore if an exchange be made between *I. S.* and *T. K.* of lands lying in one and the same county in fee, or for life, it may be by word of mouth. [A writing is now necessary in consequence of the statute of Frauds and Perjuries, 29 Car. 2, c. 3.] But if all or part of the lands of *I. S.* lie in one county, and all or part of the

(9) Accordingly 1 *Wood*, 740; *Lilly's Conv.* 138. And see further of what things an exchange may be, in *Vin. Abr. Exchange* (D.)

(10) See before page 290, note 2, as to the stat. 29 Car. 2, c. 3, for prevention of frauds and perjuries.

lands of *T. K.* do lie in another county, the exchange must be made by deed indented. If an exchange be made of rent for land, and the land out of which the rent is issuing, and the land given in exchange for it, do both lie in one county; this exchange cannot be good without deed. So if an exchange be made of the reversion of an acre of land for 3 *s.* of rent issuing out of another acre of land, and both acres are in one county; this exchange must be made by deed indented, or it will not be good. So if an exchange be made of an acre of land and a rent out of another acre, for another acre of land and common for three beasts, and all is in one and the same county; this exchange must be by deed indented, or it will not be good. But if I be seised of a manor to which I have common appendant or appurtenant, and *T. K.* is seised of another manor to which he hath a villain regardant, and both the manors are in one county, an exchange may be made of these manors by word of mouth without writing, and the common and villain will pass as incidents well enough. And yet if *I. S.* hath an office whereunto land doth belong, and *T. K.* hath rent issuing out of the land of a stranger, and all the land is in one county, and the office is to be used and occupied in the same county; if these things be exchanged, it must be by deed indented. [*Query*, the necessity of an indenture; it is apprehended a deed would be sufficient.] 2. The word "*eschange*" or "exchange" must be had and used between the parties in the making of the exchange; as, if I grant to you white acre, to have and to hold to you and your heirs in exchange for black acre; and in consideration hereof you grant to me and my heirs black acre in exchange for * white acre: for this word is so individually requisite, as it cannot be supplied by any other word; neither will any averment, that it was in exchange, help in this case (11). And therefore if *A.* by deed indented give to *B.* an acre of land in fee simple, or for life, [for or *pro* the acre of *B.*]

Co. super Lit. 50, 51. Perk. Sect. 252. 254. 9 E. 4. 21. Fitz. Exchange, 12.

*P. 295.

Livery of seisin.

(11) See before in page 290, and note 3, thereto. In exchanges of land the word *exchange* is necessary in the conveyance, because it imports a special warranty, in respect of the mutual consideration of the lands exchanged; it is likewise necessary that the estates of both parties be equal in title, [*read*, quantity:] as if one hath an estate in fee, the other must have the like estate; but it is not necessary that their estates should be equal in value [nor in quality, as distinguished from quantity.] 3 *Salk.* 158.

and by the same deed *B.* doth give to *A.* another acre of land in the same manner, this cannot enure as an exchange; and therefore if there was no livery of seisin, [grant, &c.] so as it may take effect by way of grant, it is utterly void. But by this means, [namely, by exchange (*Provost of Eton* v. *Bishop of Winchester and Fountain Clerk*, 3 *Wils.* 491,)] lands may be granted from one to another, for there needs no livery of seisin. So if an exchange be made by words between two, of lands in one county, and before their entry indentures are made between them of the same lands without words of exchange, [thus proving that they abandon the exchange,] and no livery of seisin is made, [or the livery be made;] this shall not pass by way of exchange (12). And yet it hath been held by some that *permutatio*, or some other word of like effect, [*i. e.* to be rendered into English by the word exchange,] may supply this word exchange. (13). 3. If any rent, reversion, seigniory, or the like, be granted by either party, that then the tenant do attorn to the grant, for attornment is [*i. e.* was till the 4 & 5 Ann, c. 16.] requisite in this case. And yet in the case of the grant of land in possession in exchange, no livery of seisin is needful: [so as the exchange be executed by entry.] Neither is it needful that either party to the exchange come to the thing given to him in exchange by the same means and manner of assurance: for if lessee for life of one acre give another acre to his lessor in tail in exchange for a release from him of that acre, to have and to hold in tail in like manner, this is a good exchange.

Perk. Sect. 259, 263. 289. 276.

Attornment.

Livery of seisin.

Perk. Sect. 265.

An exchange may be made to take effect in *futuro*, as well as in *presenti*; for if an exchange be made between me and *T. K.* that after the feast of *Easter T. K.* shall have my manor of *Dale* in exchange for his manor of *Sale*, this is a good exchange.

[Exchange of lands in possession for lands in reversion.]

19 H. 6. 27. Perk. Sect. 275.

If an exchange be made in writing of land, and it doth limit and express no estate that either party

[An exchange in *future*.]

(12) An exchange, in the strict legal sense of the word, cannot be between three; the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. See note 1, to *Co. Lit.* 50 b. 13th edit.; and 2 *Wils. Rep.* pt. 3, p. 496.

(13) In an exchange of ecclesiastical preferment. See *ante*, 293, &c.; *post*, 297, and note 17, thereto.

shall have in the thing exchanged, yet this is a good exchange. [What estate shall the parties have? shall each hold for his own life, or shall they hold for one, and which of their lives; or shall the exchange be for their several lives, and the life of the survivor? See p. 296. It seems that each by implication of law shall be tenant for his own life, 19 *Hen.* 6, c. 27. *Sed query*, if it shall not be for their joint lives.] But if an estate for life be limited to the other; this is not a good exchange, as shall be showed in the next place. [*Sed query.*]

4. In respect of the quality or equality of the estates or interests exchanged.

The fourth thing required in a good exchange is equality [or rather the like quality] of estate, *viz.* that either party have the like kind of estate of the thing exchanged; so that if one have an estate in fee simple, [*omit* simple] the other have so likewise, and so for other estates. [Life and life, years and years.] For if the one grant that the other shall have his land in fee simple for the land which he hath of the other in fee tail; or that the one shall have in the one land fee tail, and the other in the other land but for term of life; or that the one shall have in the one land fee tail general, and the other in the other fee tail special; or that the one shall have in the one land for life, and the other in the other *P. 296. * land but for years; these exchanges are void and cannot take effect as exchanges. [And yet tenant in tail, because he passes a base fee, may exchange with tenant in fee.] [m] And therefore if the lord release to his tenant his services in tail in exchange for other lands given to the lord in exchange in tail also; this exchange is void: for by this release made by the lord the services are gone for ever. [n] So if tenant for his own life exchange with him that is tenant for life of another; this is not a good exchange. [And yet both estates are for life. If this point be law, it should seem to follow that each must give an estate for the same identical life; but the point is not law. *Co. Litt.* 51 b.] (And by the same reason, it should seem, if lessee for twenty years of his land, exchange with another for other land for forty years, that this should not be a good exchange.) [o] But if lessee for life be of an acre of land, and he give another acre of land to his lessor in fee tail in exchange for a release of all his right in the acre that he holdeth for term of his life, to hold to him and the heirs of his body engendered; this is a good

Fitz. Exchange, 15. Lit. Sect. 64, 65. Co. super Lit. 50, 51. Perk. Sect. 276.

[m] Perk. Sect. 283.

[n] Perk. Sect. 275. Finchesley, 27.

[o] Perk. Sect. 276.

exchange. [For there is an equality of estate in point of duration; for the life estate is enlarged into an estate tail; and each has a distinct time by his estate tail. This proposition argues that one estate for life may be exchanged for another life estate, though they be held for different lives, since one estate tail
[p] Co. 11. 80. may continue longer than the other.] [p] Or if tenant for his own life exchange with him that is tenant in tail after possibility of issue extinct; this exchange is good. [For in point of duration of estate, tenant in tail after possibility of issue extinct is merely tenant for his life; this case also argues that one estate for life may be exchanged for another estate held
[q] Perk. Sect. 275. 19 H. 6. 27. for a different life.] [q] And yet if an estate for life be expressed to the one party upon the exchange, and no estate is expressed to the other party, it is said that this exchange is not good; and yet where no estate is expressed, the party shall have an estate for his own life. [See p. 296, and *query*. As a copyholder has merely an estate at will in point of law, he cannot exchange with a tenant in fee or for life, &c. of freehold lands; hence freehold lands cannot be exchanged for copyhold lands, (*Moor*. 665,) unless the owner of the freehold tenure join, so that he will be the exchanging party.]

Co. super Lit. 51. Perk. Sect. 289. Lit. Sect. 65. Perk. Sect. 280, 281. But in these cases it is not necessary that the parties to the exchange be seised of an equal estate at the time of the exchange made; for if tenant in tail or husband in right of his wife, exchange their land, in [*viz.* granting the] fee simple, with another for lands he hath in fee simple; this is a good ex-

Husband and wife. Tenant in tail. [Equal estate at the time.]

[r] Idem. change, until it be avoided by the issue or the wife. [r] Neither is it necessary that both estates be in possession; for one may grant an acre in possession in exchange for an acre in reversion, and this exchange

[One estate in possession, or in reversion.]

[s] Idem. is good. [s] Neither is it necessary that there be an equality in the value or quantity of the lands exchanged; for if the land of one of the parties be worth 100*l.* and the land of the other but 10*l.*; or if the land of one of the parties be one hundred acres and the land of the other but ten acres; if the estates given be equal, the exchange is

[Equality of value, and of quantity.]

[t] Idem. good. [t] Neither is equality in the quality or manner of the estate requisite. For if two joint-tenants be in fee of an acre of land, and they grant that acre to another in exchange for other lands, to have and to hold a moiety to one of them and his heirs, and a moiety to the other and his heirs, which

[Joint-tenants.]

4. When a deed shall take effect as an exchange, or not.

Where a deed shall take effect as an exchange, there must be all the conditions before mentioned in the case. And yet note, that where one thing is granted for another in the nature of an exchange, and for some of the causes aforesaid, the things cannot pass by way of exchange, there they may pass notwithstanding by way of grant; and the deed may take effect to other purposes, albeit it may not enure and take effect as an exchange. And therefore if two be seised of several acres of land, and the one of them by deed doth give his acre to the other, and the other his acre to him without any word of exchange, and each of them doth make livery of seisin to the other; in this case, albeit the acres will not pass by way of exchange, yet will they pass by way of grant. [See *Roe* v. *Tranmer*, 2 *Wils.* 68; *Willes*, 682; and *ch. Grants.*] And in this case if no livery of seisin be made, either of them shall hold the lands granted at will only, [unless they may pass by grant, and the deed will operate in that mode.] And in like manner it is, if two * agree to exchange land, and after each of them levy a fine, or make a feoffment of the land, to the other, [distinct from and not as part of the exchange;] by this [fine] the land will pass [from] each to the other, but not by way of exchange. So if *A.* and *B.* his wife, and *C.* and *D.* his wife, agree to exchange lands, and *A.* and *B.* enter into the land they are to have in exchange, and then they do make a feoffment of their own land unto *C.* and his father, and not to *C.* and *D.* his wife; this shall not enure as an exchange, and therefore *C.* and *D.* may enter upon their own land again; but the feoffment is good. And if one assign [to] a woman her dower in exchange for land; this shall not take effect as an exchange, but it shall enure to be a good assignment of dower.

Perk. Sect. 255. 256. Fitz. Exchange, 14. Perk. Sect. 272.

*P. 298.

5. How an exchange shall be construed and taken.

If two do exchange land by deed, and limit no estates, this shall be taken for estates for life, and the exchange is good; but if an express estate be limited to one, and no express estate to the other, it is said this is not good, and that construction of law will not help it. [*Sed query.*]

19 H. 6. 27. Perk. Sect. 275.

If an exchange be made between two men of two acres of land by deed, and in the *habendum* it is set down that each of them shall have the acres given in exchange, with divers other acres not

Perk. Sect. 256.

expressed in the premises, this addition shall be taken as surplusage, and the exchange shall be good for the two acres. See more in *Exposition of Deeds.*

6. Where an exchange shall be determined, or the nature of it changed by matter ex post facto; and how; and where not.

Perk. Sect. 286. Co. 4. 122. Perk. Sect. 299. Bro. Exchange, 12. If after an exchange is made, before or after the parties enter, all or part of the land given to either party be recovered from him upon an elder title, as by an entry upon a condition broken, alienation in mortmain, or upon a disseisin; in these cases if that party enter again upon his own land which he gave in exchange (as he may) hereby the whole exchange is determined (18). But if after the exchange is perfect, one of the parties, [without having any such cause to avoid the exchange,] do enter upon the land he doth give in exchange, this doth not make void the exchange; neither may the other party hereupon enter upon the land he doth give in exchange; but he may have an assise, or an action of trespass against the other. And yet Perk. Sect. 299. if an exchange be of a common for a way, or a rent, or the like, if the one party deny the common, it hath been said the other party may deny the way or the rent. *Sed query.*

Bro. Exchange, 8. Perk. Sect. 297. Bro. Exchange, 8. Perk. Sect. 279. If an exchange be made between two of a manor, whereof the one half is in tail, and the other half is in fee simple, and the tenant in tail that made the exchange die, and his issue [not being barred] disagree to it, so that the exchange of the entailed land is become void, this doth determine the whole exchange; for when an exchange becometh void in part, [by entry, &c.] it becometh void in all; [it is otherwise on avoidance in part by recompence recovered;] and until it be avoided, it is good for all. As if one be seised of white acre, and he exchange white acre and black acre (which is none of his) with another for two other acres; this shall continue for a good exchange, and not be avoided, until he that hath right to black acre doth evict him that hath it in exchange. [So that a mere defect of title without an eviction will not defeat an exchange.]

---

(18) And if parcel of the estate is defeated, the exchange is as totally and utterly defeated, as if parcel of the *land* given in exchange were defeated, *per cur. Cro. Eliz.* 902. See further what act or thing will defeat an exchange, in *Vin. Abr. Exchange* (N.) It is not clear in the law of exchanges, if there is an alienation by one of the parties, and there is an eviction whether the heir at law or the alienee should enter. *Per* Lord *Hardwicke*, in *Coventry* v. *Coventry*, 2 *Atk.* 369; [but see 290, that the alienee cannot enter.]

*P. 299. * If an exchange be made by tenant in tail, and his issue after his death waive the possession of all or part of the land taken in exchange, and disagree to the exchange, [or establish his title to the lands granted in exchange by tenant in tail,] hereby the whole exchange is determined. So if the wife after the husband's death, the infant at his full age, or the heir of him that is *non sanæ memoriæ*, disagree to the exchange of the husband, the infant, or him that is *non sanæ memoriæ*; hereby the whole exchange is determined, and no subsequent agreement can make it good again [after it is once avoided.] Co. 4. 121. Perk. Sect. 296. 294. 290. 298.

If two do make an exchange by word of mouth, and after, before either of them enter, they make indentures of the lands exchanged, and grant the same from one to another; it seems hereby the nature of the exchange is altered, and the exchange determined; [*i. e.* there are mutual conveyances instead of an exchange.] 15 E. 4. 3.

7. Who may take advantage of a void or voidable exchange, or not; and when.

The parties themselves, and all privies and strangers for the most part, may take advantage of such exchanges as are void for the defects before named; but when the exchange is only voidable, *contra*. Perk. sect. 285. Co. 1. 105. Dyer, 285. Perk. Sect. 298. 294. 298. Co. 1. 98.

Infant.

And therefore when an exchange is made by an infant; the infant himself at his full age, or his heir, and none other, may avoid it.

Tenant in tail.

And when an exchange is made by a tenant in tail, the issue in tail after the death of his ancestor, and none other, may avoid it. [But the persons in reversion or remainder may treat the exchange as void, and avail themselves of their title. And the issue in tail may avoid an exchange though they have lands of greater value by descent from their ancestor. 1 *Co.* 96; 14 *Hen.* 6, c. 2.]

Husband and wife.

And when an exchange is made by the husband, or husband and wife, of the wife's land, the wife after the husband's death, or heir of the wife after her death, and none other, may avoid it.

Non sanæ memoriæ.

And when an exchange is made by a man *non sanæ memoriæ*, his heir after his death, and none other, may avoid it. [But see *Thompson* v. *Leach*, 3 *Mod.* 301.] But in all these cases of infant, tenant in tail, woman covert, and a man *non sanæ memoriæ*, and where lands are recovered by an elder title, the other party may not enter and avoid the exchange, until the infant, issue in tail, woman, or heir of him that is *non sanæ memoriæ*, or him

that doth lose the land by an elder title, doth first enter.

Co. super Lit. 51. 12 H. 4. 11. Perk. Sect. 290. 294. Fitz. Exchange, 13. Perk. Sect. 291. 279. 293. 298.

8. *Where an exchange voidable at first, doth become good by matter ex post facto, or not.*

If an infant exchange lands, and after at his full age occupy the lands taken in exchange for his own lands; hereby *(cæteris paribus)* the exchange is made good. So if tenant in tail exchange his entailed lands with another, and after his death the issue occupy the lands taken in exchange by his ancestor; hereby the exchange is made good for the life [*viz.* time or ownership] of the issue in tail. [And each successive series of issue may affirm the exchange for his time.] So if the husband and wife exchange the lands of the wife for other land, and she, after her husband's death, agree to it, and enter into and agree to the lands taken in exchange; hereby the exchange is made good [against her and her heirs;] but if the husband alone make an exchange of his wife's land, and she after his death agree to this, and enter into the land; it seems this will not make the exchange good. [Because her entry into the lands received in exchange is without any title, and the grant by the husband alone was not effectual against her. *Vin. Abr. Baron and Feme* (I. 19,) (X. 9.)] And if a man, seised of land in right of his wife in fee, thereof enfeoff a stranger, and take an estate back again to him and his wife, and a third person, in fee, and they three join in exchange of the same land in fee for other lands to a stranger in fee, and the exchange is executed, and the husband dieth, and she doth occupy* the land taken in exchange with the other third person; hereby the exchange is good. [Since she was a grantor in the exchange.] If a man *non sanæ memoriæ* make an exchange, and his heir, after his death, enter into the land taken by his ancestor in exchange, and agree to the exchange; hereby the exchange is made good. [*Query* of this point.] And in all these cases when the exchange is once by agreement made good, it can never by any subsequent disagreement be afterwards made void. [Except in the case of issue in tail, who by their acceptance can only confirm the exchange during their own time; unless by fine, &c. they bar the issue, &c.

Tenant in tail.

Husband and wife.

*P. 300.

Per Lord *Hardwicke*, 2 *Atk.* 369, "it is not clear in the law of exchange, if there be an aliena-

tion by one of the parties, and there is an eviction, whether the heir at law or the alienee should enter." 4 *Co.* 121.

If trustees are authorized to make an exchange and to settle the lands received in exchange, then on eviction the lands given in exchange will be subject to the same trusts as the estate received in exchange would have been.

In Lord *Coke*'s report of *Bustard's case*, 4 *Rep.* 121, it is said, "this warranty runneth only in privity, for none shall vouch by force of it but the parties to the exchange and their heirs, and no assignee; but the assignee shall rebut by force of it though the exchange was without deed."

Persons seised in right of their church may now exchange under the powers in the statute of 17 Geo. 3, c. 53, in particular cases. See also 1 Geo. 2, c. 10, for exchanges of lands purchased for augmented livings.

The right of entry, by reason of the warranty annexed to exchanges, cannot be devised. *Attorney General* v. *Vigor*, 8 *Ves.* 256. An exchange revokes a will, *Ibid.* and though the exchange should be avoided in the lifetime of the testator, and he should obtain his old seisin, his will would not, without republication, operate on the new seisin, *Ibid.* The difference between exchange and partition is stated in 1 *Inst.* 51 a. 172 b. 176 b. A power to make partition does not authorize a sale or exchange. 2 *Prest. Abstr.* 72; *Abel* v. *Heathcote*, 2 *Ves.* jun. 98; but it seems doubtful whether a power of exchange authorizes a partition. *Attorney General* v. *Mary Hamilton*, 1 *Madd. Rep.* 223.]

And now from hence we come to a *surrender*; a special way or means for the giving or transferring of something to another, that hath already some interest in the same thing; [or rather the restoration of an existing estate to the person who has the next *vested* estate.]

CHAP. XVII.

Of a Surrender.

Co. super Lit. 337.

A SURRENDER, properly taken, is the [restoration of an estate. It is] yielding or delivering up of lands or tenements, [or hereditaments,] and the estate a man hath therein, unto another that hath a higher and greater estate, [or an equal estate,] in the same lands or tenements. [These observations mark the instances in which this mode of assurance, or rather discharge, is used, rather than constitute part of a correct definition.] But it is sometimes improperly applied to other things. He that doth surrender is called the surrenderor, and he to whom it is made is called the surrenderee. [*Comyns* in his *Digest* hath, by his arrangement, simplified the learning on this subject. The third volume of *Preston on Conveyancing*, in treating of merger, has on the one hand marked the connection, and on the other hand noted the diversities, between merger and surrender. In the fourth volume of *Preston on Conveyancing*, the theory and practice on the law of surrenders will be examined.]

1. *Surrender. Quid.*

Surrenderor.

Surrenderee.

Co. super Lit. 337, 338. Co. 6. 69. Plow. 106, 107. West. Symb. 1. part. lib. 2. cap. 460.

And there be three kinds of surrender; *viz.* 1. A surrender properly taken at the common law. 2. A surrender by custom of lands holden by custom, or of customary estates, whereof we speak not here (1.) [Of these surrenders Mr. *Watkins* has treated in a very masterly manner.] 3. A surrender improperly taken, as of a deed, or grant of a rent-charge, of a patent, and of land in fee simple to the king. [In these instances, properly speaking, the instruments are releases, whether they have their effect by matter of discharge, as a

2. *Quotuplex.*

(1) A surrender of copyhold lands (where by a subsequent admittance the grant is to receive its perfection and confirmation,) is, according to my Lord *Coke*, rather a manifesting of the grantor's intention, than a passing away of any interest in the possession; for till admittance the lord taketh notice of the grantor as tenant, and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord; but yet the interest is in him only *secundum quid*, and not absolutely, for he cannot pass away the land to another, or make it subject to any other incumbrance than it was subject to at the time of the surrender; neither in the grantee is any manner of interest invested before admittance; for if he enter, he is a trespasser, and punishable in trespass; and if he surrender to the use of another, the surrender is merely void, and by no matter *ex post facto* can be confirmed. *Co. Comp. Cop.* 87. See further, with respect to a surrender of copyhold lands, as part of the general doctrine of copyhold, in *Co. Lit.* 59; *Gilb. Ten.* 157; 2 *Bl. Com.* 147; *Wright's Ten.* 215; and the title *Copyhold* in the several abridgments, &c.

release, or by implication, by cancelling a deed.] The surrender, properly taken, is of two sorts: 1. Express, or in deed, which is when it is done by apt words, and the express agreement of the parties. 2. In law, or implied, which is when it is wrought by consequence and operation of law; or when the law doth interpret or enure something done to another intent, to make a surrender of it. [Between an express and implied surrender, the difference is: an express surrender is declaratory of the intention of the party to yield up his estate; an implied surrender is where an estate incompatible with the existing estate is accepted; or where the particular estate is actually transferred to the person having the immediate reversion or remainder, with a view that it should abide in him, and the law construes it to be a surrender.] And in the first case, it is sometimes by word only, and sometimes by writing (2.) And when it is by writing, it is said to be an instrument testifying, by apt words, that the particular tenant of the lands or tenements for life or years, doth consent and agree, that he which hath the next [vested] and immediate remainder or reversion thereof, shall also have the particular estate of the same in possession [or his own estate accelerated,] and that he yieldeth the same [particular] estate unto him.

3. *The effect of it.* The fruit and effect of a surrender is, that it doth pass the estate of the surrenderor to the surrenderee, and that hereupon the estate of the surrenderor is drowned, and extinct in the estate of the surrenderee; and yet not so, but that to some purposes it shall be * said to have continuance still. And therefore if tenant for life grant a rent-charge, and after doth surrender his land; in this case the rent-charge shall continue notwithstanding the surrender. [3 *Prest. Convey.* 153. There is this difference also between a surrender and merger. A surrender operates immediately as a consequence of the mode of assurance. The doctrine of merger may have place in consequence of a conveyance, but the conveyance itself does not affect it. It is

Co. super Lit. 338. Co. 1. 96. Bro. Surrender, 47. Perk. Sect. 591.

*P. 301.

(2) By the statute 29 Ch. 2, c. 3, § 3, no leases, &c. either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, shall be surrendered, unless it be by deed or note in writing, signed by the party *surrendering* the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law. See further in *Gilb. Eq. Rep.* 236; *Vin. Abr. Surrender* (L.)

the construction of law on the situation of the parties in regard to their estate, which produces the effect.] So if lessee for life make a lease for years rendering rent, and the lessee for life surrender his estate; in this case, albeit the primitive estate for life be yielded up, yet the derivative estate for years shall continue notwithstanding; but the surrenderee shall not have the rent reserved upon the lease for years. [In some instances the law has remedied this mischief, to facilitate the renewal of leases. 4 *Geo.* 2, c. 28.] So if lessee for life, or years, break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not hereby salved; for the lessor may have an action of covenant still, notwithstanding the surrender. [Because there was a perfect duty before the surrender, and the surrender is the act of the lessee not of the lessor. There is in this respect a difference between, 1st. Surrender; 2d. Forfeiture by condition; 3d. Forfeiture by rules of tenure, 1 *Inst.* 251, b.; 3 *Prest. Conv.* 448; 3 *Prest. Abstr.* 397. In the first and third instances, the underlease remains in force; in the second instance the underlease is avoided, because the original estate was defeasible, and the interest of the underlease is subject to the condition. 2 *Prest. Abst.* 200.] And if one seised of land, grant a rent out of it in fee, and this rent is extended on a statute, or granted for less time to another, and then the grantee doth surrender the deed of the grant of the rent to the tenant of the land; in this case the rent shall continue as to him that hath execution, and to the grantee for the less time. [When the deed of grant is cancelled *eo animo*, can the grant be pleaded?] And if one make a lease for years rendering rent, and the lessee surrender his estate to the lessor; hereby the rent is extinct: but if the lessor grant the rent to a stranger before the surrender, *contra;* [for he cannot derogate from his own act.] And if one lease for years, and the lessee let parcel of his term to his lessor rendering rent, and after the lessee surrender his whole estate; in this case it seems the rent is determined (3). [In this case

Extinguishment.

Covenant.

Co. 8. 145. 7. 39. Bro. Sur. 42.

(3) A surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for it is a conveyance at common law, to the perfection of which no other act is requisite, but the bare grant; and though it be true, that every grant is a contract, and there must be *actus contra actum*, or a mutual consent, yet that consent is implied; a gift

there is a twofold operation. First, the original lease is surrendered, and then the derivative term becomes immediately expectant on the reversion and may merge. This proves that there may be a merger where there is not any privity between the parties as lessor and lessee. 3 *Prest. Convey.* 85. 152.]

4. What shall be said a surrender in law of lands; and by what means an estate shall be surrendered in law; or not.

By acceptance and taking of a new estate.

If lessee for life, or years, take a new lease of him in reversion, of the same thing in particular contained in the former lease for life or years; [and one term is incompatible with the other, as embracing part of the same period;] this is a surrender in law of the first lease. As if lessee for his own life, or another's life, in possession or reversion, take a new lease for years; or a lessee for forty years takes a new lease for fifty years; the first lease in both these cases is surrendered. And this rule holdeth, albeit the second lease be for a less time than the first, as if lessee for life accept a lease for years, or lessee for twenty years accept a lease for two years. [The rule equally applies to the acceptance of any interest incompatible with the interest under the lease. 1 *Prest. Abst.* 16; 2 *Ibid.* 85; *Com. Dig. Surrender.*] And albeit the second lease be voidable, as being made upon condition, as if lessee for twenty years take a new lease for twenty years, upon condition that if such a thing happen the second lease shall be void, and the thing do after happen; in this case both these leases are become void; as where the lessor doth grant the reversion to the lessee upon condition, and after the condition is broken; [*i. e.* the first lease is surrendered by the acceptance of the second lease, and the second lease is avoided by the operation of the condition. 2 *Prest. Convey.* 139; 1 *Inst.* 218, b.] Or if the second lease be made by tenant in tail, or the like; as if a man make a lease for years of land, and then make a feoffment to another of the land, and then take back an estate to him and his wife of the land, and then make a new lease to the lessee

14 H. 8. 15. Plow. 194. Dyer, 28. Co. 10. 97.

Perk. Sect. 617. Co. 5. 11.

Fitz. Surrender 3. Co. super Lit. 218.

37 H. 6. 17.

Dyer, 140, 141.

imports a benefit, and an *assumpsit* to take a benefit may be well presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence should be the obligee's bond immediately without notice. *Per cur.* 2 *Salk.* 618. See the cases there cited in the margin in the fifth edition; and more amply, as to the nature, force and effect of a surrender, in 2 *Bl. Com.* 326, seventh edition; *Vin. Abr. Surrender* (A. 2.); *Wood's Inst.* 284; *Com. Dig. Surrender* (A.)

for ten years; this is a surrender in law of the first lease; but if the second lease be merely void, then it is otherwise. [*Roe* d. *Earl Berkeley* v. *Archbishop of York*, 6 *East*, 86; 2 *Prest. Convey.* 137.]

Dyer, 272. *Dyer, 178. 177. Co. 5. 54. 55. Kelw. 70. And therefore if the lessor do, by words of covenant only, promise to his lessee that he shall have a new lease, and do never actually make it; this is no surrender in law. And this rule as it seems *holdeth also, albeit the second lease be to the lessee and a stranger, or to the lessee and his wife; and albeit the second lease be by word only, and the first lease be by deed, if so be the thing granted by the lease be such a thing as may pass by word without writing; and albeit the second lease be in another right, as if the husband have a lease for years in the right of his wife, and then take a new lease to himself in his own name; and albeit the first lease be to begin presently, and the second be to begin at a day to come, or *è converso*; and albeit there be a mesne estate between, as if land be let to *A.* for years, and after let to *B.* for years, to begin after the first term, and the assignee of *A.* doth take a new lease; [in this instance there is not any mesne estate, *B.* hath merely an *interesse termini*, and an *interesse termini* is not any impediment either to a surrender or a merger.] So if one demise land for ten years to one, and after demise it for ten years to another, to begin at Michaelmas, and after the first lessee accept a new lease; for in all these cases, there is a surrender in law of the first leases.

*P. 302.

Dyer, 140, 141.

Dyer, 178.

Pasc. 40 El. Co. super Lit. 338. Co. 6. 69. 10. 53. 67. 5. 11. Dyer, 280. Dyer, 93. 112.

Dyer, 46. Co. 2. 60. And if there be two lessees for life, or years, and one of them take a new lease for years, this is a surrender of his moiety; whereby it doth appear, that a surrender in law may be made of some estates [*viz.* interests] which cannot be surrendered by a surrender in *fait*; for *fortior est dispositio legis quam hominis.* [No instance is adduced in which, under the same circumstances, a surrender *de facto* might not have been made, for there may be a surrender notwithstanding an *interesse termini*, and a joint-tenant may surrender his moiety. An *interesse termini* is the only interest which may be surrendered by operation of law, although it cannot in point of law be actually surrendered; but an *interesse termini* may be released by formal words, or words in the language proper for a surrender.]

Co. 6. 69. 10. 67. And hence it is, that a corporation aggregate may

make a surrender in law without deed, although it cannot make an express surrender without deed. But if the lessee do only license the lessor to make a feoffment, and to give livery of seisin for him; or to give livery of seisin for him as at, [*omit* at] his attorney; or do license him to enter into the land and no more; neither of these things [*viz.* acts] shall be said to be a surrender in law. So if the second lease be made of another and not of the same thing whereof the first lease is made, as where the first lease is of the land, and the second is made of a rent, or other profit to be taken out of the land; or the first is of a manor, and the second of the bailiwick or stewardship of the manor; or the first is of a park, and the second is of the keepership of the park; in these cases there is no surrender of the first lease. [See *Com. Dig. Surrender, contra.*] Also if the second lease be not a good lease, perhaps it shall not be construed a surrender. See *Co.* 2, *Lane's case*, 17 (4). [If the second lease embrace the lands, &c. leased, or any of them, jointly with other lands, &c. it will be a surrender as to those lands, &c. which are comprised in each of the two leases.]

Perk. Sect. 608. Bro. Surrender, 48. Trin. 5 Jac. Co. 6. 69. Adjudged.

But if the first lease be of the land itself, and the second lease is of the vesture of the same land, this is held to be a surrender of the first lease, [because they are incompatible.] So [*read*, but] if the second lease be not to begin until the first lease end, the taking of this second lease is no surrender of the first lease. So it hath been said, if one make a lease of black acre in *Dale*, and the lessee accept a second lease of all the lands of the lessor in *Dale*, in general words, and the lessor that doth make the lease have divers other lands there besides this acre, that this is no surrender of the first lease, [because the new lease is by implication of law confined to the other lands.] *Sed query* of this, for others do much doubt it, [and the point is certainly open to doubt.] So if one enter into land, and make a lease for

Trin. 5 Jac. Sir Jo. Chamberlaine's case. See Dyer, 200. Co. 5. 11.

Per Curiam. B. R. 9 Jac.

(4) The acceptance of a second *good* lease, (as hath been observed before), will operate as a surrender of the former; but the reason doth not hold in the case of accepting a new *void* lease, or one that the lessee cannot enjoy. There is no inconsistency in the acceptance of a new good lease being a surrender of the former, but the accepting a new void lease cannot show an intention to surrender the other, for a void contract for a thing that a man cannot enjoy, cannot, in common sense and reason, imply an agreement to give up a former contract, 4 *Burr.* 2213.

the trial of the title only, and after the lessor (he and the lessee being both out of possession) * make another lease of the same thing to the lessee; it seems this is no surrender of the first lease; but if the lessor enter before he make the lease, *contra* (5). *P. 303.

See Perk. in his chap. of Surrender in toto. Bro. Surrender in toto. Fitz. Surrender in toto. Co. super Lit. 338.

To make a good surrender in deed of lands, and to make them pass by such a surrender, these things are first of all required. 1. That the surrenderor be a person able to grant and make, and the surrenderee a person capable and able to take and receive a surrender, [by the statute 29 Geo. 2, c. 31, infants, lunatics, and femes covert, may surrender for the purposes of renewal,] and that they both have such estates as are capable of a surrender. And for this purpose, 1. That the surrenderor have an estate in possession [or rather an actual vested estate] of the thing surrendered at the time of the surrender made, and not a bare right thereunto only, [for a right may be released not surrendered. An *interesse termini* may be released, but correctly speaking it cannot be surrendered; and yet it will be virtually surrendered or released by accepting a lease for an estate which is incompatible with a former estate; and it may be released by express language or formal words.] 2. That the surrender be to him that hath the next immediate estate in remainder or reversion, and that there be no intervenient estate coming between. 3. That there be a privity of estate between the surrenderor and the surrenderee. 4. That the surrenderee have a higher and greater estate in the thing surrendered, than the surrenderor hath, [or an estate equally large,] so that the estate of the surrenderor may be drowned therein. 5. That he have the estate in his own right, and not in the right of his wife, &c. [This circumstance is not necessary as a general rule. A husband entitled to a term of years in right of his wife may surrender absolutely, and as to freehold interests he may surrender, but the surrender will be voidable by the wife after her husband's death; and an executor may surrender a term which he has in that character. This circumstance only makes the difference between a surrender good as against all persons,

5. What shall be said a surrender in deed of land; and when they shall be said to pass by such surrender; or not.

1. In respect of the persons between whom it is made, and their estate and possession.

(5) See accordingly, *verbatim*, 1 *Wood*, 745, 6; and further, in *Com. Dig. Surrender* (I.); *Wood's Inst.* 285; *Lilly's Prac. Conv.* 282.

and a surrender defeasible by the wife and her heirs. The qualification also applies only to freehold interests, and not to chattel interests. Over the chattel interests of the wife the husband has an absolute power, and therefore may surrender so as to bind his wife and her representatives.] 6. And that he be sole seised of this estate in remainder or reversion, and not in joint-tenancy. [A joint-tenant may surrender his share or accept a surrender as to that share.] As for examples: infants, women covert, mad and lunatic men, and all such like persons as are disabled to grant are disabled to make a surrender; and none but such as may grant their land may surrender their land. [The surrender of an infant is voidable only, and not void. *Zouch* v. *Parsons*, 3 *Burr.* 1179; *Perk.* § 614.] A corporation aggregate of many cannot make an express surrender without a deed, but it may make such a surrender by deed, [*read*, operation of law, by accepting an incompatible estate or interest.] And such persons as are disabled to take by a grant are disabled to take by a surrender, and such as may be grantees may be surrenderees; and therefore a surrender made to an infant is good (6). If the husband have a lease or estate for years in the right of his wife, he alone, or he and his wife together, may surrender this [lease;] but if the husband have an estate for life in the right of his wife, being tenant in dower or otherwise, and he alone, or he and she together, surrender this, this surrender is good only during the life of the husband, except it be made by fine, [nor even if there be a fine unless the wife join.] One executor may surrender an estate or lease for years which the executors have in the right of their testator; [so one of two executors may assign the whole term, *Dyer*, 23 b.; *Com. Dig. Administration*, (B. 12); and an assignment of all that belongs to an executor passes the entirety, *Dyer*, 23 b.] If there be two joint-tenants and one of them have the particular estate, and the other the fee simple; as where an estate is limited to two and the heirs of one of them, and he that hath the estate for life doth alien his part to a stranger; in this case the alienee may surrender to the other

Co. 10. 67.

Husband and wife.

Perk. Sect. 613. 612. Bro. Surrenderor, 44.

Executors.

21 H. 7. 26.

Joint-tenants.

Perk. Sect. 586, 587. Fitz. Sur. 2.

(6) See accordingly 2 *Vent.* 201; *Show. Parl. Ca.* 151; 3 *Lev.* 284, S. C.

joint-tenant: so if there be three joint-tenants for life, and the fee simple is limited to the heirs of one of them; and one of the joint-tenants for life doth release to the other, and he to whom this release is made doth surrender to him that hath the fee simple; this is a good surrender of a third part, [and as to this third part there will be a tenancy in common.] But otherwise one joint-tenant cannot surrender to another joint-tenant, albeit he be tenant for life * which [*read*, who] doth make, and he tenant in fee simple that doth take, the surrender. [A release is the proper assurance between these parties: and a deed in the form and language of a surrender may operate as a release.] A lessee for life or years may surrender to him that is next in remainder in fee simple, or fee tail, or to him in reversion in fee, and this is a good surrender; and a surrender, as it seems, may be made to the grantee of the reversion before attornment, so as attornment be afterwards made, [or rather it is apprehended because the deed amounts to an attornment and a surrender, *uno flatu*.] And in case of the surrender of an estate for life, [even though the estate for life confer the right to the immediate freehold,] there needs no livery of seisin, as in case of the grant of an estate for life. A lessee for years of a term to begin at a day to come, cannot surrender it by an actual surrender before the day the term begin, as he may by a surrender in law; [he may also release this interest.] If lessee for life be disseised, or lessee for years be ousted, and before his entry or the getting of the possession again, he surrender his estate to him in reversion; this surrender is void, [as a surrender; but it is apprehended the instrument would be good as a release.] So if a woman that hath title of dower surrender it to him in reversion before she hath recovered it, this surrender is void; [but she may release her title of dower; and an instrument in the form of a surrender would operate as a release.] And yet if lessee for years after his term is begun and before his entry, when nobody doth keep from him the profits, do surrender his estate, it seems this is a good surrender; [*query*, for till entry he has merely an *interesse termini*.] But if another enter before him, and keep him out, it seems otherwise; [because he has merely a right or title of entry, and has not any estate. In either

*P. 304.

Perk. Sect. 584. Co. super Lit. 338.
Perk. Sect. 600. Bro. Sur. 4.
Dyer, 251. 358. 280.
Livery of seisin.
Perk. Sect. 601, 602. 4 H. 7. 10. Co. 6. 69.
Perk. Sect. 600, 601, 602, 603.
[Infra, ch. Release.]

case a release would be efficient.] If there be lessee for years, the remainder for life, the remainder or reversion in fee, and the lessee for years be ousted, and he that ousted him die seised, [so that the rights of entry of the tenant for life, &c. are converted into rights of action,] and then the lessee for years enter, [being an entry which cannot reduce the freehold,] and then the tenant for life surrender to him in remainder or reversion in fee; this is not a good surrender, for there is in this case but a bare right of [action for the] remainder for life and in fee; but if the lessee for years had not been ousted, it had been a good surrender. [It follows, that ouster of tenant for years, unless it be limited to the estate for years, is the ouster of all persons in remainder or reversion, and that the re-entry of the tenant for years does not restore the seisin to the freeholder when the freeholder has merely a right of action. The points are, first, that the entry of a termor will restore the seisin of the reversioner or remainder-man, unless the reversioner or remainder-man has merely a right of action; but when there is only a right of action in the reversioner or remainder-man, an entry by him would not, so neither will an entry by the termor, restore the seisin.] If there be lessee for years, the remainder for life, the remainder in fee; the lessee for years may surrender to the lessee for life, and so may the tenant for life to him in remainder or reversion in fee; but if there be tenant for life, the remainder for life, the remainder in fee; in this case the second [*read*, first] tenant for life cannot surrender to him in remainder in fee, [on account of the intermediate estate.] If a lease be made for life or years to *A.* the remainder for life to *B.* the remainder in fee tail to *C.* and the first tenant for life or years doth surrender to *C.* or to the lessor, *B.* the next in remainder for life being then living; this is not a good surrender, neither can it take effect as a surrender in respect of the intervenient estate. And so some say the law is if the middle remainder be but for years only; as if a lease be made for years, the remainder for years, and the first termor surrender his interest to the lessor; this is no good surrender. *Sed query.* For it should seem that a future interest will no more hinder an actual surrender of the first lessee,

Perk. Sect. 605. Dyer, 251.

Perk. Sect. 588.

Dyer, 112. Plow. 190. Dyer, 93. Plow. 432, 433.

than a surrender in law. [A future interest for years certainly will not prevent the effect of a surrender; but it is apprehended that a term for years limited in remainder of a previous estate, and to take effect immediately after the determination of that estate, is a vested interest, an interposed term. See 3 *Prest. Convey.* 211. And the assertion, that it may be surrendered, clearly proves that it is of this quality. The difference then is between an estate for years which is a vested interest, and one which is a future executory interest, or *interesse termini.* An estate of the former description will prevent a surrender of one of two estates intervened by an estate of this description. *Sed query* if one estate of freehold may not be surrendered to the tenant of another estate of freehold, notwithstanding an intervening vested term for years, the term of years being merely a contract which, at the common law, might have been defeated by the freeholder. At this day, however, the surrender would be without prejudice to the term of years, or a change of its relative state.] And so also it seems the law is for a concurrent lease, which, for the latter part of it, is in the nature of a future interest. [A concurrent lease, contrary to the language of the books, gives an actual reversion, and consequently an estate. *Grumbrell* v. *Roper*, 3 *Barn. & Ald.* 711.] But if in this case it fall out the middle remainder be void; as where a lease is made to *A.* for life or years, the remainder to a monk, (who is a person incapable,) for life or years, the remainder to *I. S.* in * fee; *P. 305. in this case *A.* the first tenant, may surrender to him in remainder in fee, and the surrender is good; [for in point of law there is not any intervening estate.] If lessee for twenty years make a lease for five years, and the lessee for five years enter, and after the lessee for twenty years surrender to him in reversion or remainder; this is a good surrender, [on account of the immediate privity.] So also if the two lessees join in the surrender; [for by construction of law there is, first, a surrender by the tenant for twenty years to the reversioner; and secondly, a surrender by the termor for five years to the same person.] So also if the first lessee surrender first, and the lessee for five years surrender after, [the surrender would be good, because one estate is

Perk. Sect. 604. 14 H. 7. 3. Plow. 541. Bro. Sur. 16.

immediately expectant on the other estate.] But if the lessee for five years surrender to him in the reversion, or the remainder, [*i. e.* the first lessor, &c.] before the surrender of the lessee for twenty years; this cannot take effect as a surrender for two causes: 1. Because there is a remnant of the term as an intervenient estate, to hinder the drowning of the term. 2. Because, [while the interposed reversion continues,] there wants a privity between the lessee for five years, and him in reversion. If tenant in fee simple surrender to the lord paramount of whom the land is held; this can never take effect as a surrender, unless it be in a special case, where the lord hath cause to have a *cessavit*; [and then, properly considered, it is a release of tenancy, and not a surrender. So if tenant in tail surrender to him in remainder or reversion in fee simple; this cannot take effect as a surrender. [It is apprehended to be a good surrender against all persons except the issue, and that if their title be bound by fine, &c. the surrender will be absolute.] So if lessee for life surrender to him in remainder for years; or tenant for the life of *B.* surrender to him that hath an estate for the life of *C.* these are void surrenders; for the estates of them to whom they are made are not capable of such surrenders, for they are not greater than the estates of the surrenderors, and therefore not able to drown the estates surrendered. [The books cited do not authorize the conclusion as to the two estates for life, and the law is probably mis-stated. See 3 *Prest. Convey.* 166, *on the Gradation of Estates*; *Ibid.* p. 168, *on the Merger of Estates for Life in each other*. *Ibid.* 225.] And yet if lessee for the life of another, or for his own life, surrender his estate to him in remainder that is tenant for his own life; this is a good surrender, for an estate for a man's own life is greater in judgment of law, than an estate for another man's life. And hence it is, that if a lease be made to two for their lives, the remainder to a third person for his own life, and one of the first tenants for life surrender his estate unto him in remainder for life; this is a good surrender for a moiety. If lessee for life or years surrender to him in remainder or reversion, that hath no good estate in the remainder or reversion, as where the remainder or reversion is granted

Bro. Sur. 9. Fitz. Sur. 10.

Perk. Sect. 589, 590. Co. super Lit. 42. 3. 61.

Co. 2. 66.

by word only, or, being granted by deed, there is no attornment of the tenant to the grant, or the like; this surrender is not good. [*Query*, if the surrender did not amount, constructively, to an attornment.] And yet if tenant in tail make a lease for life [by discontinuance,] whereby he gaineth a new reversion, (but defeasible), and the tenant for life doth surrender to the tenant in tail; this shall be a good surrender. So if a woman inheritrix have a husband, and they have issue a son, and the husband dieth, and she take another husband, and he letteth the land for life, and the wife dieth, and the tenant for life doth surrender his estate to the second husband; this is a good surrender to most purposes; [because there is a privity between him and his tenant. Indeed the lease operated to give him a reversion, by way of discontinuance of the seisin of his wife.]

Co. super Lit. 338.

Perk. Sect. 622. If a feme sole be seised of land in fee, and she make a lease thereof to a stranger for life, and then take a husband, and the lessee * surrender to the husband; this is no good surrender, neither can it enure so, because he, to whom it is made, hath not the reversion in his own but in his wife's right (7). [The case put by *Perkins* is of a grant and not a surrender to the husband; and it is apprehended the husband has a sufficient seisin to warrant the surrender to him.]

*P. 306.

Bro. Sur. 2. 8. Fitz. Partition, 5. Perk. Sect. 583. It is further also required in every good surrender, that if it be made by word, and without deed, that then it be made in the same county where the land to be surrendered doth lie, [probably that the *pares curiæ* may have knowledge of the fact;] but by writing a man may make a surrender of lands that do lie in any other county, and in what place soever it doth lie. [When the surrender is made by deed, there is not the same reason for having the evidence in the same county. The deed carries in itself the evidence of its own authenticity.] And a surrender may be by word, or writing, of lands lying within the same county, in any place out of the land (8). And therefore if tenant for

2. *In respect of the place where it is made; and where the surrender of lands in one county, may be good for the lands that no lie in another county; or not.*

(7) See accordingly 1 *Wood*, 748; and further, in *Vin. Abr. Surrender* (A.)

(8) See the note before in this chapter, as to the stat. 29 Car. 2, c. 3; that statute does not make a deed absolutely necessary to a surrender, for it directs it to be made either by deed or *note in writing*; and when it is made by a note in writing, there is no occasion for

life surrender to him in reversion in any place out of the land within the same county, and the surrenderee agree to it, the freehold is in him presently.

3. In respect of the matter or thing; and of what things a surrender may be made; or not.

3. That it be made of such things of which a surrender may be made. For surrenders may not be made of estates in fee simple, or fee tail, [see p. 305,] nor yet of rights or titles only of estates for life or years, nor yet of part of an estate for life or years; as if a man have a lease for ten years, he cannot surrender the last seven years, and keep to himself the three years. But otherwise one may surrender any kind of estate for life, as by dower, by the courtesy, or as tenant in tail after possibility of issue extinct, or for years, or years determinable upon lives, and that of any messuages, houses, lands, commons, rents, or the like, that are grantable from one to another, and such surrenders are good. [The cases which raise the question, whether the deed shall operate as an under-lease or as an assignment, are collected and commented on, 2 *Prest. Convey.* 124; 2 *Prest. Abstr.* 4.]

Bro. Surren. in toto. Perk. chap. Sur. in toto. Co. 5. 11. super Lit. 338.

4. In respect of the manner, and how, and by what words, a surrender may be made; and where it may be made without deed, and upon condition; or not.

4. That there be words, or words and deeds, sufficient to make the mind of the surrenderor to appear that he is willing and desirous to part with, and yield up, the thing surrendered, into the hands of the surrenderee. And herein it is to be known, that albeit the words surrender, give, or yield up, be the most significant and proper words whereby to make a surrender; yet any other words, especially if it be in the surrender of a lease for years, that do testify and declare the will and assent of him that is the particular tenant, that he in the remainder or reversion shall have the estate of the tenant, be sufficient to pass the estate by way of surrender (9). And therefore if lessee for life or years do by word or writing say, that he will hold the land no longer, and wish him in reversion or remainder therefore to enter; or that it is his

Perk. Sect. 607, 608, 609. Dyer, 251. Bro. Sur. 1. 35. 37. 17. 21 H. 7. 7.

---

any stamp-duty, it not being a deed, 1 *Wils. Rep.* pt. 2, p. 27, *Farmer* on the demise of *Earl* v. *Rogers*. [But now a stamp is necessary, since every surrender is an agreement. And if the surrender is by mere writing, the agreement-stamp must be used; but if the surrender be by deed, the deed-stamp is necessary.]

(9) In the case in 1 *Wils.* pt. 2, p. 27, the court held that the words "*release and discharge*" were much stronger than words which have in many cases amounted to a surrender, *ut res magis valeat quam pereat.*

desire that he shall enter into the land, and have it, and his estate therein; or that he is content that he shall have his estate, or have his lease; such, or any such like declaration as this, made to him in reversion or remainder, will be a good surrender. [A surrender may be presumed from circumstances, including an abandonment of possession. 1 *Term Rep.* 310.] So if lessee for years deliver his indenture to a stranger, to deliver it and all his estate up to him in reversion, and do appoint the stranger to deliver and surrender it to him in reversion, and he do so, and he in reversion accept thereof; this is a good surrender: but otherwise it is of an estate for life. [Since the statute of Frauds and Perjuries, 29 Car. 2, c. 3, a term for years or for life cannot be extinguished by cancelling the instrument of demise, or otherwise than by writing, or accepting another lease incompatible with the former lease. *Magennis* v. *Maccullough*, *Gilb. Rep.* 235.] So if the particular tenant do by the words give, grant, or confirm, pass his * estate to him in reversion, and he do enter and agree to it; this is a good surrender (10); and by all these surrenders the estates will pass by way of surrender, except it be in some special cases where the intent of the parties doth plainly appear to be that the estate shall not pass by way of surrender (10). But if a lessee for life, or years, do only go from the house or land, and carry away his goods and cattle, and so waive the possession for a time, either because the lessor shall not distrain them for rent behind, or the like, and thereupon the lessor doth enter and enjoy it; this is no surrender, neither is this a good yielding up of his estate. And in such a manner, and by such words as before, any thing that may be granted by word without writing, may be surrendered by word without writing, so as it be made within the same county where the thing surrendered doth lie. And this holdeth true, albeit the estate to be surrendered were created by deed. But such things as commons, rents, advowsons, reversions, remainders, and the like, that cannot be granted without deed, cannot be surrendered without deed; and there-

Hil. 37 El. B. R. Sleigh & Bateman's case.

*P. 307.

Perk. Sect. 581, 582, 583. Fits. Sur. 1. Co. super Lit. 338.

(10) [So a term for years may, it is apprehended, be released; *sed quære*; and unquestionably it may be assigned to a reversioner, when he is so circumstanced that he cannot take a surrender, as on account of an intervening estate.]

fore if a lease be made for life, the remainder for life, by word of mouth without any writing, he in the remainder for life cannot [while his estate is a remainder] surrender his remainder for life without deed; [but when the estate in remainder becomes an estate in possession, it may be surrendered without deed. So an estate which could not be created without deed may, from a change in its relative qualities, be surrendered without deed. Thus the reversion cannot be granted for an estate for life or years without deed, but when this estate for life or for years becomes an estate in possession, it may be surrendered without deed. 1 *Term Rep.* 441.] So where one hath a rent, advowson, or the like, [by grant or] as tenant in dower, or by the courtesy; this cannot be surrendered without deed. And in case where there is any special matter to be contained in the surrender, as reservation of rent, condition, or the like, there for the most part it must be by deed, or it will not be good. [But a release of a right cannot be made subject to a condition subsequent, though it may be made on a condition precedent. A right released for an instant is released for ever. And an agreement that the lessor shall have the premises as mentioned in the lease, and pay a particular sum over and above the rent annually, towards the goodwill, &c. amounts to a surrender, and the remedy for the annual sum is by *assumpsit*. 1 *Term Rep.* 441.] And therefore if tenant for life declare himself by word of mouth to be contented and agreed that he in the reversion shall have the land and his estate therein, rendering 10*s.* a year rent, or paying such a sum of money, or upon condition that if he survive the lessor he shall have it again, &c. this is no good surrender, [for want of a deed.] And a surrender may be made also upon a condition precedent or subsequent; as, if it be with reservation of rent, that if it be not paid it shall be void: but if it be an estate for life that is so surrendered, it seems it must be made by writing indented; and so likewise it should seem the law is of the surrender of a lease for years upon a condition, or however it is most safe so to do. [A surrender may be made subject to a condition either precedent or subsequent.]

Dyer, 251. Bro. Sur. 16.

Perk. Sect. 624, 623. Co. super 218.

5. In respect of the agreement of him to whom the sur-

5. That the surrenderee do agree to and accept of it; for until then the surrender is not perfect: but

Perk. Sect. 606 Lit. Bro. 163.

if the surrenderee do once agree to it, he cannot after disagree; for his first agreement doth perfect the surrender; [the surrender passes the estate till disagreement, and the law will presume agreement till the contrary fact is in proof; and when it appears in evidence that the person to whom the surrender was to have been made disagreed to it, then the surrender is inoperative from the beginning.] But the actual entry of the surrenderee into the land is not necessary. And therefore if tenant for life or years surrender to him in reversion out of the land, and he agree to it, he hath the land in him presently. And yet he may not bring any action of trespass against any man* for any trespass done upon the land, until he have made his entry.

render is made; and what agreement is necessary.

*P. 308.

Perk. Sect. 588, 589.

But here note, that in the cases before, where things may not pass by way of surrender, either because of an intervenient estate, or the like, if there be sufficient words in the deed, it may avail to other purposes, and [the deed] may enure and pass the thing by way of grant, [release, &c. for *cum quod ago non valet ut ago, veleat quantum valere potest*;] but then if it be an estate for life that is intended to be surrendered, there must be livery of seisin made upon the deed. [Lord *Kenyon*, at the assises, ruled that an instrument from a father to a son, importing to be a surrender, but which could not operate in that mode on account of an intervening estate in trustees for supporting contingent remainders, operated as a covenant to stand seised, and whether there must be livery or not depends on the quantity and quality of the estate to be surrendered. Lands held in possession for an estate of freehold may not pass by any assurance at common law, unless livery of seisin be made.] And therefore if there be lessee for years, the remainder for life or years, the remainder in fee; and the lessee for years in possession doth surrender and grant all his estate to him in remainder in fee; howsoever this deed cannot enure as a surrender, yet it shall enure as a good grant of the estate of the lessee for years unto him in remainder in fee; [and if the estates are immediate to each other, one will merge in the other. *Wiscot's case*, 2 *Rep.* 60; 1 *Prest. Convey.* 286.]

Perk. Sect. 610, 611.

A surrender in general shall be taken most strongly against the surrenderor, and most bene-

6. How a surrender shall be construed and taken.

ficially for the surrenderee. And therefore if I hold of the lease of *A.* one acre for life, and another acre for years, and I surrender to *A.* all my lands, or all my lands I hold of his lease; by this surrender both the acres are surrendered. But if the surrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the lease of *A. contra*; [for in the former instance the words are general and unqualified, and *verba generaliter dicta, generaliter interpretanda.* In the other instance the words are special, and expressly restrain the operation of the deed to lands of a particular description.] And if I hold one acre for life of the lease of the father of *I. S.* and I hold another acre for life or years of the lease of *I. S.* himself, and I surrender to *I. S.* all the land I hold of his lease; by this [surrender] the land that I had by the lease of his father doth not pass. A surrender to one joint-tenant shall be construed to enure to them all. But if tenant for life or years grant his estate to one of the joint-tenants in reversion, it seems this shall not enure as a surrender to them all, but as a grant to him alone. [So also a release to one of several joint-tenants, by way of extinguishment, enures to the benefit of all. It is otherwise when it operates by way of conveyance.]

Perk. Sect. 615. Bro. Sur. 54. Co. super Lit. 192.

If the lessor make and the lessee take a new lease upon condition, this surrender in law is absolute; and albeit the condition be broken, yet the first lease is gone. [So if a particular estate merge in an estate on condition, and the condition defeats the second estate, the first estate will not be revived. 3 *Lev.* 6; *Comyns's Dig. Surrender* (L.)] But if the lessee surrender or grant his estate to the lessor upon condition; this condition if it be broken may revest the estate.

Co. super Lit. 218.

See more in the next question, and in *Exposition of Deeds.*

7. Where a feoffment, lease, grant, or other act, made or done by the tenant for life or years, shall be a surrender or not; and how it shall enure or be construed and taken.

If any kind of tenant for life of land enfeoff him in remainder or reversion of the land, or grant his estate to him in remainder or reversion, [who has the first or immediate estate in remainder or reversion;] this shall enure as a surrender, [and must be pleaded accordingly.] And if lessee for years, before his term do begin, make a feoffment to him in reversion or remainder, or grant his estate to him; this shall enure as a surrender, [or rather, by way of

Bro. Sur. 3. 5. Perk. Sect. 618. 620. 623. Co. super Lit. 42. Bro. Sur. 49.

release, which is the proper mode of assurance.] And if lessee for life grant his estate to him in reversion, the remainder in fee to another; this shall enure as a surrender, and this remainder is void. [*Query*; and see 1 *East's Rep.* 502. The ground of the case in the text, if law, is, that all the estate is granted to the reversioner or remainder-man, so that there cannot be any remainder; but if the lands had been granted to the reversioner for his own life, remainder to a stranger, the reversioner would have had an estate for his own life, if the lessee for life should so long live, and the intermediate estate to the stranger would have prevented the merger.] But if such a tenant for life make a lease to him in remainder or reversion, for the term of the life of him in remainder or reversion; this shall not enure as a surrender *because it doth not give the whole estate, but it shall enure by way of grant. [In the former example, no interest remained to be disposed of after a grant of all the estate. In the latter instance, a particular interest only was carved out of the estate, and the remaining interest might be well disposed of. As the person having the reversion expectant on the remainder, dependant on the estate of the tenant for life, did not take by the grant of the tenant for life all the time included in his estate, so as to create an immediate privity between the two estates, but on the contrary there was left in the tenant for life, and afterwards disposed of by him to the person taking in remainder, that time which intervened between the end of the term granted to the reversioner, and the time of the commencement of his reversion, the two estates were kept distinct. The privity remained between the remainder-man and the reversioner, and for that reason the grant to the reversioner could not operate as a surrender.] So if lessee for life make a lease to him in remainder in tail for term of the life of him in remainder, this shall not enure as a surrender but as a grant, and shall end with the life of the grantee. If lessee for forty years make a lease for thirty-seven years on condition, and after grant his estate to him in reversion, and the second lessee attorn; this shall enure as a surrender; [for the two estates are immediate, and the estate of the under-lessee will be discharged from the condition.] If there be tenant for life, the remainder in tail to a stranger, and the remainder in

1. *When it is made to him in reversion or remainder.*

*P. 309.

Pasch. 7 Jac. B. R.

Perk. Sect. 621.

tail to another stranger, the remainder in fee to the tenant for life, and the tenant for life doth make a feoffment to the first tenant in tail; this shall enure as a surrender of the estate for life, and as a grant of the reversion in fee also. If tenant for life, being a woman, take a husband, and then her husband and she by deed indented make a lease to him in reversion for the life of the husband; this shall not enure as a surrender, but as a grant; [for there is a mesne estate, namely, the reversion for the life of the wife.] If there be tenant for his own life, the remainder to *I. S.* for his life, and the first tenant for life surrender to him in remainder for the life of him in remainder; it seems this shall enure as a surrender, [it is apprehended there is a mesne estate, and consequently no surrender is effected,] and is no forfeiture, [a surrender never induces a forfeiture:] but if he grant it to him for the life of a stranger, and make livery of seisin, this is a forfeiture, [because he disseises the persons in remainder. 3 *Prest. Abstr.* 51.] If lessee for life, the reversion being in joint-tenants, grant the land to one or all of the joint-tenants for twenty years; this shall not enure as a surrender, but as a grant; for there remains an interest in the lessee still as a mesne estate. If lessee for years make him in reversion or remainder his executor; this shall not enure as a surrender, albeit it do give him the whole estate; [for he has the reversion and term in several rights; but if an executor, who has already a term in right of his testator, purchase the reversion, the term will merge. *Platt* v. *Sleep, Cro. Jac.* 276; 3 *Prest. Convey.* 277.] If lands be given to the husband and wife, the remainder to *I. S.* and the husband discontinue in fee, and take back an estate in him and his wife, the remainder to *W. N.* and die, and the wife claim in by the second estate, and surrender to *W. N.*; this shall not enure [simply] as a surrender, but [inclusively] as a grant. If lessee for life or years grant his estate to him in remainder or reversion and a stranger; this shall enure as a surrender of the one half to him in reversion, and as a grant of the other moiety to the stranger. And yet it is said, that if lessee for life of land grant his estate to him in the reversion and two others, that hereby they have a joint estate, and the survivor shall have the whole; [the contrary appears to be determined in

Co. super Lit. 42.

Bro. Surrender, 17.

Forfeiture.

Perk. Sect. 615.

Bro. Surrender, 52.

Bro. Surrender, 36.

2. *When it is done or made to him and a stranger.*

Bro. Surrender, 11. Co. 2. 61. 3. 61.

Perk. Sect. 619.

Wiscot's case, 2 *Co.* 60; and it seems to be a general principle of the law, that an estate of freehold in possession cannot be held in jointure with an estate of freehold in reversion, unless both estates be granted *uno flatu*. 3 *Prest. Convey.* 374.] If lessee for life make a lease for his own life to the lessor, the remainder to the lessor and a stranger in fee; this shall enure as a surrender of the one moiety, and [by reason of the livery,] a forfeiture of the other moiety. If tenant for life surrender to the husband of a woman tenant in tail or in fee, this shall enure as a grant, and not as a surrender. [*Perkins* puts his case of a grant and not of a surrender; and undoubtedly a grant to the husband would give him a continuing estate.] And so also it seems is the law, when the surrender is to the husband and wife; [this must be understood of a grant, and not of a surrender. *Query*, if a case so circumstanced ought not to depend on the apparent intent of the parties. If the assurance purport to be a grant to the husband and wife for a term, with a view to transferring the interest to them, in that case it may very properly be decided that the husband and wife have the estate in them distinctly. On the contrary, if it appear to have been the intention of the parties that the assurance should operate as a surrender, in that case it might be effectual in that mode, though made to the husband jointly with his wife.] And if *B.* be tenant for life, the remainder to *C.* in tail, the remainder to *D.* in tail, and *B.* enfeoff *C.* and *S.* his wife in fee; this [feoffment operates by divesting, and] shall not enure as a surrender, but it is a forfeiture: so that if *C.* die without issue, **D.* may enter. If there be lessee for life, the reversion to two coparceners, and one of them take a husband, and the lessee doth grant his estate to her and her husband; this shall not enure as a surrender, but as a grant. [See p. 309.] And yet if tenant for life do grant his estate to the husband and wife, she having the reversion; if she be an infant and within age at this time, it seems this shall enure as a surrender, not as a grant. [*Query*, for the cases are to the contrary.] If tenant for life or years, and he in reversion or remainder, by word without deed join in a feoffment; it shall be said the sur-

Co. super Lit. 336.

Perk. Sect. 622. Bro. Surren. 20. 34. 23.

Forfeiture.

Bro. Sur. 46.

Perk. Sect. 623. 21 H. 7. 40.

*P. 310.

Bro. Sur. 34.

Plow. 140. Dyer, 358.

3. *When it is done with him in reversion or remainder.*

render of the estate for life or years to him in the reversion, and the feoffment of him in reversion; [but if there had been a deed the assurance would have operated as the feoffment of the tenant for life, and the grant of him in reversion. *Treport's case*, 6 *Co.* 14.] But if he in reversion enfeoff the tenant for life without any deed, this [transaction] shall enure first as a surrender of the lease for life, and then as a feoffment. See more in *Deed* (11).

8. Where a deed or rent may be surrendered; how such a surrender shall enure or be taken.

If I have a rent in fee, for life, or years, issuing out of another man's manor, or other lands, I may surrender [or rather release] it; for if I deliver the deed of the grant of the rent to be cancelled unto any one that hath any estate of the manor or land in fee simple, for life, or years, in possession or remainder, either solely by himself, or jointly with others, this is a good surrender, [or rather release,] and hereby the rent is extinct and gone. But one that is tenant in tail of a rent cannot [as against his issue] surrender it, neither will the delivering up of the deed in this case determine the rent. A rent will be extinguished by cancelling the deed, and it matters not to whom the delivery of the deed is made. A rent cannot commence by grant without a deed, so no use can be made of it in pleading without a profert. Therefore, by the destruction of the deed, the right to the rent is of consequence departed with; all that is meant by this observation is, that a rent cannot properly be surrendered. It may be released. Thus stood the common law. But mere cancellation will not now, since the statute of Frauds and Perjuries, 29 Car. 2, c. 3, amount to a surrender. There must be some writing at least to evidence the surrender.] And if one be seised of land, out of which a rent is issuing in fee, and is disseised, and during the disseisin the grantee of the rent surrender his rent, and give up his deed; it seems this doth not extinguish the rent; yet hath the grantee no remedy for his rent when he hath delivered up his deed. And yet if one be seised of land in fee out of which a rent is issuing in fee, and he die without heir, so that the land escheat, and before the lord enter upon his escheat, he that hath the rent doth surrender the deed of the rent to the lord; it seems this is a good surrender to extinguish

14 H. 7. 2. Perk. Sect. 591. 595. 606. 599. 596. 598.

Perk. Sect. 594.

Perk. Sect. 596.

(11) And further, to whom a surrender may be made, in *Com. Dig. Surrender* (F.); *Vin. Abr. Surrender* (B.)

Perk. Sect. 597. the rent. And if the grantee of a rent-charge in fee grant the same to him in fee that is seised of the land in fee; this shall enure to extinguish the rent; but if he grant it to one that hath only an estate for life, *contra*; [for there the rent is suspended only. See *Com. Dig. Suspension.* An use cannot be declared to arise out of an estate which is surrendered, (*Waker* v. *Snow, Palm.* 359; 1 *Prest. Convey.* 195,) but if the tenant for life join with an intention to enable the reversioner to suffer a common recovery, and for that purpose only, the courts will raise an use out of the estate taken under the recovery; or rather the use will result to the former owner for life. But if there be an actual and formal surrender could any use arise?

And now by this time it is high time we come to *Confirmations* and *Releases*, which serve to enlarge and amend the estate and interest that a man hath in a thing already.

CHAP. XVIII.

Of a Confirmation.

Terms of the Law. Co. super Lit. 295.

A CONFIRMATION is the conveyance of an estate or [the communication of a] right, that one hath in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged (1). And this, albeit it may be made by other words, as by *dedi* or *concessi*, which are general words, and serve to make a grant, feoffment, lease, release, &c. yet it is most commonly and properly made by these words, *confirmasse, ratificasse et approbasse*, which do signify *ratum et firmum facere, et supplere omnem defectum.* And he that makes the confirmation is sometimes called the confirmor, and he to whom it is made the confirmee.

1. Confirmation. Quid.

Confirmor.

Confirmee.

(1) Confirmation is the approbation or assent to an estate already created, which, as far as in the confirmer's power, makes it good and valid; so that the confirmation doth not *regularly create an estate*, but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words as are foreign to the business of confirmation, and by their own force and power tend to create the estate. *Gilb. Ten.* 75. Confirmation is of a nature nearly allied to a release, 2 *Bl. Com.* 325.

2. *Quotuplex.*

There are two kinds of confirmations, *viz.* a confirmation implied or in law; which is, when the law by construction makes a confirmation of a deed made to another purpose: and a confirmation express or in deed; which is, when the act done, or deed made, is intended for a confirmation. And both these are always in writing, [and must be by deed.] The latter is properly called a deed or instrument of confirmation, and is made after this manner: *Noveritis universi, &c. me* A. *de* B. *ratificasse, approbasse et confirmasse* C. *de* D. *statum et possessionem quos habeo de et in uno mesuagio, &c. cum pertinen.* in F. *&c.* A confirmation is also distinguished by its effects: for sometimes it doth tend and serve to confirm and make good a wrongful and defeasible estate, [by adding the right to the possession or defeasible seisin;] or to make a conditional estate absolute, [by discharging the condition;] and then it is said to be *confirmatio perficiens.* And sometimes it doth tend and serve to increase and enlarge a rightful estate, and so to pass an interest, [*viz.* an estate;] and then it is called *confirmatio crescens.* And sometimes it doth tend and serve to diminish and abridge the services, whereby the tenant doth hold; and then it is called *confirmatio diminuens,* [operating as a release of part of the services.]

Co. super Lit. 295. Plow. 140. Lit. Sect. 515. Co. 9. 142.

3. *The nature and operation of it in general.*

The nature and work of this, where it doth find a foundation to work upon, is [are] either to increase and enlarge the estate of him to whom it is made from a lesser to a greater, and to give him some new interest he had not before; or to corroborate and perfect the estate that was [in point of title] imperfect before; or to change the quality of it, from an estate upon condition, to an absolute estate, or otherwise; for this a confirmation will do. In some cases also it will extinguish rights and titles of entry, [by making absolute, in point of title, that estate which was previously defeasible.] But it will not make an estate good that is merely void; [for an estate which is actually void does not admit of confirmation;] nor add to nor take from an estate a descendible quality; nor make a man capable of it, that is incapable of himself; * or *è contra.* [If there be a determinable fee, or a fee on condition, which descended *ex parte maternâ,* the release of the condition, or of

Co. 146, 147. Dyer, 109. 7 H. 6, 7. Lit. Sect. 519. Co. 9. 142.

*P. 312.

the possibility of reverter, will not change the course of descent, for there is not any change in the quantity of the estate. See *Vincent* v. *White*, 15 *East*, 174; 1 *Prest. Estates*, 466. But if a confirmation operate in enlargement of an estate, as of an estate for life descendible to the heirs *ex parte maternâ*, then the estate thus enlarged by confirmation, would be altered in quantity, and have a new and different descendible quality.] In some cases also it will lessen and diminish rents or services; but it cannot, neither will [it,] change the nature of the service into some other kind of service, nor increase it into a greater service. [Such new service, or greater service, must proceed from the owner or tenant, as the grantor.]

4. Where the confirmation of some persons is needful to perfect the grant of others; or not; and how it may be done.

If a bishop, dean, archdeacon, prebendary, or the like, make any lease of the land they have in the right of their bishopric, deanery, archdeaconry, or prebend, not warranted by the statute of 32 H. 8, and within the other statutes; it seems this lease must be confirmed by the dean and chapter by their common seal; and if there be two chapters, it must be confirmed by them both, or otherwise it is not good. But if the lease be such a lease as is warranted by the statutes, the bishop may make it without the confirmation of the king, the patron and founder of bishoprics, or the dean and chapter, and so also it seems of the rest; [because they are empowered under the act of 32 Hen. 8, c. 28, under certain restrictions.] And a corporation aggregate, as dean and chapter, master and fellows, and the like, may grant without any confirmation of the founder, and this grant will be good (2), [except so far as they may be restrained by trusts in the charter of foundation.] If a bishop, &c. grant an ancient office belonging to his bishopric, albeit it be but for the life of the grantee, yet it must be confirmed by the dean and chapter, other-

Co. super Lit. 300, 301. Co. 10. 62. 5. 3. Dyer, 145. 273. 349. 338, 339. 61.

Co. 10. 62.

(2) To the grants of a *sole corporation*, as parson, prebendary, vicar, and the like, the patron must give his consent, because such *sole corporation* has not the absolute fee; but a *corporation aggregate*, as dean and chapter, master, fellows, and scholars of a college, &c. or any *sole corporation that has the absolute fee*, as a bishop, with consent of the dean and chapter, may by the common law make any grant of their possessions, without their founder or patron. *Co. Lit.* 300, b. See further in what cases the confirmation of the patron and ordinary is necessary, and as to confirmation by dean and chapter of the grant of the bishop, in *Vin. Abr. Confirmation* (G.) (H.); *Bac. Abr. Leases* (G).

wise it is not good [against the successor. If a parson or vicar had made any lease for longer time than his own life, it must have been confirmed by the patron and ordinary. But at this day, albeit it be confirmed by the patron and ordinary, yet the lease is good for no longer [time] than during the parson's ordinary residence, except it be impropriated; [and except in some particular cases, as absence on another living, being a chaplain to an earl, &c. absence on account of ill health. *Sed query*, whether these, or some of them, are not only excuses against non-residence.] Dyer, 52. Stat. 13 El. ch. 20.

If tenant for life grant a rent-charge to *I. S.* and his heirs; in this case he in reversion must confirm it; otherwise the grant of the rent will be good for no longer [time] than [for] the life of the tenant for life, [under the rule *cessante statu primitivo, cessat et derivativus.*] Co. 1. 147.

[King.] Where a man hath an interest in any lands, tenements, rents, commons, felons goods, or the like, by any grant of any of the kings of the realm, he need not have the confirmation of every or of any succeeding king. [See the restraining statute of 1 Ann, stat. 1. c. 7.] Also it seems grants of fairs, markets, warrens, and the like, made by one king, will be good in law against his successors without any confirmation. But all such as have any judicial or ministerial offices, commissions and authorities, derived from the king, must have the confirmation of every succeeding king, otherwise they may lose them. [The law is, in this respect, materially altered by 57 Geo. 3, c. 45.] Co. 8. 167. Dyer, 277. Dyer, 327. Lit. Rep. 203. Kelw. 145. 182.

5. What confirmations may be made; and what shall be said a good, express or implied confirmation, or not; and by what words it may be made.

1. To confirm or alter the quality of the estate of him to whom it is made.

In every good confirmation tending to confirm an estate, or alter the quality of it, these things must concur: 1. There must be a good confirmor and a good confirmee, and a thing to be confirmed, as in other grants; and the deed must be well sealed, &c. 2. There must be a precedent rightful or wrongful estate in him to whom the confirmation is made, in his own or in another's right; or at least he must have the possession of the thing whereof the confirmation is to be made, that may be as a foundation for the confirmation to work upon. As if feoffee on condition make a feoffment over, and the feoffor confirm his estate to him to whom the second * feoffment is made and his heirs; this is a good confirmation to make his estate absolute. Co. 1. 146. 9. 142. 7 H. 6, 7. Lit. Sect. 516.

*P. 313.

And if lessee for life make a feoffment in fee, [thus passing a fee under a new and defeasible seisin and title,] or lease for years, and the first lessor confirm this second estate, it seems this is a good confirmation; [and if a reversioner, &c. confirm a second lease in the first instance, and afterwards the first lease, the second lessee will, as against the reversioner, have the better title. 1 *Inst.* 296 a.] And if one disseise me of land, I may after confirm the estate of the disseisor, or of his heir if he be dead, or of his feoffee if he have aliened it; and this [confirmation] will make his estate good for ever: and if the disseisor make a lease for life, or years of it, I may confirm the estate of the lessee, and this [confirmation] will make it good for the time, [and will leave the right to the remainder in fee open. In this respect a confirmation differs from a release; for a release to the tenant for life would extinguish the right, and enure to the benefit of the reversioner. *Infra, chap. Release.*] And if one make a lease for life absolute; or a feoffment in fee, or lease for life on condition, or be disseised of land, and the lessee for life, feoffee or disseisor, doth grant a rent out of the land in fee, and the lessor, feoffor, or disseisee, doth confirm the estate of the grantee; this doth make good the grant for ever. [How can a tenant for life make a grant in fee of a rent? shall it be said, that as against him and against all persons except the reversioner, the rent is a rent in fee, though without confirmation it would necessarily determine on the death of the tenant for life? Is it not more consistent in this case with principle, to consider the grantee as having an estate for life in the rent, and the confirmation as an enlargement of that estate.] And so also if the heir of a disseisor that is in by descent grant a rent-charge, and the disseisee confirmeth it; this is a good confirmation. And if an infant make a lease for twenty years, and the lessee doth make a lease to another for all or part of the time, and the infant at his full age doth confirm this second lease, this is a good confirmation and doth perfect the lease; for it is a rule, that which I may defeat by my entry, I may confirm by my deed. But if there be no precedent estate on which the confirmation may work, or the estate be such an estate as is merely void, then is the confirmation

Co. 9. 142. 6. 15. Perk. Sect. 86. Lit. 518. 521. 11 H. 7. 29. 28.

Co. 1. 144. Lit. Sect. 527. 529. 11 H. 7. 28. Co. super Lit. 300. Lit. Sect. 547. 11 H. 7. 28.

Infant.

Co. super Lit. 295. 301. Dyer, 263.

void, and cannot take effect as a confirmation; as for example, if a man assign dower to a woman that hath nothing to do with it; or a court that hath not power doth make leases by commission, or an estate that was upon condition is avoided by entry, or a lessee surrender, or a disseisee enter upon a disseisor, and afterwards he that hath the rightful estate confirm their estates so defeated and gone; these confirmations are void: *Debile fundamentum fallit opus.* And a confimation to him that hath nothing [*viz.* hath not any estate] in the land is void. And hence it is, that if one confirm all his estate that he hath granted to another, when in truth he hath granted none at all, this [confirmation] is void. And so also it is, if there be an estate and no possession; as if a disseisor make a lease for years to begin at Michaelmas, and before the day the disseisee doth confirm the estate of the lessee for years; it is said this is not a good confirmation, *sed query.* [If there be an *interesse termini* there is an interest only and not an estate.] 4 H. 7. 10a.

3. The confirmor must have such an estate and property in the thing whereof the confirmation is made, as [*viz.* that] he may be thereby enabled to confirm the estate to the confirmee; as the lessors, feoffors, and disseisees in the cases before have; otherwise the confirmation is void, [*i. e.* will be void for want of title to confirm;] and therefore if the heir [apparent or presumptive] of the disseisee, during the life of the disseisee, confirm to the disseisor, this is no good confirmation to perfect his estate, albeit the disseisee die, and the right of the land descend to his heir afterwards; [for the heir has not any estate or interest; he has merely a hope or chance of succession: He cannot grant, or confirm, or devise, and his sale creates, as it is said, an equity personal merely against himself. *Tanner* v. *Morse*, 3 *Term Rep.* 365. But as to freehold lands, (*Helps* v. *Hereford*, 2 *Barn. & Ald.* 244; 1 *Anstr.* 11,) but not as to copyhold lands, the heir might bind himself by estoppel. So if land be given to *A.* and *B.* his wife, and the heirs of their bodies issuing, the remainder in fee to *A.* and *A.* levy a *fine with proclamations and die, and she within five years doth enter and claim, and after the conusee doth confirm the estate made by the first gift to the wife, to have and to hold Dyer, 109. 9 H. 6. 62. Co. 9. 138. *P. 314.

according to the same; this confirmation is to no purpose. [This was *Beaumont's case*, 9 *Rep.* 138. The same case was agitated afterwards under the name of *Baker* v. *Willis*, *Cro. Car.* 476; and the court seems to have been of opinion that the confirmation operated to give to the wife an estate tail descendible as her old estate tail. In this instance the original estate tail was bound by the operation of the statutes of proclamations of fines.] So if lessee for life make a lease for thirty years, and after he in reversion and the lessee for life lease for sixty years; in this case he cannot [as against the lessor for sixty years] confirm the lease for thirty years, because he hath granted it before for sixty years; [but his confirmation would, it is apprehended, operate as against himself and his heirs in the event of a forfeiture of the term of sixty years, or its being defeated by a condition or surrendered, &c.] And hence it is also, that the confirmation by one joint-tenant of the estate of his companion worketh nothing; for their estates [and which is still more important their titles] are equal, and each hath equal interest in the whole land; [*sed query*, because a disseisor may have regranted to a disseisee and another jointly, but in that case the acceptance by the disseisee of the estate so granted may be an estoppel to him against his right to defeat the estate of the other joint-tenant.] And yet if one joint-tenant confirm the whole land to his companion, to have and to hold the land to him and his heirs; this shall amount to a grant, [or rather a release, for joint-tenants cannot grant to each other, *infra*, *ch. Release*,] and so will be good to pass [or rather exclude him from] his moiety. And hence it is also, that if a man grant a rent-charge out of his land to another for life, and then confirm his estate without any clause of distress (for by a clause of distress a grant of a new rent may be made,) to have and to hold to him in fee simple, or fee tail; this is void, for the confirmor hath no reversion of the rent in him; [but *query*, if the confirmation will not of itself at this day amount to a new grant.] 4. The precedent estate must continue until the confirmation come; as in all the cases of voidable estates the confirmation must be before the estates be made void by entry, &c. or otherwise the confirmation will be void; [since a grant originally void, or an

Co. super Lit. 296.

Fitz. Confirmation, 15.

Joint-tenants.

Lit. Sect. 523. Dyer, 263.

Lit. Sect. 543. Co. super Lit. 300.

estate which is determined or avoided, cannot be confirmed.] And therefore if lessee for life or years surrender, or the disseisee enter upon the disseisor, and after the lessor or the disseisee confirm the estate of the lessee or disseisor; this confirmation comes too late. 5. The estate precedent, and that which is to be confirmed, must be lawful and not prohibited by any act of parliament. And therefore if a spiritual person, as prebend, or the like, make a lease not warranted by the statutes; the confirmation of the dean and chapter will not help nor amend it. And if tenant in tail make a voidable lease, and after confirm it himself, this is voidable still; [unless he levy a fine with proclamations, or suffer a recovery, so as to bind those who may claim in opposition to the lessee, &c.] 6. There must be apt words of confirmation in the deed or instrument. And herein note, that albeit the words *confirmavi*, *ratificavi*, *et approbavi*, be the most significant and proper words to make this [assurance, either as a] conveyance [of an estate, or confirmation of a title,] yet such as are made by other general words may make [*read*, be] a good confirmation. And therefore it is agreed, that a deed made by the words *dedi*, *concessi* or *demisi*, may make a good confirmation. And therefore that if the disseisee, coparcener, or lessor, make a deed of the land by the word *dedi* or *concessi* to the disseisor, other coparcener, or lessee for life, and deliver the deed; this is a good confirmation without livery of seisin (3); [in the case of a coparcener at least, the deed operates, and must be pleaded, as

Co. 5. 15. Lit. Sect. 607.

Lit. Sect. 531, 532. 10 E. 4. 3. Co. super Lit. 295. Dyer, 116. Co. 1. 147. 5. 15.

Livery of seisin.

(3) The words *dedi et concessi* are as strong as the word *confirmavi*, for they amount to a grant of the right of the person in possession; and if he has my right I can never after impeach his estate. *Gilb. Ten.* 79. See further what words shall enure as a confirmation, in *Vin. Abr. Confirmation* (X.) *Madox*, in p. 19 of the *Dissert.* prefixed to the *Formul. Angl.* says, that most ancient confirmations made after the conquest, often run, like feoffments, with the words *dedi* or *concessi*, and *confirmavi*; and are distinguishable from the feoffments, chiefly by some words importing a former feoffment or grant; as where they run, *dedi*, or *concessi et confirmavi*, such lands *sicut charta facta* to such a one (either the confirmatory or his ancestor) *testatur*, or the like. In ancient time, when feoffees were frequently disseised of their lands upon some suggestion or other, charters of confirmation, seem to have been in great request. For, in the early times after the conquest, we meet with so many confirmations successively made to the same persons, or their heirs or successors, of the same lands and possessions, that it looks as if men did not then think themselves secure in their possessions against the king, or other great lords, who were their feoffors, or in whose fees their lands lay, unless they had repeated confirmations from the king, or his heirs or successors, or the other great lords or their heirs. And these confirmations, very anciently, seem to have been sometimes made, either by precept or writ from the king or other lords, to put the feoffees, or their heirs or successors, into seisin, after they had been disseised, or to keep them in their seisin undisturbed, or else by charter of express confirmation.

a release.] Also if a feoffment be made to *A.* to the use of *B.* and his heirs upon condition, and before the condition broken, the feoffor and *B.* do join in the grant of a rent-charge, and after the condition is broken; in this case the law doth interpret this a good grant from *B.* and a good confirmation of the * feoffor, without any words of confirmation. So if *P. 315. tenant for life do grant a rent to him in reversion, and he by deed doth grant it to another and his heirs in fee; in this case, the law doth construe this a good grant and a confirmation also. And in these cases of confirmations of estates, [*read*, a confirmation of estate,] if it be by the disseisee to the disseisor, it is good without any words of heirs; as if the disseisee confirm the estate of the disseisor, or confirm the land unto him, and say not to him and his heirs; this is an effectual confirmation to him and his heirs for ever; [for words of limitation are not necessary when a right only is to be extinguished by confirmation.] And if a lessee for life or a disseisor make a lease for life, or years, &c. and he in the reversion or the disseisee confirm their estates, and not the land, and without any *habendum* or limitation of estate; this is good for so long as the estates do continue; [that is, it makes the estate during the period originally prescribed for its continuance, indefeasible. To enlarge a particular estate by confirmation, there must be words of limitation.] But it is most safe always, [and in these cases of confirmation of particular estates necessary,] to express the estate, *i. e.* to say, to have and to hold the land to him and his heirs, or for life, &c. as the agreement is. If lessee for life grant a rent to one and his heirs out of the land, and the lessor doth confirm the estate, or the rent-charge, this doth make the estate of the rent sure [in fee.] And so also if he do confirm the rent, and say, to have and to hold to him and his heirs; this is a good confirmation. But if he confirm the rent, to have and to hold to him in fee, without naming his heirs, hereby his estate is not made better (4). [See *infra*, 320, and *query* this point;

Lit. Sect. 519. Co. super Lit. 296.

Co. 1. 147.

(4) See accordingly *verbatim* in 1 *Wood*, 720. If the student compares this chapter on confirmation, or any other in this book, with the chapter on the same doctrine, in 1 *Wood*, he will easily discern how much the author of that book stands indebted to the *Touchstone*. It is to be lamented, that in copying the *Touchstone* he has very frequently transposed the parts of it, and thereby greatly diminished the order of its beautiful analytic arrangement.

for if the grantee had a fee in the rent originally, it would seem that a confirmation of the rent is a confirmation of the estate in the rent, unless the operation of the instrument be restrained by words of limitation. The doctrine of the text proves that there is at first only an estate for life by the grant, and that when the fee passes, it is given by force of the confirmation, and by way of grant.]

2. To enlarge the estate of him to whom it is made.

If the lessor confirm the estate of his lessee for life with this clause, to hold without impeachment of waste; this is a good confirmation to change the quality of the estate so far as to make it dispunishable of waste; [in this respect the instrument operates as a grant of this privilege, and it is observable that this privilege may be annexed to an estate by the original grant, or by a confirmation, or by a separate and independent assurance.] So if the lord paramount confirm the estate of the mesne with clause of acquittal; [in this instance the instrument operates as a release of the rent, services, &c. which are acquitted.] And so if lessee for years, or for another's life, be without impeachment of waste, and the lessor confirm to him for his own life, and omit that clause; hereby this privilege is gone, and the estate is become punishable for the waste; [because the privilege is annexed to an estate which is merged by the accession of a larger estate under the confirmation. 3 *Prest. Convey.* 166. 273.]

Co. 9. 139. F. N. B. 136. Co. 8. 76. Dyer, 10.

This kind of confirmation *crescens* must have all the qualities of the former; and there must be also in this case a privity between the confirmor and the confirmee. And then it may enlarge the estate of him to whom it is made, as from an estate at will to an estate for years, or to a greater estate; from an estate for years, to an estate for life, or to a greater estate; from an estate for life, to an estate in tail, or in fee; and from an estate tail, to an estate in fee; and these confirmations are good; [but, in the instance of an estate tail, there is rather the addition of a new and distinct estate than the enlargement of an estate tail; for the estate tail will not merge, while, in all the other instances, the particular estate will merge in, or be absorbed by, the estate taken under the confirmation.] But in all these kinds of confirmations, care must be had of the manner of penning them;

Co. 9. 142. super Lit. 305. Dyer, 145. 296. Co. 6. 15. Lit. Sect. 533. 532. 523. Dyer, 263.

and that in every such deed there be a limitation of the estate; *i. e.* that these words be inserted, to have and to hold the tenements, &c. to him and his heirs; or to him and the heirs of his body; or to him for term of life, or years; as the agreement is; for if lessee for life make a lease for years, and then lessee for life and he in reversion confirm the land, to have and to hold to him for life, or to him and his heirs; these words will make the estate to increase. But * if the confirmation be made to the lessee for life or for years of his term or estate, and not of the land, as when he doth confirm his estate, to have and to hold his estate to him and his heirs; this doth not increase the estate; [*query* at this day.] And yet if he confirm the land, to have and to hold the land to him and his heirs; this will increase the estate, *et sic de similibus*. [An estate for life may pass by confirmation without words of limitation.]

Lit. Sect. 524. 545. Plow. 549. *P. 316.

Co. super Lit. 299. Plow. 160. Lit. Sect. 525. Fits. Confirmation, 7. 17.

If the husband have an estate of land for life, or years, in the right of his wife; or to them both for life, and a confirmation [is made] to him alone of his estate, or of the land, to have and to hold the land to him and his heirs; this is a good conveyance of the fee simple to him after the death of his wife; [but there will not be any merger of the estate of freehold. An estate for years would merge. 3 *Prest. Convey.* 166.] And if I let land to a woman sole for the term of her life, who taketh a husband, and after I do confirm the estate of the husband and wife, to have and to hold for term of their two lives; this is good, but it shall enure only to enlarge his estate for term of his life if he survive his wife, [and not to merge the estate of the wife, and give a new estate to her and her husband by intireties.] But if one lease to another for life, and after confirm the estate of the lessee to him and his wife for term of their two lives; this is void as to his wife, [because the confirmation is confined to his estate; or because there is not any privity between the wife and the confirmor.]

Lit. Sect. 548, 549.

If one grant a rent-charge out of his land for life [by express words, or by the omission of words of inheritance,] and after the grantor confirm the estate of the grantee in the rent without any clause of distress, to have and to hold to him in fee simple, or fee tail; this confirmation is not effectual

to enlarge the estate. [*Query*, and see p. 315. 320] But if a man be seised of an old rent-charge or rent-service, and grant the same first for life, and after confirm the estate of the grantee in fee simple or fee tail; this is good, and will enlarge the estate accordingly; [in one instance there is a reversion of the rent, in the other instance there is not any reversion.]

If tenant for life grant a rent out of the land, to one and his heirs during the life of the lessee for life, and after the lessor confirm the rent to the grantee and his heirs; it seems the estate is not hereby enlarged, but when the tenant for life doth die the rent shall cease; [because the grantor had not any pretence to claim the rent as a fee in him, since it was expressly confined to the period of the life of the tenant for life. But *query*, if the intended confirmation would not operate as the grant of a new rent.] Co. 1. 147.

This kind of confirmation may be made by the same words as the former, *viz.* by the words, give, grant, or demise. But neither of these may be made by the words surrender, release, exchange, or the like: for these are peculiar words destined to a special end, being proper and peculiar manner of conveyances. [This distinction seems to be overruled; Lord *Kenyon*, as is stated in the chapter on *Surrenders*, held an instrument, purporting to be a surrender, to operate as a covenant to stand seised.] And yet if I that am a lessor do say to my lessee for years by my deed, I will that you shall hold the land for your life; this is a good confirmation to increase the estate by this word *volo* only. So if I grant to my lessee for years, that he shall hold the land for term of his life, this, without any other words, is a good confirmation. Co. super Lit. 301 b. Fitz. Confirmation, 93.

3. *To diminish or abridge the services, &c.*

By a confirmation the lord may confirm the estate of his tenant which holdeth by knight's service to hold in socage; or to hold for a less rent; [*query*, if the ground be not, that all the services incident to a tenure in socage, are included in the tenure by knight's service;] or to hold at common law, where before he did hold in ancient demesne; and such a confirmation is good. But such a * confirmation [of a fee,] as is to hold by new services, as a rose for money, or the like, is not good for that purpose. And in this case there must be also a Co. 9. 142. Lit. Sect. 538.

*P. 317.

privity. And therefore if there be lord, mesne, and tenant, and the lord confirm the estate of the tenant to hold by less services; this is void [as against the mesne; but *query*, if it would not operate, when the mesnalty shall be extinct, by escheat, release, &c.] And if the lord confirm to his tenant after he is disseised before his entry, to hold by less services, this is void. [This is probably a mistake. See the distinction between tenant and very tenant. *Kitch.* fol. 99.]

Co. 5. 82. 83. Lit. Sect. 5. 19. Co. super Lit. 297. Lit. Sect. 520.

[Chap. Defeasance.]

6. Where a confirmation may be good for part of the estate, or for part of the thing; or not.

A confirmation may be by apt words in case of a lease for years for part of the time, but in case of a freehold it cannot be so; [for, in point of law, a term is divisible into portions; but an estate of freehold is entire; or rather a term of years is considered as a contract for the possession, and admits of a modification by defeasance. 1 *Inst.* 236 b. This is not the case as to an estate of freehold.] And so also it may extend to part of the thing before in estate, [*i. e.* part of the land, &c. This is equally true in application to terms of years and to estates of freehold.] And therefore if a disseisor, tenant in tail, or husband of the land he hath in the right of his wife, or lessee for life, make a lease for years, and the disseisee, issue in tail, wife, or lessor make a confirmation of all the land for part of the time, or of part of the land for all the time; this confimation is good. But if any such person make a lease for life, gift in tail, &c. the disseisee, &c. cannot confirm part of the estate but he must confirm all [the entire estate.] And therefore if he confirm his estate for one hour, it is a confirmation of the whole estate. And so also if he confirm the land to the disseisor himself but [only for] one hour, one week, one year, or for his life, &c. this is a good confirmation of the estate for ever. And if it be a lease for years that is confirmed, care must be had to the manner of the confirmation; for if the confirmation be of the estate or the term for one hour, this is a good confirmation for the whole time: and therefore the confirmation must be had of the land, to have and to hold for part of the term, [*viz.* a given number of years;] and being so made, it may be good for that time only, and no longer. [So where a man granted all his term or estate, *habendum* from a future day, all the term passed, and the *habendum* was rejected as repugnant.

Jermyn v. *Orchard*, *Show. Parl. Cas.* 199. But where a lessee for three lives granted all his estate to hold for years, the *habendum* was construed to explain the grant, and to confine it to the particular term of years expressed in the *habendum*. *Plowden* v. *Cartwright*, 1 *Burr.* 282. From this case it is doubtful whether the distinction taken in the text would be adopted at this day; but in confirmations enlarging estates, a right annexed to the estate enlarged is extinguished.]

7. The force and virtue of it; and how it shall enure and be construed and taken.

If I make [a] feoffment on condition, and before the condition broken I confirm the estate of the feoffee absolutely; this will not extinguish the condition; [but *query*, if the confirmation may not be pleaded as a release, so as to operate in extinguishment of the condition.] And yet if the condition be broken first, so as my entry is lawful; in this case the confirmation will extinguish the condition, [or rather the right of entry under the condition.] And if the feoffee on condition make a feoffment over absolutely to another, and I confirm the estate of the second feoffee, whether it be before or after the condition broken; by this [confirmation] the condition is discharged. 11 H. 7. 29. Co. 1. 148. a. 142.

If the lord confirm the estate of his tenant in the tenements; or one that hath a rent, common, or profit out of land confirm to the terre-tenant his estate; in these cases, notwithstanding this confirmation, the seigniory, rent, common, &c. do continue, and this shall not enure to extinguish it. [To extinguish the rents, &c. there must be a release, &c. or there must, in substance, be an intention to release, so that the deed may be pleaded as a release.] Lit. Sect. 514. 536. 537.

If the disseisee and a stranger disseise the heir of the disseisor, [after a descent which tolled the entry,] and the disseisee confirm the estate of his companion; this shall not enure to extinguish the suspended right of the disseisee, but when the heir of the disseisor shall re-enter it, [the right] shall be revived; [because the heir cannot take advantage of the confirmation, since he does not claim under the confirmee, but under a title paramount to the estate which was confirmed.] And if the grantee of a rent-charge and a stranger disseise the tenant of the land, and the grantee confirm the estate of his companion; * this shall not enure as to the rent Co. super Lit. 298.

*P. 318.

suspended, to extinguish it, but after the re-entry of the tenant, the rent shall be revived.

Co. super Lit. 305. If a man hold his land of me by knight's service, rent, suit of court &c. and I confirm his estate to hold of me by knight's service only, for all manner of services and demands; in this case, albeit this do abridge the service, [by taking away the rent,] yet it shall not be construed to take away wardship, relief, and to marry my daughter, and make my son knight, [or the suit of court,] and the like; [because all these are incidents to the tenure by knight's service.]

See before. If I have an estate in land for my life, and he in reversion doth confirm the estate to me and my wife for the term of our lives, this shall enure only as a confirmation of my estate, and not so as to give any estate to my wife. But if I have a lease for life or years in right of my wife, and he in the reversion do confirm the estate to me and my wife, to have and to hold to us for our lives; this shall enure not only to confirm the estate, but also to create an estate to me after my wife's death: and in the case of a lease for years, it maketh our estate joint; [it would merge an estate for years:] but in the case of a lease for life, I shall take by way of enlargement of estate for my life after my wife's death; [or *query*, by way of grant of the remainder. *Litt.* § 525.] And if in this case the confirmation be to me and my wife, to have and to hold the land to us two and our heirs; this shall enure to us in fee simple as joint-tenants, [as tenants by intireties; but after the coverture the wife may waive the fee and re-

Co. super Lit. 290. sort to her life estate.] If land be let to husband and wife, to have and to hold the one moiety to the husband for his life, and the other moiety to the wife for her life, and the lessor confirm to them both their estate in the land, to have and to hold to them and their heirs; in this case, as to the one moiety, it doth enure only to the husband and his heirs, [since in that moiety the wife has not any estate which admits of confirmation. 1 *Inst.* 299 b;] but as to the other moiety they shall be joint-tenants, [tenants by intireties; for the husband and wife being, as to that moiety, seised in right of the wife, their interest admits of confirmation.] And yet if such a lease for life be made to two men by

several moieties, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; by this they are tenants in common of the inheritance, [in repect of their several estates in the freehold. 1 *Inst.* 299 b; but even if a grant or bargain and sale in fee were made to them jointly of the inheritance immediately expectant on their several estates for life, the freehold in each moiety would merge in the inheritance, and sever the joint-tenancy; and therefore there is a difference between a grant to two as tenants in common with remainder to them as joint-tenants in fee, and a grant to them first as tenants in common for life, with a subsequent and distinct conveyance to them in fee. In the latter case there will, though in the former case there will not, be a merger. *Wiscot's case*, 2 *Rep.* 60; 3 *Prest. Convey.* 299, 300.]

If the disseisee confirm the estate of the disseisor, to have and to hold to him and his heirs of his body engendered, or to have and to hold to him for term of his life; this [assurance] shall enure to him as a fee simple, and shall confirm his estate for ever; [for as the disseisee has the fee simple, a confirmation of his estate for a moment is a confirmation of it for ever. *Litt.* § 519, 520.] Lit. Sect. 419.

If my disseisor make a lease for life, the remainder over in fee, and I confirm the estate of the tenant for life, [for any one distinct and entire estate admits of confirmation;] this [deed] shall not enure to nor avail him in remainder. And if the disseisor make a gift in tail, the remainder to the right heirs of the tenant in tail, and the disseisee confirm the estate of the tenant in tail; this shall not extend to the fee simple, no more than if the disseisor make a gift in tail, the remainder for life, the remainder to the right heirs of the tenant in tail, and the disseisee confirm the estate of the tenant in tail [as such;] for this [confirmation] shall extend only to the estate tail, and not to the remainder for life or in fee, [since there are two distinct estates.] But if the disseisee in the first case confirm the estate of him in the remainder, this shall enure * to and avail the tenant for life, [since the remainder would be defeasible if the estate for life remained defeasible.] And so if a disseisor make a lease for life and keep the reversion, and after the disseisee doth confirm to the disseisor; this shall enure to Co. super Lit. 297, 298.

*P. 319.

the tenant for life. And so if a disseisor make a lease for life to *A.* and *B.* and the disseisee confirm the estate of *A.* this shall enure to *B.* and make his estate good also in the other moiety, [because they are joint-tenants, and have one joint seisin; but it would be otherwise if they were tenants in common; because tenants in common have several freeholds and several seisins.] And so if there be two disseisors, and the disseisee confirm the estate of one of them, without saying more; this shall enure to them both, [because the confirmation is of the estate, and they have a joint seisin or estate. *Litt.* § 522.] But if the confirmation be of the land, to have and to hold the land to one; in this case it may enure to him alone. [*Litt.* § 522.] So if a disseisor enfeoff *A.* and *B.* and the heirs of *B.* and the disseisee confirm the estate of *B.* albeit it be but for his life, yet this shall enure to both and to the whole fee simple, [partly because the confirmation is of the estate, 1 *Inst.* 297 b; and partly and principally because they are seised under the same feudal contract.]

Co. super Lit. 299. If a lease be made for life to *A.* the remainder to *B.* for life, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; this shall enure as to the one moiety to *A.* in fee after the death of *B.* and as to the other moiety in fee to *B.* after the death of *A.* [So if a grant or a bargain and sale were made to them as joint-tenants, the same effect would be produced, since, though they took in the first instance as joint-tenants, the merger as to one moiety of the estate for life of *B.* in the inheritance of this moiety, would be the severance of the joint-tenancy.]

Co. Idem. If lands be given to two men and the heirs of their two bodies begotten, and the donor doth confirm their estates in the land, to have and to hold the land to them two and their heirs; it seems this shall enure to them as a joint estate for their lives, and after for several inheritances. [There is not in *Coke on Littleton* any proposition to ...ant this conclusion. In *Coke on Littleton* the ... expressed doubtfully, and the doubt is ... shall have several estates in respect ... inheritances, or a joint estate in fee

in respect of their joint freehold. Lord *Coke* leaves the point open, merely stating the reasons on it. It is apprehended, that as the intent is to give a joint estate, that intent shall prevail, since the joint freehold seems the groundwork for a joint inheritance; and since an estate tail, as incapable of merger, (3 *Prest. Convey.* 342,) will not occasion a severance of the joint-tenancy.]

If the lessee for life, or the disseisor, doth make an absolute lease for years, and he in the reversion, or the disseisee, doth confirm the estate of the lessee for years; this makes the lease good for all the time. So if the disseisor makes a lease for life, and the disseisee doth confirm the estate of the lessee for life; this makes the estate good for the life. And if he in reversion confirm the estate of the termor but one hour, this doth make it good for all the term. [But if he confirm the land for one hour, the limitation would be good: for a term of years is, as has been stated, in this respect, distinguished from an estate of freehold.] And [therefore] if an estate for life or in fee be confirmed but for one hour, it is a good confirmation for all the estate. And if the disseisee confirm the estate of the disseisor, to have and to hold for one hour, year, or for life, or in tail; this is a good confirmation for ever, and makes his estate unavoidable. And yet if the disseisee confirm the land, *habendum* the land for life, or in tail, &c. *contra.* [It is true, that lands may be confirmed for part of a term of years, but, it is repeatedly said, that an estate of freehold cannot be partially confirmed. The distinction is, that there may be a confirmation for a particular estate, without confirming the estates in remainder or reversion; but this partial confirmation is admissible only, when there is a distinct estate for the particular period already existing.]

Lit. Sect. 516. 521. 519, 520. 541. Co. 5. 79.

If a voidable lease be made for forty years, and the lessor confirm the term for twenty years; this is a good confirmation of the whole term. But if he confirm the land for twenty years, it may be good for that time only and no longer; wherein, as in divers other cases before, observe that the very words, whereby the confirmation is made, are much to be heeded; for *parols font plea.* [Probably this

Dyer, 58. 338. Co. 5. 81.

distinction between a confirmation of the term and of the land is overruled.]

Lit. Sect. 606, 607. 610. If tenant in tail or for life of land letteth it for years, and after confirm the land to the lessee for years, to have and to hold to the lessee and his heirs for ever; by this the lessee hath only an * estate for term of the life of the tenant in tail, or for life, and therein his lease for years is extinct. [As to tenant in tail this point is overruled, for it is now agreed that the grant, &c. of tenant in tail will pass a base fee to continue so long as the estate tail shall continue, (*Machel* v. *Clarke*, 2 *Lord Raym.* 778; *Seymour's case*, 10 *Rep.* 95,) subject to be defeated by the issue in tail, unless they be barred. It is more correct to say that the estate shall continue so long as the estate tail shall continue, than it is to say that the grantee shall have a fee determinable on the failure of issue; for if the estate tail should by any means be enlarged into a fee simple, as by recovery, the grantee would have a fee simple. *Doe* v. *Whitehead*, 2 *Burr.* 704; 2 *Prest. Abstr.* 309.] *P. 320.

Co. 1. 147. super Lit. 301. If tenant for life doth grant a rent to another and his heirs during the life of the tenant for life, and the lessor confirm to the grantee and his heirs; this shall be construed to be an estate for life only, and no enlargement of the estate. [*Sed quære.*] But if tenant for life grant a rent-charge in fee, and the lessor confirm it, this shall be construed to be a confirmation of the fee-simple; [in this instance the confirmation operates partly as a grant, for the tenant for life cannot create a rent in fee. In point of law the estate in the rent is originally an estate for life; and there are former observations which question the accuracy of the distinction.]

See more in *Exposition of Deeds, chap.* 5, *in toto*; and more also in the chapter of *Release*, whereunto we are now come in the next place.

CHAP. XIX.

Of a Release.

1. *Release. Quid.*

A RELEASE is the giving or discharging of the right or action which a man hath, or may have or claim, against another man, or that which is his. Or it is the conveyance of a man's interest or right, which he hath unto a thing, to another that hath the possession thereof or some estate therein (1). And this, albeit it may be made by other words, as *dedi, concessi,* or *renunciavi,* or such like, yet it is most commonly and properly made by these words, *remisi, relaxavi, et quietum clamavi,* all which are much to one purpose (2). He that makes the release is sometimes called the releasor, and he to whom it is made the releasee.

Terms of the Law. West. Symb. l. 2, sect. 466.

Releasor.

Releasee.

2. *Quotuplex.*

There are two kinds of releases like unto those of confirmation, *viz.* a release express or in deed; and that [the express release] is a purposed release, when the act done, or deed made, is intended a release. And this is always done by writing, [namely, by deed.] And then it is defined by some to be an instrument whereby estates, rights, titles, actions, and other things be sometimes extinguished, sometimes transferred, sometimes abridged, and sometimes enlarged, which is after this manner. *Noverint, &c. me* A. *de* B. *remisisse, relaxasse, et omnino de me "vel pro me" et hered. meis quietum clamasse* C. *de* D. *totum jus, titulum et clameum quæ habui, habeo, vel quovismodo in futuro habere potero, de et in uno mesuagio cum pertin. in* F. *&c.* [these are the usual words, but they have not any

Co. super Lit. 264, 265.

(1) For it is contrary to the nature of a release to give possession, 4 *Co.* 25; *Hutt.* 65; and therefore one tenant in common cannot release to his companion, because they have distinct freeholds. *Co. Lit.* 200. A release cannot operate but upon an estate, interest, or right. *Roll. Rep.* 197. When a man has the right and possession in him, he must convey by feoffment, which made a notoriety amongst the tenants by the feoffment *coram paribus.* When a man was out of possession, he might convey [*read*, extinguish his right] by release only, for the disseisor had the possession, which of itself made the notoriety, and the release transferred the right; so that a release is a conveyance of right to a person in possession. *Gilb. Ten.* 53.

(2) Ancient releases were usually distinguishable from feoffments by the words *quietum clamavi, remisi, relaxavi,* &c.; to which words others were sometimes joined, such as *abjuravi, forisjuravi, forisaffirmavi,* &c. Upon a charter of release, seisin has been delivered to the releasee, or an act done that was like giving seisin. See further in *Mad. Form. Angl. Dissert.* p. 19.

particular application, because a man cannot by deed release a title which may hereafter arise to him, (*Litt.* §. 446; 1 *Inst.* 265,) though he may bind it by estoppel. A release of all title, &c. which he has includes every thing which can be operated on by the release.] And a release implied or in law; and that is when the law by intendment and construction, and by way of consequent, doth make a release of an act done to another purpose; [as a grant, &c. to a person who has the seisin will in law amount to a release or confirmation.] And this is sometimes by writing, [being a deed,] and sometimes without writing. These releases also are sometimes of a bare and naked right, and sometimes of a right accompanied with some estate or interest; and sometimes they are of actions real or in lands or tenements, and sometimes of actions personal of or in goods or chattels, and sometimes of actions mixed partly in the realty and partly in the personalty (3). [The difference between release, extinguishment and estoppel, is stated in *Cro. Eliz.* 827.]

Co. super Lit. 193. 273. 277. Co. 1, 147. Lit. Sect. 606. 469. 465. 466. 446.

3. *The nature and operation of it in general.*

*A release is much of the nature of a confirmation, for in most things they agree and produce the like effects. This therefore is said sometimes to enure by way of *mitter le estate*, *i. e.* by way of giving or transferring or enlarging of an estate or interest, and so doth give some new interest or estate to him to whom it is made. And sometimes it is said to enure by way of *mitter le droit* only, *i. e.* by way of giving, transferring and discharging of a right, title or entry unto him to whom it is made. And so it doth sometimes perfect an estate that was imperfect and defeasible before, and enure by way of entry and feoffment. And sometimes also it doth enure to make a conditional estate absolute [by discharging the condition]. And sometimes also it doth work and enure by way of extinguishment or discharge; and then also sometimes it doth enure by way of discharge or extinguishment as against all persons, and also as that whereof all persons may take advantage. And sometimes it doth enure only as a discharge against some *P. 321.

(3) See accordingly 1 *Wood*, 696; and more amply as to releases express and implied, how and in what manner they are respectively created, in *Bac. Abr. Release* (A.) and (B.); *Com. Dig. Release* (A.)

persons only, and as to or against other persons by way of *mitter le droit*. And some of these in deed enure by way of extinguishment; for that he to whom the release is made cannot have the thing released. And some of them have some quality of such releases, and are said to enure by way of extinguishment, but in truth do not; for that he to whom the release is made, may receive and take the thing released. And in some cases also a release, like a confirmation, doth enure by way of abridgment. But a man cannot bar himself hereby of a right that shall come to him hereafter. And therefore it is held that these words used in releases "*quæ quovismodo in futuro habere potero*," are to no purpose; [and therefore an heir at law cannot release his hope or chance of succession in the lifetime of the ancestor, *Morse* v. *Faulkner*, 1 *Anstr.* 11; 3 *Term Rep.* 365; 3 *Prest. Abstr.* 273; but in equity he will be personally bound by his release. But there is not any equity against the heir of the heir; 1 *Anstr.* 11; 3 *Term Rep.* 365; *sed quære*. But if the heir apparent, &c. levy a fine, and survive the ancestor, he will be bound by estoppel, and the right extinguished. *Helps* v. *Hereford*, 2 *Barn. & Ald.* 244; *Sir W. Jones*, 456; 2 *Prest. Abstr.* 211. So if he demise by indenture, the lands will be bound by estoppel when they descend to him. So a release with warranty may be a defence to the possession. 1 *Inst.* 265; 2 *Prest. Abstr.* 212.]

4. What things may be released; or not; and how.

Lands, tenements and hereditaments themselves, may be given and transferred by way of release; and all rights and titles to lands may be given, [or rather extinguished,] barred, and discharged, by release; and so also may rights and titles to goods and chattels. Also all actions, real, personal and mixed, may be given, [*i. e.* released,] discharged or extinct by release; for howsoever rights and titles of entry cannot be granted by act of the party, nor may any action be granted from one man to another by act of the law or the party, yet all these may be released to the terre-tenant [and heirs, as realty representatives, and executors and administrators as personal representatives. Assignments under a commission of bankrupt, and assignments under insolvent debtors act, are exceptions. In 2 *Hen. Black.* 244, it was determined that the

Co. 10. 48. super Lit. 268, 269. 266.

assignees of bankrupt may maintain a real action on a title which accrued to the bankrupt, and the cause of action was sufficiently transferred by the usual words in bargains and sales of bankrupt's effects.] And a right to a freehold or inheritance, seigniory or rent, *in præsenti* or *futuro*, may be released [by] five manner of ways, and the first three ways without any privity at all. 1. To the tenant of the freehold in deed or in law. 2. To him in the remainder. 3. To him in reversion. The other two ways in respect of privity without any estate or right; as by demandant to vouchee, donor * to donee after the donee hath discontinued. *P. 322.

Bro. Release in toto. Also conditions annexed to estates, powers of revocation of uses, [which are coupled with an interest,] warranties, covenants, tenures, services, rents, commons and other profits to be taken out of lands, may be discharged, extinguished and determined by release to the tenant of the land, &c. [But it should seem that a mere authority to revoke may not be released by any other person than the person entitled to have the benefit resulting from the revocation. There are many other powers which are considered as mere authorities, and personal, and cannot be released. Of this description are powers of nomination or selection in favour of children, powers to executors to sell, and the like. *Digges' case*, 1 *Rep.* 173.]

Co. 10. 47. 51, 52. 5. 70. 71. super Lit. 265. Lit. Sect. 446. Co. 1. 111. Dyer, 57. Co. 1. 113. 174. Also possibilities of land, &c. if they be near and common possibilities, [and if not they are said to be void in the first instance,] albeit they be not grantable over to another person, yet may they be released to him that hath the present estate of the land. [They are not grantable at law, but they are assignable in equity for a valuable consideration. Also possibilities coupled with an interest, as contingent remainders, executory devises, &c. are transmissible, descendible and devisable. But an interest to a person not ascertained, is not devisable or grantable; it may be bound at law by estoppel, or in equity by contract. It is sometimes said a possibility cannot be released, as the title under a gift, to commence at a future day; 1 *Co.* 110; but it is apprehended the law is contrary when the interest is to a person who is ascertained.] And therefore if a man possessed of a term devise it to *A.* for life, the remainder to

Jermyn v. *Orchard*, *Show. Parl. Cas.* 199. But where a lessee for three lives granted all his estate to hold for years, the *habendum* was construed to explain the grant, and to confine it to the particular term of years expressed in the *habendum*. *Plowden* v. *Cartwright*, 1 *Burr.* 282. From this case it is doubtful whether the distinction taken in the text would be adopted at this day; but in confirmations enlarging estates, a right annexed to the estate enlarged is extinguished.]

7. The force and virtue of it; and how it shall enure and be construed and taken.

If I make [a] feoffment on condition, and before the condition broken I confirm the estate of the feoffee absolutely; this will not extinguish the condition; [but *query*, if the confirmation may not be pleaded as a release, so as to operate in extinguishment of the condition.] And yet if the condition be broken first, so as my entry is lawful; in this case the confirmation will extinguish the condition, [or rather the right of entry under the condition.] And if the feoffee on condition make a feoffment over absolutely to another, and I confirm the estate of the second feoffee, whether it be before or after the condition broken; by this [confirmation] the condition is discharged. 11 H. 7. 29. Co. 1. 148. a. 149.

If the lord confirm the estate of his tenant in the tenements; or one that hath a rent, common, or profit out of land confirm to the terre-tenant his estate; in these cases, notwithstanding this confirmation, the seigniory, rent, common, &c. do continue, and this shall not enure to extinguish it. [To extinguish the rents, &c. there must be a release, &c. or there must, in substance, be an intention to release, so that the deed may be pleaded as a release.] Lit. Sect. 535, 537.

If the disseisee and a stranger disseise the heir of the disseisor, [after a descent which tolled the entry,] and the disseisee confirm the estate of his companion; this shall not enure to extinguish the suspended right of the disseisee, but when the heir of the disseisor shall re-enter it, [the right] shall be revived; [because the heir cannot take advantage of the confirmation, since he does not claim under the confirmee, but under a title paramount to the estate which was confirmed.] And if the grantee of a rent-charge and a stranger disseise the tenant of the land, and the grantee confirm the estate of his companion; * this shall not enure as to the rent Co. super Lit. 298.

*P. 318.

suspended, to extinguish it, but after the re-entry of the tenant, the rent shall be revived.

Co. super Lit. 305. If a man hold his land of me by knight's service, rent, suit of court &c. and I confirm his estate to hold of me by knight's service only, for all manner of services and demands; in this case, albeit this do abridge the service, [by taking away the rent,] yet it shall not be construed to take away wardship, relief, and to marry my daughter, and make my son knight, [or the suit of court,] and the like; [because all these are incidents to the tenure by knight's service.]

See before. If I have an estate in land for my life, and he in reversion doth confirm the estate to me and my wife for the term of our lives, this shall enure only as a confirmation of my estate, and not so as to give any estate to my wife. But if I have a lease for life or years in right of my wife, and he in the reversion do confirm the estate to me and my wife, to have and to hold to us for our lives; this shall enure not only to confirm the estate, but also to create an estate to me after my wife's death: and in the case of a lease for years, it maketh our estate joint; [it would merge an estate for years:] but in the case of a lease for life, I shall take by way of enlargement of estate for my life after my wife's death; [or *query*, by way of grant of the remainder. *Litt.* § 525.] And if in this case the confirmation be to me and my wife, to have and to hold the land to us two and our heirs; this shall enure to us in fee simple as joint-tenants, [as tenants by intireties; but after the coverture the wife may waive the fee and re-

Co. super Lit. 299. sort to her life estate.] If land be let to husband and wife, to have and to hold the one moiety to the husband for his life, and the other moiety to the wife for her life, and the lessor confirm to them both their estate in the land, to have and to hold to them and their heirs; in this case, as to the one moiety, it doth enure only to the husband and his heirs, [since in that moiety the wife has not any estate which admits of confirmation. 1 *Inst.* 299 b;] but as to the other moiety they shall be joint-tenants, [tenants by intireties; for the husband and wife being, as to that moiety, seised in right of the wife, their interest admits of confirmation.] And yet if such a lease for life be made to two men by

several moieties, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; by this they are tenants in common of the inheritance, [in repect of their several estates in the freehold. 1 *Inst.* 299 b; but even if a grant or bargain and sale in fee were made to them jointly of the inheritance immediately expectant on their several estates for life, the freehold in each moiety would merge in the inheritance, and sever the joint-tenancy; and therefore there is a difference between a grant to two as tenants in common with remainder to them as joint-tenants in fee, and a grant to them first as tenants in common for life, with a subsequent and distinct conveyance to them in fee. In the latter case there will, though in the former case there will not, be a merger. *Wiscot's case*, 2 *Rep.* 60; 3 *Prest. Convey.* 299, 300.]

If the disseisee confirm the estate of the disseisor, to have and to hold to him and his heirs of his body engendered, or to have and to hold to him for term of his life; this [assurance] shall enure to him as a fee simple, and shall confirm his estate for ever; [for as the disseisee has the fee simple, a confirmation of his estate for a moment is a confirmation of it for ever. *Litt.* § 519, 520.] Lit. Sect. 419.

If my disseisor make a lease for life, the remainder over in fee, and I confirm the estate of the tenant for life, [for any one distinct and entire estate admits of confirmation;] this [deed] shall not enure to nor avail him in remainder. And if the disseisor make a gift in tail, the remainder to the right heirs of the tenant in tail, and the disseisee confirm the estate of the tenant in tail; this shall not extend to the fee simple, no more than if the disseisor make a gift in tail, the remainder for life, the remainder to the right heirs of the tenant in tail, and the disseisee confirm the estate of the tenant in tail [as such;] for this [confirmation] shall extend only to the estate tail, and not to the remainder for life or in fee, [since there are two distinct estates.] But if the disseisee in the first case confirm the estate of him in the remainder, this shall enure * to and avail the tenant for life, [since the remainder would be defeasible if the estate for life remained defeasible.] And so if a disseisor make a lease for life and keep the reversion, and after the disseisee doth confirm to the disseisor; this shall enure to Co. super Lit. 297, 298.

*P. 319.

the tenant for life. And so if a disseisor make a lease for life to *A.* and *B.* and the disseisee confirm the estate of *A.* this shall enure to *B.* and make his estate good also in the other moiety, [because they are joint-tenants, and have one joint seisin; but it would be otherwise if they were tenants in common; because tenants in common have several freeholds and several seisins.] And so if there be two disseisors, and the disseisee confirm the estate of one of them, without saying more; this shall enure to them both, [because the confirmation is of the estate, and they have a joint seisin or estate. *Litt.* § 522.] But if the confirmation be of the land, to have and to hold the land to one; in this case it may enure to him alone. [*Litt.* § 522.] So if a disseisor enfeoff *A.* and *B.* and the heirs of *B.* and the disseisee confirm the estate of *B.* albeit it be but for his life, yet this shall enure to both and to the whole fee simple, [partly because the confirmation is of the estate, 1 *Inst.* 297 b; and partly and principally because they are seised under the same feudal contract.]

Co. super Lit. 299. If a lease be made for life to *A.* the remainder to *B.* for life, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; this shall enure as to the one moiety to *A.* in fee after the death of *B.* and as to the other moiety in fee to *B.* after the death of *A.* [So if a grant or a bargain and sale were made to them as joint-tenants, the same effect would be produced, since, though they took in the first instance as joint-tenants, the merger as to one moiety of the estate for life of *B.* in the inheritance of this moiety, would be the severance of the joint-tenancy.]

Co. Idem. If lands be given to two men and the heirs of their two bodies begotten, and the donor doth confirm their estates in the land, to have and to hold the land to them two and their heirs; it seems this shall enure to them as a joint estate for their lives, and after for several inheritances. [There is not in *Coke on Littleton* any proposition to warrant this conclusion. In *Coke on Littleton* the point is expressed doubtfully, and the doubt is whether they shall have several estates in respect of their several inheritances, or a joint estate in fee

in respect of their joint freehold. Lord *Coke* leaves the point open, merely stating the reasons on it. It is apprehended, that as the intent is to give a joint estate, that intent shall prevail, since the joint freehold seems the groundwork for a joint inheritance; and since an estate tail, as incapable of merger, (3 *Prest. Convey.* 342,) will not occasion a severance of the joint-tenancy.]

If the lessee for life, or the disseisor, doth make an absolute lease for years, and he in the reversion, or the disseisee, doth confirm the estate of the lessee for years; this makes the lease good for all the time. So if the disseisor makes a lease for life, and the disseisee doth confirm the estate of the lessee for life; this makes the estate good for the life. And if he in reversion confirm the estate of the termor but one hour, this doth make it good for all the term. [But if he confirm the land for one hour, the limitation would be good: for a term of years is, as has been stated, in this respect, distinguished from an estate of freehold.] And [therefore] if an estate for life or in fee be confirmed but for one hour, it is a good confirmation for all the estate. And if the disseisee confirm the estate of the disseisor, to have and to hold for one hour, year, or for life, or in tail; this is a good confirmation for ever, and makes his estate unavoidable. And yet if the disseisee confirm the land, *habendum* the land for life, or in tail, &c. *contra.* [It is true, that lands may be confirmed for part of a term of years, but, it is repeatedly said, that an estate of freehold cannot be partially confirmed. The distinction is, that there may be a confirmation for a particular estate, without confirming the estates in remainder or reversion; but this partial confirmation is admissible only, when there is a distinct estate for the particular period already existing.]

Lit. Sect. 516. 521. 519, 520. 541. Co. 5. 79.

If a voidable lease be made for forty years, and the lessor confirm the term for twenty years; this is a good confirmation of the whole term. But if he confirm the land for twenty years, it may be good for that time only and no longer; wherein, as in divers other cases before, observe that the very words, whereby the confirmation is made, are much to be heeded; for *parols font plea.* [Probably this

Dyer, 5a. 338. Co. 5. 81.

distinction between a confirmation of the term and of the land is overruled.]

Lit. Sect. 606, 607. 610.

If tenant in tail or for life of land letteth it for years, and after confirm the land to the lessee for years, to have and to hold to the lessee and his heirs for ever; by this the lessee hath only an *estate for term of the life of the tenant in tail, or *P. 320. for life, and therein his lease for years is extinct. [As to tenant in tail this point is overruled, for it is now agreed that the grant, &c. of tenant in tail will pass a base fee to continue so long as the estate tail shall continue, (*Machel* v. *Clarke*, 2 *Lord Raym.* 778; *Seymour's case*, 10 *Rep.* 95,) subject to be defeated by the issue in tail, unless they be barred. It is more correct to say that the estate shall continue so long as the estate tail shall continue, than it is to say that the grantee shall have a fee determinable on the failure of issue; for if the estate tail should by any means be enlarged into a fee simple, as by recovery, the grantee would have a fee simple. *Doe* v. *Whitehead*, 2 *Burr.* 704; 2 *Prest. Abstr.* 309.]

Co. 1. 147. super Lit. 301.

If tenant for life doth grant a rent to another and his heirs during the life of the tenant for life, and the lessor confirm to the grantee and his heirs; this shall be construed to be an estate for life only, and no enlargement of the estate. [*Sed quære.*] But if tenant for life grant a rent-charge in fee, and the lessor confirm it, this shall be construed to be a confirmation of the fee-simple; [in this instance the confirmation operates partly as a grant, for the tenant for life cannot create a rent in fee. In point of law the estate in the rent is originally an estate for life; and there are former observations which question the accuracy of the distinction.]

See more in *Exposition of Deeds, chap.* 5, *in toto*; and more also in the chapter of *Release*, whereunto we are now come in the next place.

and he in remainder in fee release to the tenant for life; this [release] will not increase his estate; [on account of the intermediate estate; for the particular estate cannot, on account of the intermediate estate, be enlarged; but see a difference as to reversions, p. 326.] And if the tenant in tail in this case release to the tenant for life, his estate shall be no longer increased hereby than for the life of the tenant in tail. [At this day a base fee would pass. *Machel* v. *Clarke*, 2 *Lord Raym.* 778.]

2. In respect of the estate of him to whom the release is made.

2. He to whom the release is made, must have some estate in possession, [*read*, vested,] in deed or in law, or in reversion in deed, in his own or another's right, of the lands whereof the release is made, to be as a foundation for the release to stand upon: for a release, which must enure to enlarge an estate, cannot work without a possession joined with an estate. [All that is required is, that there should be a vested estate; it is not necessary that the estate to be enlarged should confer a right to the possession.] And therefore the releasee must be lessee for life, years, or tenant by statute merchant, staple, or elegit, or as guardian in chivalry, that doth hold the land over for the value; or at least he must be tenant at will. [2 *Prest. Convey.* 284.] And therefore if a man let his land to another for term of years, to begin presently, and after the lessor or his heir doth release to the lessee (after his entry and being in possession) all his right in the land; this is good to enlarge the estate according to the time set down in the release: but if the release be before the term begin, or after the term begin, and before the lessee have entered, (howsoever if any rent be reserved on the lease, it may enure and be good to extinguish that rent), yet it is not good to enlarge the estate. [This observation is applicable to terms to take effect by demise at the common law. To supersede the necessity of an actual entry, a bargain and sale may be made for years, and the bargainee will have a vested estate immediately without entry, and this estate is capable of enlargement. Hence, the conveyance by lease and release; the lease operating as a bargain and sale for a year; and the release operating to enlarge that estate. *Barker* v. *Keate*, 2 *Mod.* 251; 1 *Inst.* 273 a; 2 *Prest. Convey.* 217. But where the parties to the lease for a year cannot

Co. super Lit. 270. 273. 285.

Lit. Sect. 459. Plow. 433. Dyer, 4. 15 H. 7. 14.

stand seised to an use, as a corporation, &c. it is the practice either to make an actual entry before the release, or to have a feoffment.] And yet if a tenant for twenty years in possession, make a lease to *B.* for ten years, and *B.* enter, [it is immaterial whether there be or be not any entry by *B.* the underlessee,] and he in the reversion release to the first lessee for years; this is a good release to enlarge the estate. [Because the immediate privity still continues as between them; but as there is not any privity between the underlessee and the tenant of the reversion in fee, the underlessee's estate cannot be enlarged by a grant to him by the reversioner in fee; and here note, that if after making a lease for ten years, the lessee for twenty years make a surrender, or his estate merge, there is not any remedy at law for the rent, or covenant reserved on the underlease, because they were annexed to the reversion for twenty years, and that reversion is extinct. Hence it is often prudent to assign a term, instead of surrendering the same; that there may be an existing remedy for the rent, &c. The assignment should be to a trustee to attend, &c.] So if a man make a lease for years, the remainder for life or years, and the first lessee doth enter; in this case a release to him in remainder is good to enlarge the estate; [on account of the immediate privity.] So if I grant the reversion [expectant on the estate] of my tenant for life to another for life, and after release to him [the second lessee] and his heirs; this is a good release to enlarge the estate; [because his estate for life, and the reversion in fee, are immediate to each other; and it seems to be a general rule, that whenever an estate may merge in the remainder or reversion, that estate may be enlarged by the release of the remainder-man or reversioner.]

Co. super Lit. 273. * So if a man make a lease for life, or years, to a feme sole, and she take a husband, and he in the reversion release to the husband and his heirs; this is a good release to enlarge the estate according to the words of the release. [And in case of a lease for years, the term will be absolutely merged; while, in case of a lease for life, the wife's title will be preserved for her benefit.] But if the case be so that a man had an estate in possession of land, and he be now out of the possession of it, [that is, *P. 325.

disseised or ousted,] and have but a right only to it; or if he have a possession only and no estate, [as is the condition of a tenant by sufferance;] or if he have neither estate nor possession, [as a mere stranger;] in these cases a release made to such a one will not avail to enlarge his estate. [But it should seem (*cæteris paribus*) that an instrument in the form of a release may operate as a grant.]

And therefore if a man make a lease for life, the remainder for life, and the first lessee dieth, and the lessor release to him in remainder for life, before his entry; this is a good release to enlarge his estate, for he hath an estate of freehold in law, capable of enlargement by release before entry. Co. super Lit. 270.

But if there be lessee for life, the remainder for life, the remainder in tail, the remainder in fee, and the lessee for life is disseised, and during the possession of the disseisor, he that hath right doth release to one of them in the remainder; this is void. [For a disseisin of the tenant for life, is a disseisin of all those in remainder or reversion, and converts their estate to a right of entry, for every disseisin necessarily gains in fee simple. See argument in *Goodright* v. *Forrester*, 1 *Taunt.* 578.] Lit. Sect. 451.

So if lands be given in tail or leased for life, and the donee or lessee is disseised, and, during the possession of the disseisor, the donor or lessor doth release all his right to the donee or lessee; this is void, and will not enlarge his estate: howbeit if there be any rent reserved on the estate, it will extinguish the rent. Lit. Sect. 455. 456.

So if the tenant by the courtesy grant over his estate, and after he in reversion doth release to the tenant by the courtesy; in this case his release is void, and will not enlarge his estate; [for in fact no estate is left in him.] Co. super Lit. 273.

So if an infant make a lease for life, and the lessee granteth the estate over with warranty, and the infant at full age doth bring a *dum fuit infra ætatem*, and the tenant doth vouch the grantor, who doth enter into the warranty, and the demandant, being the infant, doth release to him and his heirs; this [release] will not enlarge his estate; for in truth he had no estate before, and that which is not cannot be enlarged: and if lessee for life, or years, release to him in remainder or reversion; this cannot be good as a release; howbeit if there be apt words, it may amount to a surrender. [At this day any words may be pleaded as a surrender.] Dyer, 251.

Co. super Lit. 271. Lit. Sect. 461. And if a man have only an occupation of land as tenant at sufferance, as when a lessee for years doth hold over his term, or the like; no release to him can work any enlargement of estate: for albeit he have a possession, yet hath he no estate; and besides in this case there is no privity, which is the third thing required in these releases.

Co. super Lit. 296. Lit. Sect. 461. For as in all these releases that enure by way of increase or passing an estate, there must be some estate in the releasor and the releasee, so there must be some privity in estate between them at the time of the release made; for an estate without privity is not sufficient: [a subject fully examined in 3 *Prest. Convey.* 324. 329.] And therefore it must be, between donor and donee, lessor and lessee, * and the like; as in the cases before, between him in reversion and the lessee for life or years, tenant by statute merchant or staple, or by elegit, or guardian in chivalry, that keepeth the land for the value. And if tenant for life lease for years, and he in the reversion and the tenant for life do join together and release to the lessee for years; this is a good release to enlarge the estate, [operating first, as the release of the estate for life; and secondly, as an enlargement of the estate for life into a fee simple.] So if he in reversion release to the husband that hath an estate in the right of his wife only for life or years; this is a good release. So if lessee for years make a lease of the land but for part of the term, the privity continueth still, and therefore a release to him is good to enlarge the estate. But if he assign over all the term, then the privity is gone, and therefore a release made to him afterwards is void: and then a release, made to the assignee of the term, is good to enlarge the estate. And if a disseisor make a lease for life or years, and after he and the disseisee join together to make a release to the lessee for life or years; this is a good release to enlarge the estate; [it operates, it is apprehended, as the release by way of enlargement of the disseisor, and the release of right by the disseisee.] But if the disseisor in this case make a lease for life or years, and the disseisee, or he that hath right, release to the tenant for life or years; in this case the release is void for want of privity [so as to enlarge the estate, but it is apprehended it will operate by way of confirmation of the particular estate during its continuance. *Gilb.*

3. *In respect of privity.*

*P. 326.

Plow. 541.

Co. super Lit. 273.

Dyer, 4. Co. 3. 22.

Plow. 540. 14 H. 7. 4. Lit. Sect. 518.

Ten. 70.] And if there be lessee for years, the remainder for life, and he in reversion release to the lessee for years or to him in remainder for life, and his heirs, all his right; this is a good release to work an enlargement of estate. [See *Gilb. Ten.* 70; 1 *Inst.* 273, accordingly.] So if one make a lease for life, and grant the reversion for life, and then the lessor doth release to the grantee of the reversion and his heirs; this is a good release to enlarge the estate of the grantee, and here is privity enough. If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *C.* for life, the remainder to *A.* in fee, and *A.* die, and his heir doth release all his right to *B.* being in possession; this is a good release, and gives the fee simple, [notwithstanding the intermediate estate for life, and though the estate tail cannot be merged so as in strictness to be enlarged; and if there be tenant for life and remainder in tail, with remainder to the tenant for life in fee, the tenant for life may by *release* pass his remainder in fee, but not his estate for life, to the tenant in tail. 2 *Roll. Abr.* 400, pl. 7. The estate for life may pass by grant.]

Co. super Lit. 273.

Bro. Release, 71.

But if *A.* make a lease to *B.* for life, and the lessee maketh a lease for years, and after *A.* in the life time of the tenant for life maketh a release to the lessee for years; this release [as such] is void, and will not enlarge his estate, for want of privity. So if a man make a lease for twenty years, and the lessee make a lease for ten years, and the first lessor doth release to the second lessee, [*viz.* the underlessee,] and his heirs; this release is void. [In each of those cases the deed may operate as a grant, and must be pleaded accordingly.] So also if the donee in tail make a lease for his own life, and the donor release to the lessee and his heirs; this release is void, [because the privity is between him and the donee in tail.] So also if the donee in tail make a lease for his own life, and after the donor release to the donee [should be lessee] and his heirs; it seems this is not a good release. [On the text it may be said, why not? There is ainly a continuing estate and privity. Neither e books cited is an authority for the conclusion, he conclusion itself was probably drawn from taken idea, that when tenant in tail hath

Co. super Lit. 273. Lit. Sect. 516.

granted an estate for his life, he hath granted all the estate that he has; but it is now clear that a reversion is left in him. If he had granted an estate *pur autre vie*, and by that means discontinued the estate tail, the point would be tenable; besides, on referring to *Coke on Littleton* it will be found, that donee is inserted by mistake for lessee, and then the proposition is law, because there is not any privity between the lessee and the donor of the estate tail.] Also one joint-tenant or coparcener may release to another, and thereby transfer all his estate and give the whole interest unto his companion; and this is a good release to pass all his or her part of the land, [and the fee simple thereof, without any words of inheritance; and therefore this species of release, which is called a release *mitter le estate*, differs from a release in enlargement of an estate, to which words of inheritance are essentially necessary, if an estate in fee or in tail is to pass. 1 *Inst.* 273 b; *Gilb. Ten.* 70.] And if there be three joint-tenants * in fee, and they make a lease for life, and after two of them release all their right in the land to the third, this is a good release (5), [for the tenancy and privity still subsist between them.] So if one make a lease for life to another, and after he grant the reversion to seven, and the tenant for life doth attorn, and after four of the seven release all their right to the other three, and after one of the three release to the other two, [or one of the three releases to one of the others of them, 1 *Inst.* 273 b;] these are good releases. So if a lease for years be made to two, to begin at a day to come, a release by one of them to the other is good to give all the term and all the land to the releasee. [This is another instance of an interest which may be released, though it cannot be assigned; and though the person who has an *interesse termini* cannot surrender it, he may release it to the lessor. So he may surrender or waive it by construction of law, as by accepting a lease incompatible.] But it seems one tenant in common cannot release to another tenant in common, [on

Bro. Release, 77. Perk. Sect. 84.

*P. 327.

10 H. 4. 3.

(5) A release being the proper mode of conveyance from one joint-tenant to another; and such joint-tenant not being capable of making a feoffment to his companion; see before in page 201, and note thereto. If one joint-tenant *grants, bargains, and sells*, or *gives, grants, and confirms* his estate unto his companion, either of these will operate as a release. 1 *Vent.* 78; 1 *Sid.* 452.

account of their several seisins. In point of law each has a distinct tenement.] (6)

4. In respect of the words whereby it is made.

The fourth thing that is required in such a release is, sufficient words in law not only to make a release, (which is required in all releases) but also to raise and create a new estate. For this therefore know, that all releases (of what kind soever) are commonly made by these words, *remisisse, relaxasse, et quietum clamasse*, as being the most ancient and significant word to this purpose. And amongst these the word *release* is the most effectual [and formal] word, as that which doth include the other two, and as that which is the proper and peculiar [*omit* and peculiar] word for this kind of conveyance, [expressing a repetition of the act of releasing.] But there are other words also by which a release may be made, as *renunciare, acquietare, &c.* And therefore it is held, that if one have common in another's land, and he by deed release it to him thus, *Renuntio communiam meam, &c.* this is a good release. [And an instrument in the form of a charter of feoffment (being a deed, and without livery of seisin) may operate as, and have the effect of, a release or grant. *Clayt.* 32. Words of release of a term may operate as a surrender, 1 *Lev.* 145; *Dyer*, 251; or as a covenant to stand seised, *Roe* v. *Tranmer*, 2 *Wils.* 75; *Willes*, 782. So words of conveyance, grant, or confirmation may operate as a release. 1 *Ventr.* 78; 1 *Sid.* 52.] And if the lessor do but grant to his lessee for life that he shall be discharged of the rent, this is a good release of the rent. [1 *Inst.* 301 a.] And it is a rule, that by what words a debt or duty may be created, by words of a contrary signification it may be released. And therefore if one do acknowledge himself to be satisfied and discharged a debt, this is a good release of the debt (7). And for words to raise the estate, it is usual and most safe to specify in the deed what estate he to whom the release is made shall have; and in most cases this is needful, [*i. e.* necessary]: for it is generally true, that when a release doth enure by way of enlarge-

4) Co. super Lit. 273. 307.

9 H. 6. 35. Dyer, 116. Lit. Sect. 544. Co. super Lit. 264. Dyer, 307. Co. 9. 52.

Co. super Lit. 273. Lit. Sect. 465. 468, 469.

(6) But they must pass their estate by feoffment, &c. because this estate being established by different notorieties, each having passed by distinct liveries, they must pass to each other ——— distinguishing livery; or else it cannot be known, in whom such parts are, which v had passed by a distinct livery.

e more amply, by what words a release may be made, in *Vin. Abr. Release* (L.)

ment of estate, no inheritance in fee simple or tail can pass without apt words of inheritance. As by therefore if I make a lease of land to another for his life, and after I release to him all my right without more saying in the release; hereby his estate is not enlarged. But if I release to him and his heirs; by this [release] he hath a fee simple. And if I release to him and the heirs of his body; by this [release] he hath an estate tail. [So if he be tenant *pur autre vie*, and I release to him generally, he will have an estate for his own life, since that estate is larger in intendment of law than an estate for another man's life. 1 *Inst.* 273 b. The releasor is supposed to have the fee simple, for a different construction might be beneficial to the releasee, in releases by tenant in tail, &c. 1 *Inst.* 41 a. So a release to a tenant for years will enlarge his estate into an estate for life without words of inheritance.] But where a release worketh by way of *mitter le estate*, there in some cases there need not any words of inheritance; [except for the purpose of restriction, as if a particular estate is to be created;] as in cases where releases are made between joint-tenants or co-parceners; as where a joint estate is made to the husband and wife, and a third person and their heirs, and the third person doth * release all his right to the husband alone, or to the wife alone. *P. 328.

So if there be three joint-tenants, and one of them doth release to one of the other two; in all these, and such like cases, there needs not any limitation of the estate, for the release is good without it (8).

Lit. Sect. 466. Co. super Lit. 265. Co. 5. 70, 71. 1. 111. 8. 151.

In every good release in deed, that doth tend and enure to give, discharge, or extinguish, any right or title of lands, it is also further requisite,

2. When it doth enure by way of passing and extinguishment of a right or title only.

1. In respect of the estate of the releasor.

1. That he that doth make it hath, at the time of the release made, some right or title to release. As where one doth disseise me of land, and I release to him all my right in the land; this is a good release, [because by the disseisin he gained the fee simple, and the former owner had merely a right of re-entry.] So if one disseise my tenant for life, and

(8) See more amply, as to releases which enure by way of enlargement of the estate, in *Com. Dig. Release* (C.); *Vin. Abr. Release* (B.); *Bac. Abr. Release* (C. 4.); and therein of the modern manner of conveyancing by *lease and release*; for which, see also the note at the end of chapter 9, on Feoffment.

4. *In respect of the words whereby it is made.*

nainder, or reversion in fee) id make the disseisin; this he disseisin turns the re- ll as the particular estate, such release would make st the releasor, though it by the tenant for life.] So lease for life, and then take the wife release her dower to his is a good release. [This the wife were dowable, but the e prevented a title to dower in her.] also if after the marriage a man make a se for life, the remainder in fee, and she release all her right to him in remainder in fee, or to him in reversion; this is a good release, and will bar her for ever, [so that the tenant for life will have the benefit of the same; and a release to the tenant for life may also under similar circumstances, and on account of the privity, be taken advantage of by the remainder-man or reversioner.]

Lit. Sect. 446. Co. 10. 47. 42. super Lit. 265.

But if the releasor have only a possibility of a right, [as an heir apparent, or even a title under a contingent remainder, or executory devise or future use to persons not ascertained,] or if a right happen to come to him after the release, this is not sufficient to make the release good. And therefore if the father be disseised, and the son before his father's death release all his right to the disseisor, and after the father dieth, so that the right doth descend [to the releasor;] this is no good release to bar the releasor of his right. So if there be grandfather, father, and son, and the father disseise the grandfather, and make a feoffment, and the son release in the life-time of his father, and after the father and grand-father die; this release in this case will not bar him, [for in each of those cases the heir had not any interest till the death of his ancestor.] So if a

Co. 10. 57.

lease be made for life, the remainder to the right heirs of *I. S.* and the lessee is disseised, and the eldest son of *I. S.* living his father, doth release to the disseisor; this release is void, [for at that time he had not any estate vested or contingent, since the limitation was to a person not defined. But a contingent interest, limited to a person who is ascertained, may, it should seem, be released; and such interest, or even a future interest under a gift

to a person not ascertained, may be bound by estoppel. *Pells* v. *Brown*, *Cro. Jac.* 590; *supra*, 321.] So if the conusee of a statute, &c. do release to the conusor all his right in the land; this is void, and he may sue execution after notwithstanding, [because he hath not any estate or interest in the land, but merely a right to sue execution against the land.] Or if the releasor have only a power, [a mere authority or a power without any interest,] this is not sufficient to make the release good. And therefore if a man by his will devise that his executors shall sell his land, and dieth, and the executors release all their right and title in the land to the heir; this is void; [for they have merely an authority without any interest. But it is agreed that a power coupled with an interest may be released. *Albanie's case*, 1 *Rep.* 110, b.; *Digges' case*, 1 *Rep.* 173.]

Co. 5. 70.

Co. super Lit. 265.

Co. super Lit. 267.

2. In all cases of a release of a bare right of a freehold in lands or tenements, he to whom the release is made, must at the time of the making thereof in any case have the freehold (in deed or in law) in possession or some estate in remainder or reversion (in deed and not in right only) in fee simple, fee tail, or for life, of the lands* whereof the release is made; for rights of entry, and actions, and the like, are not to be transferred to strangers, [except assignees under a commission of bankrupt,] but are thus to be released, and such releases are good. As if the disseisee release to the disseisor himself, who hath the freehold in deed, or to the heir of the disseisor who hath the freehold in law, [after the death of the disseisor,] before his entry, or to the lessee for life of the disseisor; these releases are good. So if a disseisor make a lease to *A.* and his heirs during the life of *B.* and *A.* die, and the disseisee release to his heir before his entry; this is a good release; [because he is named as special occupant, and the freehold is cast on him; but if the title had been left open to general occupancy, there could not at the common law have been any effectual release until the freehold had been acquired by occupancy.]

2. *In respect of the estate of him to whom the release is made.*

*P. 329.

Co. super Lit. 266. 275. Lit. Sect. 448. 1 H. 6. 4. Dyer, 302.

So if a fine *sur conusance de droit come ceo, &c.* or *sur conusance de droit* only (which is [the acknowledgment of] a feoffment on record) be levied; or if tenant for life, by agreement of him

in the reversion, surrender to him in the reversion; or if a man do bargain and sell his land by deed indented and enrolled; or uses are raised by covenant on good considerations; in all these cases, the conusee, he in reversion, bargainee, and *cestui que use*, have a freehold in law in them before entry. And therefore a release to them of the right of the land by him that hath it, is good, and will bar the releasor. But otherwise it is in cases of exchange, partition, or upon livery within the view; for, in these cases, no release is good until an actual entry made, for till then they have neither freehold in right nor law. [This exchange is supposed to be made of lands in possession merely by deed of exchange. But the more general practice is, to make the exchange by lease and release, and then the lease, or rather bargain and sale for a year, supersedes the necessity of an actual entry, and the grantee obtains a seisin in law *instanter* by means of the release as a grant, and of course a release of title would be efficient.] So if a disseisor make a gift in tail, or lease for life or years, of the land, and keep the reversion, and then the disseisee or his heir release to the disseisor all his right; this is a good release to bar his right for ever. So if the heir of the disseisor be disseised, and the first disseisee do after release to him all his right; this is a good release to bar him; [and yet in this instance the second disseisee has merely a right of entry, but he is tenant in law.] So if a donee in tail discontinue in fee, and the donor release to the discontinuee and die; this is a good release against the donor; [because the discontinuee has the seisin, and the owner of the remainder or reversion has a right.] So if the donee in tail be disseised, and after the donor release to the donee all his right, this is good, [on account of the privity and tenure;] but in this case nothing of the reversion [or right to the reversion] will pass by the release; for the donee had then nothing but a right. But if any rent be reserved on the estate tail, the rent is gone by the release. So if a lease be made to one for life rendering rent, and the lessee is disseised, and the lessor release to the releasee [*read*, lessee] and his heirs all his right; in this case, albeit the rent be extinct, yet nothing of the right of the reversion doth pass. And yet if a woman that hath right of dower release to the guardian in chivalry; this is a good release, and her right or

Lit. Sect. 449.

Co. super Lit. 266. Lit. Sect. 455. 456.

Extinguishment.

title of dower is gone; [because dower is demandable against him.] But if a disseisor make a lease for years, and the disseisee release to the lessee for years; this release is void, because he hath no[t any] freehold. [And note the difference between a release of a right to a tenant for years, and a release operating by way of grant in enlargement of an estate for years.] But if he make a lease for life, and the disseisee release to the lessee for life, this is a good release, [for the benefit of the lessee for life and those in remainder or reversion.] So also a release to the disseisor after the lease for years made, is good. [So it is even if the lease be for life.] And if lessee for years be ousted, and he in the reversion disseised, and * the disseisor make a lease for years, and the first lessee release to him; this is a good release [for the right to the possession.] Also in some cases a release made to one that hath neither freehold in deed, nor freehold in law, is good, when he hath an estate in reversion or remainder; as in the case before, where a release is made by the disseisee to the disseisor after he hath made an estate for life. So if the demandant in a real action release to the tenant that comes in by receipt upon a prayer of aid or voucher upon a warranty; this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other besides the demandant, it is void. So if the tenant in a real action alien, hanging, [*i. e.* during the pendency of] the *precipe quod reddat* against him, and after alienation the plaintiff release all his right in the land to him, this is a good release; [for as between the parties the alienation is void, and the releasee is tenant for the purpose of the demandant.] So if a disseisor make a lease for life, the remainder to another for life, the remainder to a third in tail, the remainder to a fourth in fee, and the disseisee release to either of them in remainder; this is a good release [for the benefit of all.] But if in this case tenant for life be disseised, and after he that hath right (the possession being in the disseisor) doth release to either of them in remainder; this is a void release; [the disseisin of the particular tenant being a disseisin of all those in remainder or reversion, so as to reduce them to a right of entry, and not to leave in them any estate to be strengthened by release.] But in all the cases of a release of

Co. super Lit. 265.

*P. 330.

Lit. Sect. 448, 449, 450, 451. Co. 8. 151.

Ten. 70.] And if there be lessee for years, the remainder for life, and he in reversion release to the lessee for years or to him in remainder for life, and his heirs, all his right; this is a good release to work an enlargement of estate. [See *Gilb. Ten.* 70; 1 *Inst.* 273, accordingly.] So if one make a lease for life, and grant the reversion for life, and then the lessor doth release to the grantee of the reversion and his heirs; this is a good release to enlarge the estate of the grantee, and here is privity enough. If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *C.* for life, the remainder to *A.* in fee, and *A.* die, and his heir doth release all his right to *B.* being in possession; this is a good release, and gives the fee simple, [notwithstanding the intermediate estate for life, and though the estate tail cannot be merged so as in strictness to be enlarged; and if there be tenant for life and remainder in tail, with remainder to the tenant for life in fee, the tenant for life may by *release* pass his remainder in fee, but not his estate for life, to the tenant in tail. 2 *Roll. Abr.* 400, pl. 7. The estate for life may pass by grant.]

Co. super Lit. 273.

Bro. Release, 71.

But if *A.* make a lease to *B.* for life, and the lessee maketh a lease for years, and after *A.* in the life time of the tenant for life maketh a release to the lessee for years; this release [as such] is void, and will not enlarge his estate, for want of privity. So if a man make a lease for twenty years, and the lessee make a lease for ten years, and the first lessor doth release to the second lessee, [*viz.* the underlessee,] and his heirs; this release is void. [In each of those cases the deed may operate as a grant, and must be pleaded accordingly.] So also if the donee in tail make a lease for his own life, and the donor release to the lessee and his heirs; this release is void, [because the privity is between him and the donee in tail.] So also if the donee in tail make a lease for his own life, and after the donor release to the donee [should be lessee] and his heirs; it seems this is not a good release. [On the text it may be said, why not? There is certainly a continuing estate and privity. Neither of the books cited is an authority for the conclusion, and the conclusion itself was probably drawn from a mistaken idea, that when tenant in tail hath

Co. super Lit. 273. Lit. Sect. 516.

granted an estate for his life, he hath granted all the estate that he has; but it is now clear that a reversion is left in him. If he had granted an estate *pur autre vie*, and by that means discontinued the estate tail, the point would be tenable; besides, on referring to *Coke on Littleton* it will be found, that donee is inserted by mistake for lessee, and then the proposition is law, because there is not any privity between the lessee and the donor of the estate tail.] Also one joint-tenant or coparcener may release to another, and thereby transfer all his estate and give the whole interest unto his companion; and this is a good release to pass all his or her part of the land, [and the fee simple thereof, without any words of inheritance; and therefore this species of release, which is called a release *mitter le estate*, differs from a release in enlargement of an estate, to which words of inheritance are essentially necessary, if an estate in fee or in tail is to pass. 1 *Inst.* 273 b; *Gilb. Ten.* 70.] And if there be three joint-tenants * in fee, and they make a lease for life, and after two of them release all their right in the land to the third, this is a good release (5), [for the tenancy and privity still subsist between them.] So if one make a lease for life to another, and after he grant the reversion to seven, and the tenant for life doth attorn, and after four of the seven release all their right to the other three, and after one of the three release to the other two, [or one of the three releases to one of the others of them, 1 *Inst.* 273 b;] these are good releases. So if a lease for years be made to two, to begin at a day to come, a release by one of them to the other is good to give all the term and all the land to the releasee. [This is another instance of an interest which may be released, though it cannot be assigned; and though the person who has an *interesse termini* cannot surrender it, he may release it to the lessor. So he may surrender or waive it by construction of law, as by accepting a lease incompatible.] But it seems one tenant in common cannot release to another tenant in common, [on

Bro. Release, 77. Perk. Sect. 84.

*P. 327.

10 H. 4. 3.

(5) A release being the proper mode of conveyance from one joint-tenant to another; and such joint-tenant not being capable of making a feoffment to his companion; see before in page 201, and note thereto. If one joint-tenant *grants, bargains, and sells*, or *gives, grants, and confirms* his estate unto his companion, either of these will operate as a release. 1 *Vent.* 78; 1 *Sid.* 452.

3. *In respect of privity.* a bare right to him that hath an estate of a freehold in deed or in law, generally there needs no privity to make the release good; as in the cases before of a release made to the tenant for life of the disseisor, and them that follow. For if tenant for life make a lease to another for life of the lessee, the remainder over in fee, and the first lessor release all his right to him to whom the tenant made the lease for life; this is a good release and perpetual bar, albeit the release be not to him and his heirs. [This case supposes a feoffment to have been made by the first lessee, so as to divest the estate of the reversioner, otherwise no more than an estate for life passes.] And so it is in case of a reversion. [The fee in reversion could not pass without words of inheritance.] Co. super Lit. 275. Lit. Sect. 470, 471. Co. 10. 48.

If lessee for years be ousted, and he in the reversion disseised, and the disseisor make a lease for years, and the lessee that is ousted doth release to the lessee of the disseisor, this a good release; [and in these cases, it is apprehended, the release of the lessee for years will extinguish the right to the possession during the term, so that the reversioner, &c. may take advantage of the release, and consequently the estate of the second lessee would not be enlarged.] And yet if the disseisee do release to the lessee for years of the disseisor, this is void [for want of freehold. Though the lessee for years be not capable of a release of right from the rightful owner of the inheritance, yet the converse is not true, for it is apprehended a lessee for years, whose estate is turned to a right, may release to the freeholder.]

If lessee for a thousand years be ousted by the lessor, and he make a lease for two years, and the lessee for a thousand years release unto him, this is a good release, [and it is apprehended would extinguish all the term.] But if a lessor disseise his lessee for life, and make a lease for a thousand years, and the lessee for life release to this lessee of a thousand years, this is void; [for a freehold cannot be released to a termor for years.]

If one be disseised, and after another doth disseise him, and the disseisee release to the last disseisor, this is a good release; [and this release will complete the title, by annexing the right to the estate, or by releasing the seisin or estate from the right, and will Co. super Lit. 277. Lit. Sect. 473. 470. 471. 478.

exclude the right of entry, existing in favour of the first disseisor, as against the second disseisor.] So if *A.* disseise *B.* who enfeoffeth *C.* with warranty, [who is therefore in by title,] who enfeoffeth *D.* with warranty, and *E.* disseiseth *D.* to whom *B.* the first disseisee releaseth; this is a good release, and doth defeat all the mesne estates and warranties; [because the title of *A.* does not depend on the feoffment by which the warranties were created, but on the disseisin, and the release by the rightful owner.] So if my disseisor lease for life, and the lessee for life alien in fee, and I release to the alienee all my right, [thus giving him my right, and confirming in effect the lease for life,] &c. this is *a good release *P. 331.
and will bar me of my entry: but if my entry be gone, [or rather no right of entry be in me at the period of my release,] as if I lease for life, and my lessee be disseised, and that disseisor is disseised, and I release to the second disseisor; in this case, the first disseisor may enter upon the second, [since the first disseisor has a good title as against the second disseisor. So if the right of entry be converted into a right of action, then the release to the second disseisor, though good as against the releasor and his heirs, would not avail against the first disseisor and his heirs. But the first disseisor could not take advantage of this release, or of any warranty annexed to the release, although he might take advantage of a fine, &c. operating by estoppel. *Buckler's case*, 2 *Rep.* 55, 5 *Resol.*] So if my disseisor, in the case aforesaid, make a lease for life, and the lessee for life maketh a feoffment to two, and I release to one of the feoffees; this is a good release, and will bar me and my disseisor also, [for the benefit of both the feoffees. But a release to one of two disseisors will give a complete title to the releasee, in exclusion of the other disseisor. *Litt.* §472; *Gilb. Ten.* 55.] So if tenant for life let the land to another for the life of the lessee, the remainder to another in fee, [being a wrongful alienation passing the fee,] and the lessor release to his tenant for life, [or to the remainder-man;] this is a good release. [And each of them, the tenant for life and the remainder-man, may take advantage of the release.]

If one that hath a son within age be disseised and die, and the disseisor die seised, and the land

descend to his heir, [being a descent which does not toll the right of entry, so as to convert it into a right of action,] and a stranger abate, to whom the son when he comes of age doth release; this is a good release, [annexing the right to the seisin or estate.] So if one be disseised by an infant which doth alien in fee, and the alienee die seised, and his heir entereth, the disseisor being within age, and the disseisee release to the heir of the alienee; this is a good release. [In both these cases, the infancy protects the infant, so that the descent does not toll his right of entry.] But where an inheritance or an estate for life is released to one that is but tenant for years, the release is not good; [even by way of conveyance and enlargement,] without privity. And therefore if tenant, [*viz.* the rightful owner of an estate,] for life, or in fee, release to the lessee for years of his disseisor; this is not good. But the release of a term of years to the lessee for years of him that doth eject him, [the first lessee; or to the person himself who is the ejector,] is good enough, without privity, as in the case before.

9 H. 6. 43.

Co. 10. 48.

Warranty.

But here note, that in cases of a void release of a right to an inheritance or freehold, where there is a warranty contained in the deed, the warranty may be good, and be used by way of rebutter, albeit the release be void. As if the son of the disseisee release with warranty in the lifetime of his father; or if there be grandfather, father and son, and the father disseise the grandfather, and make a lease with warranty and die; in both these cases, albeit the son be not barred by the release, yet he is barred by the warranty; [as a defence to the possession, or a rebutter of the demand; for the difference between, 1st, a mere indenture of demise operating by estoppel; 2dly, a mere release; 3dly, a release with warranty; 4thly, a feoffment; and 5thly, an estoppel by fine; see 2 *Term Rep.* 371; 1 *Inst.* 265.

Co. super Lit. 265.

4. In respect of the words whereby it is made.

4. Such words as will make a good release in the cases of releases that enure by way of enlargement of estate, will make a good release in these cases [of a release of right.] And note that this kind of release is good without any limitation or specifying of the estate; for by a release of all a man's right, without saying to have and to hold to

Co. super Lit. sect. 467.

him and his heirs, &c. in all the cases before, he that makes the release is barred of his right for ever, [whether the releasee have a particular estate, or the fee simple, and whether he has a freehold in possession or only in remainder or reversion, but he must have an estate of freehold, either in possession or reversion;] for if I be seised of an estate in fee [for life or in tail] by wrong, and he that hath right release to me all his right, albeit it be but for one hour, yet this is a good release for ever, [and shall enure to the benefit of all persons connected in privity of estate with the releasee.]

Lit. Sect. 480. Co. super Lit. 280. 305. Perk. Sect. 70.

If there be lord and tenant, and the lord release to the tenant all his right that he hath in the seigniory, or all his right that he hath in the land, &c. this is a good release to extinguish the * seigniory. And in this case there needs no words of inheritance or limitation; for by a release of all the right in the seigniory, the same is extinct for ever, without saying "to him and his heirs." And yet in this case the lord may by apt words release his seigniory to the tenant only in tail, or for life, and it shall be good so long, [operating by way of grant. So that there is a difference between a release in extinguishment of a service or a charge, and a release of a mere right.] But if a lord grant to his tenant, that he shall do his suit to another manor of the lord's; or that the tenant shall give him yearly 12 *d.* for his suit; this grant will not extinguish and determine the [ancient] services or tenure. [There is merely an agreement to accept one benefit, while paid, in lieu of the other.]

7. What releases may be made of other things; and what shall be said a good release in deed of such things; or not; and by what words. Of a seigniory, rent-service, common, or the like.

*P. 332.

Lit. Sect. 457. Co. 10. 58. super Lit. 268.

If there be lord and tenant, and the tenant be disseised, and after the lord release all his right, &c. to the tenant; by this release the service or seigniory is extinct: for albeit a right regularly cannot be released to him that hath but a bare right, yet a seigniory may be released and extinct to him that hath but a bare right in the land; [because, as between the lord and tenant, the tenancy continues notwithstanding the disseisin. Hence the difference between the tenant and the very tenant.] But if the tenant make a feoffment in fee, and then the lord release all his right, &c. to the tenant; this is not good to extinguish the seigniory or services; [because, in this case, the feoffment hath destroyed the tenancy, as between the lord and

the releasee, for the releasee is seised under a feudal contract. So if the disseisee, the rightful tenant, had released to the disseisor, the lord could not afterwards have released the services to the disseisee;] but it will discharge all arrearages.

If a rent-charge, common of pasture, or any other profit apprender, be issuing out of my land, and he that hath it doth release it to me; this is a good release and will extinguish it, [or it may be leased or granted for a time.] But if I be disseised of the land, and have but a right at the time of the release made; the release is not good, as it is in the case of a rent-service and a seigniory; [because the rent-charge, &c. is chargeable on the possession or seisin only, while, as between the lord and the very tenant, the tenant, notwithstanding the disseisin, continues tenant to the lord.] But if lands be given to me in tail, or for life, rendering rent, and I be disseised, and after the donor release to me all his right in the land; this is a good release and shall [operate to] extinguish the rent, [because this rent is annexed to the reversion; and as between the reversioner and the disseisee, the tenancy continues; at least there is a privity of title and tenure. But such release would not pass the right of the reversioner to the fee.] So if in this case where I am tenant in tail, and I make a feoffment in fee [operating as a discontinuance] rendering rent, and after I release to the feoffee; this is a good release, and hereby the rent is extinct; [for this rent was reserved to the donee or discontinuor, and he and his heirs only could claim it.] And if two coparceners be of a rent, and one of them take the terre-tenant to husband, and after either of them release; [the release by the wife, while under coverture, must be by fine, &c.] these releases will be good (9).

Lit. Sect. 480. 336. 357. Co. super Lit 305. Lit. Sect. 455. 456. Co. super Lit. 273.

If one disseise me of land, and then grant a rent-charge out of the land, and I, reciting the same, grant, release to the grantee; this release it seems is good, and will bar me so, as after my re-entry I shall not be able to avoid it. [The authorities in the margin are contrary. A confirmation would be

Lit. Sect. 527. Co. super Lit. 300.

(9) In *Co. Lit.* 273, b. it is said, if two coparceners be of a rent, and the one of them taketh the terre-tenant to husband, the other may release to her, notwithstanding the rent be in suspense; and it shall enure by way of *mitter l'estate*, and she may release also to the terre-tenant, and that shall enure by way of extinguishment.

good, but a release is void; however, at this day, an instrument in the form of a release might be pleaded as a confirmation. This point may be further explained by the following observations: A confirmation would avail the grantee, but a release as such would not. The author must therefore have inserted one case for the other through mistake. It is the property of a confirmation to give stability and title as against the person confirming, and his heirs, or other persons deriving their title under him, to that which before was voidable; while a release of a rent-charge would only extinguish a mere right which the person releasing had thereto. But in this case it was not to the rent, but to the land on which it was charged, that the disseisee had a right or title. A release would therefore only express an agreement to relinquish a right, which as it was never possessed, could not be released. But as the grantor of the rent, had title to take the rent during the time for which it was granted, if the estate of the disseisor should so long continue, the person disseised might well make a deed confirming that grant.]

Co. super Lit. 270. Of an advowson, &c.

If two have the grant of the next advowson or avoidance of a church, before it be void one of them may release to the other, but afterwards they cannot.

Co. 1. 112. Perk. Sect. 823. 764. Of a condition.

If *A.* make a feoffment in fee, gift in tail, lease for life or years to *B.* on condition that upon such a contingent [or event] it shall be void; in this case *A.* may, before the condition broken, release all his right in the land, or release the condition to *B.*; and this [release] will be good to make the estate absolute and to discharge the condition. So if a feoffee * on condition make a gift in tail or lease for life, and after the feoffor release to the donee or lessee; this is a good release to discharge the condition. So if a copyholder surrender to the use of another on condition, and this [surrender] is presented to be without condition, and after the surrenderor doth release to him to whose use the surrender were made, all his right, &c. this is a good release, and doth extinguish the condition. [So the release would extinguish the condition, if the surrender were presented to be on condition.] But if a disseisor make a feoffment on condition, and the disseisee release to the feoffee on

*P. 333.

condition; howsoever this doth bar the right of the disseisee, yet it doth not discharge the condition. [Because the feoffee, by accepting the feoffment on condition, is estopped from denying that the feoffor can take advantage of the condition when broken. So if a disseisor grant a rent-charge in fee, and the disseisee confirm the rent, and afterwards re-enter, he shall not, in derogation of his own confirmation, avoid the rent-charge.]

Of a power of revocation.

Where a power or authority is such, that it doth respect the benefit of the lessor, as in the usual cases of power of revocation of uses, when the feoffor, &c. hath power to alter, change, determine or revoke the uses being intended for his benefit, and he release to any one that hath a freehold in possession, reversion, or remainder, by the former limitation; this is a good release, and doth extinguish the power, and make the estates that were before defeasible absolute, and it doth se[*read*, pre]clude him from any power of alteration or revocation. [So of a power, being an interest in any other person; as a power of leasing, jointuring, &c.] But if the power be collateral, or to the use of a stranger, [*i. e.* a mere authority,] and nothing to the benefit of him that makes the release: as if *A.* make a feoffment to *B.* to divers uses, provided that *B.* shall have a power to revoke the uses, and *B.* release to any one of them that hath a use; this [release] doth not extinguish the power, as it doth in case where the power is given to *A.* and *A.* doth release it. [The difference is between powers coupled with an interest, and powers which are mere authorities; the former may, the latter may not, by the person by whom they are exerciseable be released or defeasanced.]

Co. 1. 113, 113. 173. 174.

Of a warranty.

If a feoffment be made with warranty, and the feoffee release the warranty; this [release] doth extinguish it, [the warranty.] And so it is of other warranties. But if tenant in tail release the warranty annexed to his estate tail, this [release] doth not extinguish the warranty, [as against his issue in tail, though it will preclude him for his time, and his alienees, from taking advantage of the warranty. So if a particular tenant release the warranty annexed to the fee, this release will not bind those who have interests in reversion or remainder.]

Bro. Release, 88. 21 H. 7. 29. Co. 5. 27.

Of debts and other duties personal.

1. In respect of the persons.

Any man may release any debt or duty due to himself. Also a man may discharge or release any thing due, or any wrong done, to his wife, before or after the marriage (10); [so as the same duty may happen during the coverture; (1 *Salk.* 327;) or any cause of action which she hath as executrix or administratrix.] And therefore if a trespass were done, or a promise were made, to my wife before the marriage, I may at any time during the marriage release this. So if any wrong be done, or obligation, statute, or promise made to her alone, or to her and me together, at any time during the marriage; I alone may release and discharge this. And if my wife be an executrix to any other man, I may release any debt or duty due to the testator.

Husband and wife.

Per Ch. Justice, B. R. Mich. 17 Jac.

And if a legacy be given to a woman sole, to be paid at Michaelmas next, and I marry her, and I release the legacy before the day; it seems by this, the legacy is gone (11). [But it is said, a possibility which cannot fall due during the coverture, cannot be released by the husband. See 1 *Salk.* 327.]

Co. 5. 27.

Infant.

An infant executor may release a debt duly paid unto him of the testator's debt. [But see the act of 38 Geo. 3, c. 87, which renders infants incapable to act as executors, &c. till they are of the age of twenty-one. In the mean time administration may be granted.] But if he release that which he doth * not receive, it is a void release (12). And regularly the release of an infant is void (13).

*P. 334.

2. *In respect of the time.*

Co. 5. 27. 9. 39.

An executor, before probate of the will, may release a debt or duty due to the testator; and this

(10) By the marriage the husband acquires such an interest in all debts due to the wife, that he may release them; and therefore the release of the husband is a good bar to a debt due before the coverture. *Roll. Abr. Release*, (D.)

(11) If husband and wife be divorced a *mensa et thoro*, and a legacy is left to the wife, and the husband release it, she is thereby barred; for the marriage continues, and the husband has all her right. *Per Holt*, 1 *Salk.* 115. And in the case of *Palmer* v. *Trevor*, 1 *Vern.* 261, where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the feme and took her receipt for it, yet on a bill brought by the husband, it was decreed not to be a good payment. See further how far the husband's release shall bind his wife, in *Bac. Abr. Release*, (F.); *Vin. Abr. Release*, (H.); *Com. Dig. Release*, (E. 1.)

(12) See accordingly *Russell* v. *Pratt*, *And.* 117. S. C. *Mo.* 146, says, that *Plowden* was strong in opinion against the judgment; but *Wray*, C. J. said to him, "that he had conferred with all the justices of England, and they had agreed to give judgment for the infant, because, the release being without consideration, the infant would charge himself in a *devastavit*." S. C. cited in *Roll. Rep.* 336.

(13) Or voidable. See before, with respect to deeds made by infants, in page 7, 54, 232, and the references in the notes thereto.

release is good to bar him (14). [But the release cannot be given in evidence until the will hath been rendered authentic by letters of probate or letters of administration.]

A future or contingent promise may be released and discharged before the contingent happen, [by the words, promise, covenant, &c.] Trin. 4 Jac. in Elton's case.

A debt on an obligation, or rent, may also be released before the day of payment, as well as after, but not, [*i. e.* each cannot be effectually released,] by the same words. And therefore if one promise to *I. S.* that upon the surrender of *I. S.* he will pay him an 110 *l.* and after the promise, and before the surrender, he release this debt; this [release] doth discharge the debt. But if the promise be, that if the surrenderee shall sell the land, and shall have 500 *l.*, that then he shall pay the surrenderor an 100 *l.* more, and the surrenderor before sale release this sum, [as distinguished from the promise, &c. *viz.* the right to have the sum;] this is no discharge of it. And yet a release of the promise is a discharge of it. And if *A.* promise to me, that if *I. S.* do not pay to me an 100 *l.* 1 *Octobris*, that he doth owe me, that *A.* will pay me the 100 *l.* 1 *Novembris*, and I, 10 *Septembris*, release to him this debt, or all actions and demands; in this case this release is not good to discharge this promise. But by a release of the promise, the same is discharged. [In the one case, the promise itself creates an immediate or present duty to be performed on an act done; in the other case, the act must be done to create the duty. The right to have the sum promised in specie, is in the former case present, though the right to receive it is to commence on an act to be done. In the latter case, though immediately after the promise, the person to whom it is made hath a right to have the promise kept, yet the promise does not give any right to the sum in specie. That right is to arise on the performance of the act, which was the inducement to the promise. 1 *Inst.* 292, a.] Hil. 16. Jac. B. R. Brisco v. Heires.

Of actions.

If a man release to another all actions, and do not say further, which he hath against him; this Bro. Release, 29.

(14) See accordingly in *Plow.* 281; *Co. Lit.* 292, b; and more amply as to releases by executors and administrators, in *Went. Office of Ex.* 33; *Bac. Abr. Release*, (E.); *Com. Dig. Administration*, (B. 9.)

is as good a release as if these words were inserted: *quod necessario subintelligitur non deest* (15). [These words, as they are understood in law, are the same as *upon him*, when applied in reference to the person to whom a release is made of all *demands*, and will confine the operation of a release of all demands to *personal* actions. 1 *Inst.* 291, b. and *Lord Nottingham's* note thereto.]

Co. 9. 531. And all these releases must be made by apt words, and such as the law shall judge sufficient for that purpose.

Bro. Release, 56. 58. And in all these cases care must be had there be no[t any material] mistakes; for mistakes will make releases and confirmations void, as well as other grants. And therefore if *A.* make a release to *B.* in this manner; *Noveritis, &c. me* A. *de* B. *remisisse, &c.* B. *omnes actiones quas idem* B. *habet versus* A. whereas it should be *quas idem* A. *habet versus* B.; this release is void (16).

Co. super Lit. 264. If there be lord and tenant, and the lord purchase the tenancy; by this means the services are released and extinct in law, [and the lands become parcel of the manor, and pass under that denomination, and may pass inclusively with the manor, by a will made prior to the purchase of the tenancy. So if the tenant purchase the services, they are extinguished in the tenancy, if he have equal estates in the tenancy and the services.] And if the lord disseise his tenant, and make a feoffment in fee by deed or without deed; this is a release in law of the seigniory. [But the seigniory shall revest if the tenant restore himself to the seisin; *sed quære.*]

8. *What shall be said a release in law; or not; and how.* Of a seigniory. Of a right to land.

Co. Idem. If a disseisee disseise the heir of the disseisor, [*i.e.* after the right of entry is converted into a right of action, so that the entry of the disseisee is taken away,] and make a feoffment with or without a deed; this is a release in law of the right in fee. And if he make a lease for life, this is a release in

---

(15) A release of all actions, discharges a bond to pay money at a certain day to come, for it is *debitum in presenti, quamvis sit solvendum in futuro*; and albeit no action lieth for the debt, yet because the right of action is in the releasor, the release of all actions is a discharge of the debt itself, *Co. Lit.* 292, b; by a release of all actions, actions real, personal or mixed, are discharged, *Com. Dig. Release*, (E. 3.) See further, in *Bac. Abr. Release*, (I. 2); *Vin. Abr. Release*, (P.)

(16) As to mistakes and misrecitals in releases, see *Bac. Abr. Release*, (L.); *Vin. Abr. Release*, (L. 3.)

law of the right, so long as the lease doth last. [But if the heir may rightfully re-enter, the right shall revest by his entry. Not so if he release to the feoffee. *Co. Litt.* 264, b. An entry by a disseisee, after the right of entry is taken away by descent, or by the statute of limitations, &c. is wrongful; and though he obtain the possession, an ejectment may be maintained against him by the disseisor, or his heir, alienee, &c.; (*Litt.* § 487;) for the right of possession is acquired by the disseisor, &c. 2 *Prest. Abstr.* 289.]

Of a right of action. Executor.

*P. 335.

* If a creditor, as an obligee, or the like, make a debtor, as the obligor, &c. his executor; by this means the action is released by act of law, and yet the duty remains still, for the executor may retain so much of the goods of the testator, [as against other creditors in equal degree. So if a debtor makes his creditor executor, and he proves the will, or acts as executor, the debt is extinguished at law, though not in equity, as against creditors.] And if the creditor be a woman, and she marry with the debtor; by this [marriage] the debt [if it might fall due during the coverture] is released in law. And if there be two obligees or debtees, and one of them, being a woman, is married to the obligor; this is a release in law of the debt, albeit the creditor be an infant (17). [The general rule, that a personal demand, once suspended, is extinguished, seems to govern all these cases.]

Co. super Lit. 264. 8 E. 4. 3. 21 E. 4. 2.

But if there be a woman executrix to the debtee, and she take the debtor to the husband, this is no release in law (18).

M. 30 & 31. El. B. R. adjudged. Co. 8. 136.

And if an obligor be made administrator of the goods and chattels of the obligee, this is no release in law (19); [because the grant of administration

---

(17) See accordingly 1 *Salk.* 306; 8 *Co.* 136. If an infant at the age of seventeen years makes his debtor executor, it is a release in law; for as the law gives him power to make an executor, it gives his executor the same advantages with others. *Co. Lit.* 264.

(18) Because she hath the debt in another right; and if this amounted to a release in law, it would be a *devastavit*, which is a wrong the law will not suffer. *Co. Lit.* 264. In *Crossman* v. *Reade*, *Cro. Eliz.* 114, it was adjudged, that by the intermarriage the debt which the executrix had *in auter droit*, was not extinct but suspended, and that after *baron*'s death an action would lie against his executor. A similar distinction is made in the law of merger, where different terms for years happen to vest in the same person in different rights. [See 3 *Prest. Convey.* 273, with the distinctions.]

(19) See accordingly 1 *Wood*, 697; and more amply in what cases a release by operation of law is created, and the effect thereof, in *Vin. Abr. Release*, (L. 2.); *Bac. Abr. Release*, (B.); *Com. Dig. Release*, (A. 2.)

is the act of the ordinary or of the law, and not of the obligee or creditor. The distinctions on this subject are collected and exemplified by Mr. *Thomas*, in a note to his Digest of *Coke on Littleton*, vol. 2, p. 453, n. (*c*), and are well deserving of attention.

Co. 6. 15. 5. 22. Bro. Releases, 84. 94. Stat. 23 H. 8. ch. 3.

Where divers join in any suit or action to recover any personal thing of which they are to have the joint benefit or interest, when the law doth not compel them to join, there the release of one of them shall bar all the rest. And therefore if two men join in an action of debt, trespass, or the like, and one of them alone doth release to the defendant; this is a bar to the other plaintiff also. So if [their title to the debt be joint; and therefore if] a statute or an obligation be made to two or more, and one of them release it to the conusor or obligor; this is a discharge of the whole duty, and a bar to the rest, so that they can make no use of the statute or obligation. But if divers be charged in an action, and they for the discharge of themselves only join in a suit or action, where also they can do no otherwise, being compelled by law to join; in this case, the release of one of them shall not hurt the others. And therefore if divers join in a writ of error, attaint, or *audita querela*, and one of them release to the defendant in the writ; this will not bar the rest of their remedy, but they may go on in their suit notwithstanding.

9. The force and virtue of it; and how it shall enure and be construed and taken.
1. In respect of the persons; and where a release made by one shall bind another; and where not; and where a release made to one, shall enure to another; or not.

16 H. 7. 4.

If there be two or more executors, and one of them alone release a debt or duty to the testator before judgment in a suit, had by all the executors against the debtor, this will bar all the rest. But otherwise it seems it is after judgment had. [Why so? The same law of administrators; though formerly a doubt on this point was entertained, on the ground that administrators had a joint authority. *Jacomb* v. *Harwood*, 2 *Ves.* sen. 265; *Heath* v. *Perceval*, 1 *Str.* 403.]

Executors.

Co. super Lit. 205. Lit. Sect. 458. 470. Co. super Lit. 275. 290. 267, 268. Co. 8. 151.

If a writ of ward be brought by two, and one of them release; this shall not bar his companion, but shall enure to his benefit; for hereby he shall have the whole ward. [Wardship is a title, and not merely a debt or duty.]

A release made to the tenant in tail, or for life, of the right to the land, shall avail and enure to him that hath a reversion or remainder in deed.

And so *e converso*, a release [of right] made to him that hath a remainder or reversion will avail and enure to the benefit of him that hath the estate tail, for life, or years precedent. As if a disseisor
*P. 336. make a lease for life, and the disseisee * release to the tenant for life; this [release] shall enure to the disseisor. So if he, or a tenant for life, make a lease for life, the remainder for life, the remainder in tail, the remainder in fee, [operating by way of wrongful alienation]; and the disseisee or first lessor doth release all his right to any of them in remainder; this [release] shall enure unto and benefit all the rest. And if the husband make a lease of his wife's land, [operating by way of discontinuance,] to one for life, the remainder to another in fee, and the wife after his death doth release all her right in the land to him in remainder; this shall enure to the lessee for life. [The husband and wife are seised in fee in right of the wife, and the wife hath merely a right of entry; and formerly when there was a discontinuance, a mere right of action, to avoid his alienation.]

If a disseisor make a lease for life, and the disseisee release all his right to the tenant for life; this shall enure to the benefit of the disseisor. But if the disseisee release no more to the tenant for life, but all actions; this release will not benefit him in remainder, or reversion, after the death of the tenant for life, [for the right of action is only against the tenant for life; and the release is, by its effect, a confirmation of title.] Co. super Lit. 275.

If a disseisor make a feoffment to two in fee, [as joint-tenants,] and the disseisee release to one of the feoffees, this [release] shall enure to both; [because they are seised under a feudal contract. But if he had entered and defeated the seisin, and afterwards enfeoffed one of these feoffees, that feoffee would have had a good title against his companion. As between purchasers, equity would probably afford relief.] Lit. Sect. 472.

If tenant in tail be disseised by two, and he release to one of them, this [release] shall enure to both, [since this is the only mode under which the fee can be in the parties. If the release operated to one releasee only, it would be a confirmation only for the life of the tenant in tail, and the continuance of the issue, and would be defeasible by the Co. super Lit. 276.

issue, and the law will not allow such commixture of interests. Such release would revest the reversion or remainder in fee. And this is the true reason why the releasee does not gain a title against his co-disseisor.] But if the king's tenant be disseised by two, and he release to one of them; this shall not enure to the other; [because the disseisin is by law confined to the particular estate, since the king cannot be disseised, and consequently this release may give a title to the land, for the particular estate, to the releasee.] So if two joint-tenants make a lease for life, and then disseise the tenant for life, and he release to one of them; in this case, his companion shall have no benefit by it. [The release places the releasee in the condition of the tenant for life, and by operation of law revives the former reversion; for they have the reversion in fee by right, and the freehold as a distinct estate by wrong, and the release to one of the disseisors makes the wrongful possession a rightful estate.]

Lit. Sect. 472. 522. If tenant in fee simple be disseised by two, or two do abate or intrude, and he doth release to one of them; the other shall have no benefit by this; [for the release is equivalent to an entry and feoffment: it annexes the right to the possession.] But if tenant for life do, after a disseisin done to him, release to one of the disseisors; this shall enure to both; [because they have the fee simple. As the releasor has only a particular estate, he cannot give the right for a longer period than his life. The disseisors have the fee simple by disseisin, though the release operates for the benefit of both, since otherwise it must determine the disseisin, and the title under the same. 1 *Inst.* 275, b.]

Co. super Lit. 276. And if two disseisors be, and they make a lease for life, [which is as against them a rightful estate, and by means of which they have a reversion,] or years, and after the disseisee doth release to one of the disseisors; this shall enure to them both, and to the benefit of the lessee for life also; [since, without such operation, they the disseisors would not have a joint reversion, *i. e.* the title would not be in *statu quo*.]

And if lessee for years be ousted, and he in reversion disseised, and the lessee release to the disseisor; the term of years is hereby extinct, and

the disseisee may take advantage of it and enter presently. [This is a very important point in titles, depending on adverse possession. The rule does not apply to estates for life. Would it apply if the right of the termor for years were barred by non-claim on a fine, &c.?]

But if two joint-tenants in fee, be disseised by two disseisors, and one of the disseisees release to one of the disseisors all his right; this [release] shall enure to the other, for this extendeth but to a moiety; [and by any other operation it would convert a joint-tenancy into a tenancy in common. *Gilbert on Tenures*, p. 59, puts this case on the ground of notoriety.]

If a release be made by a woman of her dower to the guardian in chivalry; this [release] shall enure to the heir, and he may take advantage of it, [and it will be effectual, because dower may be demanded against him.] Co. super Lit. 266.

If tenant for life be disseised by two, and he in the reversion and the tenant for life join in a release to one of the disseisors; this [release] shall not enure to the other, [because they give the right to the entire fee *uno flatu*. *Gilb. Ten.* 67.] But if they do severally, [at distinct times, and as distinct transactions,] * release their several rights, their several releases shall enure to both the disseisors, [because they do not release the entire fee at once.] Co. super Lit. 276.

*P. 337.

If a mortgagee upon condition, after the condition broken, be disseised by two, and the mortgagor that hath the title of entry, doth release to the one disseisor; this shall enure to both; [for the releasor hath not any title of entry, so as to have his release treated as an entry and feoffment, in respect of any personal liability.] And like law is for an entry for mortmain, or a consent to mavishment, &c. Co. Idem.

If there be lord and two joint-tenants, and the lord release to one of them; this shall avail his companion, [so as to release the seigniory.] Co. super Lit. 269.

If tenant in fee simple make a feoffment in fee, and after the lord release to the feoffor; this [release] shall not enure to the feoffee to extinguish the seigniory, [for want of privity.] But if he release to the feoffee, this [release] shall enure to the feoffor to extinguish the seigniory.

If there be lord and tenant, and the tenant make Co. super Lit. 279

a lease for life, the remainder in fee, and the lord release to the tenant for life; the rent is hereby wholly extinguished, and he in remainder shall take advantage of it: as when the heir of a disseisor is disseised, and the disseisor makes a lease for life, the remainder in fee, and the first disseisee doth release to the tenant for life; this [release] shall enure by way of extinguishment to him in remainder, *viz.* to the lessee for life first, and after to him in remainder. [A grant in fee of the rent to the tenant for life would have passed the fee, and the rent would have been suspended for his life.]

Co. super Lit. 267. If two tenants in common of land grant a rent of 40 *s.* out of it, and the grantee release to one of them; this shall not enure to the other. [Because, in construction of law, there are several rents, each issuing out of a distinct moiety.] But if one be tenant for life of lands, the reversion [or remainder] in fee to another, and they join in the grant of a rent out of the lands, and the grantee release either to the tenant for life, or to him in reversion [or remainder;] this [release] shall enure to the other, and extinguish the whole rent. [Because there is only one rent, derived partly out of the estate for life, and partly out of the reversion; each granting *pro interesse suo.*]

Co. super Lit. 276. If two men gain an advowson by usurpation, and the right[ful] patron release to one of them; this release shall enure to them both.

Co. 5. 59. super Lit. 232. Lit. Sect. 376. If two be bound jointly and severally in any obligation, or other specialty, and the obligee, &c. release to one of them; this [release] shall enure to discharge the other also, if it be a good release as to him that makes it. [The like rule applies to joint and several covenants.] But otherwise it is in case of a release made by the king. [On account of his prerogative, and the different rules of construction which govern his grants.] Prerogative.

And if two do a trespass to another together, and he to whom it is done doth release it to one of them; this shall enure to discharge the other. [*Query*, if each be not a distinct trespasser; so that one may be released without releasing the other.

Dyer, 319. Co. super Lit. 273. 276. 14 H. 8. 6. If husband and wife, and *I. S.* purchase to them and the heirs of the husband, and after *I. S.* The husband and wife.

release all his right in the land to the husband; the wife shall have no benefit by this [release], but it shall enure to the husband alone; [operating by way of *mitter le estate*, and not of *mitter le droit*.]

P. 338. And if there be two women joint disseisoresses, and the one take a husband, and the disseisee release to the other; in this case the husband and wife shall take no benefit by this; [but the releasee shall be in by title.] And if the disseisee release to the husband, this shall enure to him and his wife and the other woman. [Because the husband alone is not a disseisor, nor hath he such estate to which exclusively the right may be annexed.]

And if one that hath a rent out of my wife's land release it to me and my heirs; this shall enure by way of extinguishment, and my wife will have advantage of it. And yet if the words be, "grant and release" the rent to the husband and his heirs, in this case the husband may take as a grant if he will.

Note. But here note, in all these cases of releases, when one man will take advantage of a release made to another, he must have the release to show and plead; [except that in modern times he may plead the deed as lost, and give secondary evidence of the deed, if lost.] Co. super Lit. 232.

If I be disseised, and I release to the disseisor all actions I have or may have against him; this is but personal, and shall not be expounded to bar my heir after my death of his remedy; neither will it bar me of my remedy against his heir after his death. Co. 10. 51. 22 H. 6. 1.

So if I deliver goods to another, and afterwards I release to him all actions, and then he die; by this I am not barred so, but I may sue his executors.

See more in *Confirmation, chap.* 18, *numb.* 7.

2. *In respect of the thing released.*

Of all actions. A release of all actions, without any more words, is better than a release of all actions real only, or a release of all actions personal only: for by a release of actions, or a release of all manner of actions, without more words, are released and discharged all real, personal, and mixed actions then depending, and all causes of suit for any real or personal thing; as appeals for the death of an ancestor, conspiracies, suits by *scire facias* to have execution of a judgment, detinue for charters. Co. 8. 153. 5. 28. 70. Kelw. 113. Co. super Lit. 286. 290. 292. 289. Lit. Sect. 492. 505. 506. 512. 513. Bro. stat. 39.

And if two conspire to indict me, and I release to them all actions, and after they go on with their conspiracy; by this release I am barred to do any thing against them. By this release also of all actions, a debt due to be paid upon a statute or an obligation at a day to come, albeit the release be before the day, is discharged; and by this [release] also the statute itself, if it [the release] be at any time before execution, is discharged.

And if one be to pay 40 *l.* at four days, and some of the days are past, and some to come, and the debtee make such a release; by this [release] the whole debt is discharged.

Also in a *scire facias* upon a fine or a judgment, this release is a good plea in bar.

But this release of all actions will not discharge executions, or bar a man of taking out of executions, except it be where it must be done by *scire facias*; neither will it discharge or bar a man of suits by *audita querela*, [otherwise if *audita querela* be depending; 1 *Inst.* 309, b.;] or writ of error to reverse * an erroneous judgment; neither will it discharge covenants before they be broken; nor will it discharge any thing for which the lessor had no[t] cause of action at the time of the release made; as if a woman have title of dower, and do release all actions to him that hath the reversion of the land after an estate for life; [for he is not liable *in presenti* to his action; *Co. Litt.* 265, a.;] or a man is by an award to pay me 10 *l.* at a day to come, and before the time I make such a release; or I make a lease rendering rent, or an annuity is granted to me, and, before the rent-day, [or day of payment of the annuity,] I make the lessee or the grantor such a release; in these cases, and by a release in these words, without more, the dower, debt, rent, or annuity, is not discharged.

[Co. Litt. 292. Godb. 12. 3 Cro. 590.]

*P. 339.

And if a man have two remedies or means to come by land, as action and entry; or by goods, as action and seizure, or the like; in this case, by a release of all actions, he doth not bar himself of the other remedy. *Et sic e converso.*

Lit. Sect. 496. 497.

And if a man doth covenant to build a house, or make an estate, and, before the covenant broken, the covenantee doth release unto him all actions; by this the covenant itself is not discharged. And yet, after the covenant is broken, this release will

Co. super Lit. 292.

discharge the action of covenant given upon that breach (20).

Of all right.

By a release of all a man's right in any lands or tenements, without more words, is released and discharged all manner of rights of action, and entry, the releasor hath to, in, or against the land, for there is *jus recuperandi, prosequendi, intrandi, habendi, retinendi, percipiendi, possidendi*, and all these rights, whether they accrue by fine, feoffment, descent, or otherwise, are extinct and discharged; so that if the releasee have gotten into the land of the releasor by wrong, by this release the wrong is discharged, and the releasee is in the land by good title. Co. 8. 151. Plow. 484. 6 H. 7, 8. Co. 3. 29. 6. 1. super Lit. 345.

Also by this release are discharged and released all titles of dower, and titles of entry upon a condition or alienation in mortmain. [*Co. Litt.* 345.]

And if a woman have title of dower after an estate for life, and make such a release to him in reversion, this doth bar her. By such a release [of right] also from the lord to the tenant, the services are extinct,

But this release [of right] will not bar a man of a possibility of a right that he hath at the time of the release, or of a right that shall descend to him afterwards. And therefore if the conusee of a statute, before execution, release all his right in the land to the terre-tenant; or the heir of the disseisee, in the lifetime of his father, do release to the disseisor all his right; these releases do not bar them. [But interests under contingent remainders and executory devises, to persons who are ascertained, are releasable.] Nor will this release bar a man of an *audita querela*, [unless depending,] and such like things. Co. 10. 47. super Lit. 289.

*P. 340. And yet if the tenant in a * real action, after the demandant hath recovered the land, release to him all his right in the land; this [release] doth bar him of a writ of error, for any error in the proceeding in that suit, [for *qui adimit causam adimit finem.*]

And if there be lord and tenant by fealty and rent, and the lord, by his deed reciting the tenure, doth release all his right in the land, saving his said rent; by this release the right of the seigniory, save only of the seigniory of the rent and fealty, is extinct; [for the fealty is incident, and cannot be released.] Co. super Lit. 150. Dyer, 157.

(20) See further as to a release of all actions in the references before in note 4, to page 330.

And if the lord release to his tenant all his right to the land and seigniory, *salvo sibi dominio suo, &c.* hereby the services only, not the tenure is extinct, [and fealty will remain as incident. *Query.*]

Perk. Sect. 644. And if one have a rent-charge out of my land, and make such a release of all his right in the land to me that am the terre-tenant, without exception of the rent; hereby the rent is extinct and gone for ever (21).

Kelw. 484. 6, 7, 8. Co. super Lit. 265. 345. By a release of all a man's title unto lands or tenements, without more words, is released and discharged as much as is released by the release of all a man's right, and both these releases have the like operation: for howsoever title, strictly and properly, is where a man hath lawful cause of entry into lands whereof another is seised, for which he can have no action, yet it is commonly taken more largely, and doth include a right also. And *titulus est justa causa possidendi, quod nostrum est.* Of all title.

Co. 8. 151. By a release of all entries, or rights of entry, a man hath into lands, without more words, a man is barred of all right or power of entry into those lands upon any right whatsoever. And if a man have no other means to come by the land but by an entry, and he hath released that by these words; he is barred for ever. But if one have a double remedy, *viz.* a right of entry, and an action to recover his right by, and then release all entries; by this [release] he is not barred of his action. Of entry, or right of entry.

Lit. Sect. 492, 493. 495. Co. 8. 151. Lit. Sect. 115. 500. Co. super Lit. 288, 289. By a release of all actions real, without more words, are discharged all real and mixed actions then depending, and all causes of real and mixed actions [then existing, though] not depending [in suit.] And therefore all causes of suing of assises, writs of entry, *quare impedit*, actions of waste, and the like, which the party hath at the time of the release made, are hereby discharged. But this release, [nor a release in any form of words,] will not bar him that doth make it of any causes of action that shall arise and accrue afterwards. [Such future rights, titles, &c. can be bound only by estoppel.] Neither will it bar him of an appeal of death or robbery, writ of error, or any such like thing: nor of any thing which a release of all actions will not Of actions real.

(21) See more amply as to the operation of a release of all right, in *Com. Dig. Release* (E. 2.); *Vin. Abr. Release* (T.)

bar. And yet when land is to be restored or recovered by judgment in a writ of error; this release is a bar to the writ of error. So if a judgment be given upon a false verdict in a real action, a release of all actions real is a bar in an attaint.

Of actions personal.

*P. 341.

* By a release of all actions personal, without more words, are discharged all personal actions then depending, and all causes of personal actions wherein a personal thing only is to be recovered, and therefore hereby are discharged all causes of suing out of actions of debt, trespass, detinue, or the like. Also all mixed actions, as actions of waste, *quare impedit*, an assise of novel disseisin, writ of annuity, [for arrears then existing,] appeal of maihem, and the like. Bro. Release, 47. Co. super Lit. 285. 9 H. 6. 57. Lit. Sect. 502.

And if debt, &c. or damages be recovered in a personal action by false verdict, and the defendant bringeth a writ of attaint; or if a writ of *audita querela* be brought by the defendant in the former action to discharge him of execution; by this release, the defendant in both cases is barred of his suit. Co. super Lit. 309.

Also, when by a writ of error the plaintiff shall recover or be restored to any personal thing only, as debt, damage, or the like; as if the plaintiff in a personal action recover any debt, &c. or damages, and be outlawed after judgment; in this case, in a writ of error brought by the defendant upon the principal judgment, this release will bar him. But where by a writ of error the plaintiff shall not be restored to any personal or real thing, this release is no bar: as if a man be outlawed in an action personal by process upon the original, and bring a writ of error, and then release; this [release] is no bar to him. Co. super Lit. 288. Lit. Sect. 503.

If a man by wrong take or find my goods, or they be delivered to him, and I release to him all actions personal, notwithstanding this release, I may in this case take my goods again, [by seizure or recaption,] albeit I be barred of my action by this release (22). Neither is this release a bar in an appeal of robbery or death. Neither will it bar in any case where a release of all actions will not bar. Neither is it any bar to an action of debt brought for an annuity granted for a term of years Lit. Sect. 497, 498. 500. Co. super Lit. 292. 285.

(22) See accordingly *Foot* v. *Rastall*, *Skin.* 57.

for any arrearages that shall grow due after the release. Nor for any rent, or sum of *nomine penæ*, when the release is before the day of payment, or *nomine penæ* happen. Neither is it a bar in real actions wherein damages are recoverable only by the statute, and not by the common law; as in a writ of dower, entry, *sur disseisin in le per*, *Mordancester*, *Aile*, &c. (23).

Co. super Lit. 76. 291. Fitz. Audita Querela, 3.

Of debts.

By a release of all debts without more words, are discharged and released all debts then owing from the releasee to the releasor upon especialties, or otherwise, all debts due also upon statutes. And therefore if the conusor himself, or his land, be in execution for the debt, and he hath such a release, he must be discharged; [for by releasing the debt, the security for the debt is released.] And so he cannot be upon a release of all actions; [for the debt or duty remains, and the execution has terminated the action.]

Co. 8. 153. super Lit. 291.

Of duties.

By a release of all duties, without more words, is a releasor barred and the releasee discharged of all actions, judgments, * and executions, also of all obligations. And if the body of a man be in execution, and the plaintiff make him such a release; hereby he shall be discharged of execution, because the duty itself is discharged. And if there be rent or services behind to the lord from his tenant, and the lord make such a release to his tenant; by this [release] it seems the arrearages are released.

*P. 342.

Co. 8. 154. 157. 5. 70. super Lit. 291.

Of suits.

This word [suits] is of a somewhat more large extent than actions; for by a release of all suits, without more words, is released and discharged as much as by a release of all actions. And hereby also are discharged all executions in the case of a subject. But in the case of the king it doth not release executions. And this doth not release a covenant before it be broken (24).

Prerogative.

Co. super Lit. 292. 8. 157. 5. 70.

Of debates, quarrels, controversies.

By a release of all quarrels, without more words, all actions real and personal, and all causes of such actions, are released and discharged. So likewise by the release of all controversies, or by the release of all debates. But this [release] will not bar the releasor of any causes of suit that shall arise after,

(23) See further what things shall be released by a release of actions personal, in *Vin. Abr. Release* (R.)

(24) By a release of all suits a man is barred of a writ of error. *Cole's case*, *Latch.* 110.

and were not [existing] at the time of the release: as the breach of a covenant which shall be after, albeit the covenant be before, is not discharged hereby.

Of covenants. By a release of all covenants, without more words, all covenants then broken, and all that shall be after broken, but were then made and in being, are discharged. *Qui destruit medium destruit finem.* Co. 1. 112. 10. 51. super Lit. 292.

And therefore if a lessee do covenant to leave a house, leased to him, at the end of the term, as it was at the beginning of the term, and the lessor before the end of the term release to the lessee all covenants; this [release] doth discharge the covenant. But this release doth discharge nothing else but covenants, [and existing causes of action under covenants (25). Adjudged Hil. 4 Jac. B. R. Hancock's cast.

Of statutes. By a release of all statutes from the conusee to the terre-tenant, [or any one of several terre-tenants,] without more words, the statute is discharged. And yet if he release all his right in the land of the conusor; this [release] will not discharge the land of execution; [for till execution he hath not any right in or to the land, but merely a lien on the land. The like observation is applicable to judgments.] Co. 10. 47.

Of errors. By release of all errors and writs of error, all errors and writs of error, and that before they be brought, [so as they be existing causes for error,] are extinct and discharged. And if a man be outlawed in a personal action by process upon original, and make such a release; this will bar him [of his right to reverse the outlawry, so as to remove his personal disability.] Co. 2. 16. Lit. Sect. 503.

Of warranties. By a release of all warranties or covenants real, all warranties then made and in being, are for ever discharged. Lit. Sect. 148.

Of legacies. By a release of all legacies, without more words, a man doth bar himself of all the legacies [already] given him, [either] *in præsenti* or *futuro*, [vested or contingent;] so that if he be to have a legacy at twenty-four years old, and at twenty-one years of age he release to the executor all legacies, or this Co. 10. 51. Dyer, 56. Co. super Lit. 76.

---

(25) A release of *all covenants* until such a day, is no discharge of *covenants which were broken before*; for being broken before, there was no covenant as to them. *Per Hobart*, J. *Smith* v. *Stafford*, *Hutt.* 17. See more amply what shall be deemed a release of covenants in *Vin. Abr. Release* (U. 5.); *Com. Dig. Release* (E. 4.)

legacy in particular; this [release] is a bar to him of this legacy for ever. [So in equity the mere possiblity of legacies as to the survivor of several persons, may be released before the survivor be ascertained.] *And yet a release of all demands in this case is no discharge of his legacy. *P. 343. [Demands.]

Co. super Lit. 292. By a release of rent, the rent is extinct and discharged, whether the day of payment be come or not. But a release of all actions will not discharge a rent, before the day of payment come. Of rent. [Actions.]

Adjudged Hil. 16 Jac. B. R. Briscoe v. Heires. Co. 10. 51. By a release of all promises or *assumpsits*, without more words, a man may bar himself of a contingent or future thing, [*i. e.* of the fruit or effect of the promise, or the damages for the breach of it,] that by other words could not be released: as if a man promise to me, that if *I. S.* do not pay me 100*l.* the tenth of March next, that he will pay it me the twentieth of that month, and before the time I release to him all actions and demands, this will not discharge the promise. But if I release to him all promises, this will bar me. *Et sic de similibus* (26). Of promises.

Lit. Sect. 507. Co. 8. 151. super Lit. 290. By a release of all judgments, without more words, is he that maketh it [the release] barred of the effect of any judgment he hath against the releasee; for if execution be not taken out, he is now barred of it; [*viz.* the execution would be wrongful, since the judgment is the cause of the right to have execution; or the release may be pleaded in bar to a *scire facias* to revive the judgment.] And if the releasee, or his land, &c. be in execution, he and it shall be discharged thereof by *audita querela*. Of judgments.

And by a release of all executions, without more words, a man is barred of taking or having out of any execution upon any judgment, either before *scire facias* or after, [and the benefit of any existing execution.] But if, after execution be made by *capias ad sat.*, *elegit*, or *fieri facias*, the plaintiff release to the defendant all executions, he cannot plead such a release, but he must have an *audita* Of executions. *Audita querela.*

(26) With respect to promises by one person for another, it is enacted by the 4th section of the statute 29 Car. 2, c. 3, "that no action shall be brought, whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

querela; and that he may have to discharge him of execution (27). [In modern practice, injuries of this description are redressed by motion to the court, &c.]

Of appeals. By a release of all appeals, are discharged all appeals of felony, of death, of robbery, of rape, of burning, of larceny depending, and all causes not yet moved also. Co. super Lit. 287, 288.

Of advantages. By a release of all advantages, it seems actions of debt upon account are discharged. Co. 8. 150.

Of conspiracies. By a release of all conspiracies, all conspiracies past are discharged, and such also as are only begun and shall be prosecuted and perfected after the release, are likewise hereby discharged. Kelw. 113.

Of forgeries. By a release of all forgeries before publication, the forgery [as a civil offence] is discharged, but not the publication, and therefore the releasor may take his remedy for that notwithstanding. Co. 10. 48.

Of demands or claims. A release of all demands is the best release of all, and this word is the most effectual word of all, and doth indeed include and comprehend within it most of all the releases [*viz.* terms in releases] before (28). By a release therefore of all demands, without more words, are released all rights and titles to land, warranties, conditions annexed to estates before they be broken or performed, and after they be broken. Also by this release, are *P. 344. released and * discharged all statutes, obligations, contracts, recognizances, covenants, [too general, *infra*, p. 339,] rents, commons, and the like; also all manner of actions, real and personal, appeals, debts, duties. Also all manner of judgments and executions. Also all annuities, and arrearages of annuities and rents. And therefore if a man have a title of entry by force of a condition, &c. or a right of entry into any lands; by such a release, the right and title is gone. And if a man have a rent-service, rent-charge, estovers, or other profit to be taken out of the land; by such a release to the tenant of the land, it is discharged and extinct. Co. super Lit. 291. Co. 8. 154. Lit. Sect. 501. 509, 510.

And therefore if a termor for years, grant the land by indenture to *A.* rendering rent, and at the end Adjudged B. R. Pasc. 17 Jac. Wotton's case.

(27) See fully by what words executions may be released; and what is released by the words "all executions," in *Vin. Abr. Release* (U. 3.)

(28) If a common person releases all demands, this extends to inheritances, rents, right of entry, &c. for all these are implied in demands; but if the king releases all demands, or pardons them, this shall not extend to any inheritance. *Br. Abr. Charters de Pardon*, pl. 67; *Releases*, pl. 44. 90.

of the first year he release to the grantee all demands, [generally, without any limit;] the rent is hereby extinct during all the time [term.] And a release of all claims it seems is much of the same nature.

Co. 5. 70. But by a release of all demands, or of all claims, is not released any such thing as whereof a release cannot be made, as a mere possibility, [not coupled with any present interest,] or the like.

Hil. 4 Jac. B. R. Hancock's case adjudged. Neither will this release discharge a covenant or promise, that is future and contingent, before it be in being; nor a covenant before it is broken: and therefore if the lessee of a house covenant to leave it as well in the end of his term, as it was in the beginning of his term, and before the end of the term the lessor release to the lessee all demands: this [release] is no bar to an action brought for a breach of the covenant afterwards.

Hil. 6 Jac. B. R. Belcher & Hudson's case. And if a man, in consideration of a sum of money given to him by a woman sole, assume to her that if she marry one *M.* that he will pay to her after the death of *M.* 100*l.* by the year if she survive him, and she marry him, and the husband release all demands and then die; this is no bar to the duty. So if one promise a woman, that if she will marry him, that he will leave her worth 100*l.* if she do survive him, and before the marriage she release to him all actions and demands; this [release] doth not discharge the promise (29). [A release of all promises would have been effectual.]

Note. And note, that all these words are of the same force, when they are joined with other words, as when they are alone, [unless there be a context or recital to restrain and qualify their operation.]

Co. super Lit. 267. If two tenants in common of land, grant a rentcharge of 40*s.* out of it to one in fee, [there are two several rents, each of 40*s.*] and the grantee release to one of them; this [release] shall extinguish but 20*s.* [*read*, the 40*s.* payable out of his moiety;] for that the grant in judgment of law is several.

19 H. 6. 4. If one have several causes of action against two, and make a joint release to them: this shall be

(29) See accordingly 1 *Wood*, 712; and more amply as to the operation of a release of all demands, in *Bac. Abr. Release* (I.); *Vin. Abr. Release* (U.)

taken to be a release of all joint and several causes of action.

*P. 345. * So if an executor have some cause of action for himself, and some for his testator, and he release all actions, indefinitely; [*i. e.* without qualification as to the nature of his demand;] this release doth discharge both sorts of actions (30). Bro. Release, 31. 29.

If the tenancy be given to the lord and a stranger, and to the heirs of the stranger, and the lord release to his companion all his right in the land; this [release] shall enure not only to pass his estate in the tenancy, but also to extinguish his right in the seigniory. Co. super Lit. 280.

If there be lord and tenant of two acres, and the lord release all his right in one of them to the tenant; hereby the services are extinct for both. So if one have a rent-charge out of twenty-acres, and release all his right in one acre; hereby all the rent is extinct. And yet if *A.* lease white acre to *B.* for life, rendering rent, and afterwards doth release part of the rent; this release is good only for such part. [A rent-service may be apportioned; a rent-charge cannot. It may however be granted, part to one, part to another. The rule respecting rent-charges gives occasion to great difficulties in practice; and, contrary to the general plan of editing this work, invites the following observations. Perk. Sect. 71. Bro. Release, 85. 9 E. 3.

Frequently a rent of this description is chargeable on divers lands, and the jointress or owner of the rent is consenting to exonerate part of the lands, if she could do this without releasing all the lands from the rent-charge; but as a rent-charge is against common right, it is a rule of law, that a release of any part of the lands will necessarily operate as a release of the rent-charge. *Co. Litt.* 280.

To avoid the application of this rule of law, several modes have been adopted by different gentlemen, to secure and keep on foot the rent-charge for the benefit of the jointress, notwithstanding a release of part of the lands from the same.

The first mode, and the one most generally used, is, to release part of the lands, and then to add a clause, that the release shall not extend to extinguish the rent, and that the other lands shall remain

(30) In *Bac. Abr. Release* (E.) it is said, "but yet in some cases such general words may, according to the intention of the parties, be restrained." See the case of *Hutchinson v. Savage*, as to this point, in 2 Ld. *Raym.* 1306.

chargeable with the rent, and that the jointress may distrain for it upon the lands remaining unsold. This mode is open to objection, on the ground, that it operates as a release of the rent-charge, and that the additional clause does not preserve the original rent, but amounts to a grant of a new rent, and consequently the jointress loses her priority as against intermediate incumbrancers.

The second mode is, to covenant not to sue the purchasers for the rent, or not to distrain on the lands purchased by them; but this is a mere covenant, and not a release, and therefore it is objectionable on the part of the purchaser, since, in the case of a sale of the rent-charge to a purchaser, without notice of the covenant, the purchasers would be left merely to the remedy of bringing an action of covenant against the covenantor, without any right to be relieved at law or in equity from the rent; besides the rent may be levied on other terre-tenants, and they may resort to the purchasers for a contribution. To render a purchaser therefore secure from the rent, there ought to be a conditional release, to operate in the contingency, that the purchaser of the lands should be compelled, either by distress or suit, or otherwise, to pay the rent, or make a contribution for the same, or any costs in respect thereof.

The third and still more eligible mode is, to assign the rent to trustees in trust, to indemnify the purchased lands from the rent-charge, and from any contribution towards the same, and subject thereto in trust to enforce the payment of the said rent-charge from the residue of the lands, and pay the same to the jointress, with a provision that in case any of the lands chargeable with the rent should be vested in any person, except the seller, his heirs, &c. entitled to have a contribution from the purchaser towards the same rent, that the trustee should levy so much only of the rent as shall be payable, after deducting the amount of such part thereof, as shall be payable for the lands which are purchased, by way of contribution towards the same; with a further provision, that as between the seller and the jointress, the lands unsold shall remain charged with the full amount of the rent, and with a covenant from the seller to pay the same as it shall become due.]

If I be seised of land in fee, and I make a lease of it to one for [his] life, and after I release all my right in the land for the life of the tenant for life, so as neither I nor my heirs shall have, claim or challenge any thing or right in that land for the life of the tenant for life; by this release, nothing is extinct or discharged, but the causes of action of waste that were then [existing], and not any cause that shall happen afterwards, [and for rent in arrear. If the releasee had been tenant for another's life, that estate would have been enlarged into an estate for his own life.] Bro. Releas, 65. Dyer, 307.

If a statute be entered into the twentieth of April and the conusee [afterwards] by a release dated the nineteenth of April (meaning to except this statute) doth release all debts and demands till the making of the release; by this release the statute is discharged: [but then the time of delivery must be shown.] But if the words had been to the day of the date of the release, *contra.* [This may be correct, notwithstanding *Pugh* v. *Duke of Leeds*, *Cowp.* 714; since the motive for the date might be to exclude the operation of the deed to release subsequent duties.] Per Justice Dodridge, Trin. 14 Jac. Co. 9. 53.

If a promise be of two parts, [*viz.* of something which consists of two parts, one depending on the other, as distinguished from distinct subjects,] and he to whom it is made doth release one part, it seems this is a release of both.

If *A.* 1st January enter into an obligation of 40*l.* to *B.*, and *B.* 13th July make a deed thus, it is agreed between *B.* on the one part, and *A.* on the other part, that upon good considerations *B.* doth acknowledge himself fully satisfied and discharged of all bonds, debts or demands whatsoever, from the beginning of the world to this day by the said *A.* and that he the said *B.* is to deliver all such bonds as he hath yet undelivered to *A.* except one bond of 40*l.* yet unforfeit, which is for the payment of, &c. which was the obligation before; in this case it was adjudged a good release and discharge of all the bonds excepting that one, and that this exception shall go to all the premises.

3. *In respect of the time or estate.*

A release of a right, or of an action, [real or personal,] cannot be for a time, but it will be for ever. Lit. Sect. 467. 470. Co. super Lit. 273. 264. 280.

*P. 346. And therefore if a release be made to any * one

Kelw. 88. Co. super Lit. 9. that hath a fee simple by wrong, [or to any one who hath a particular estate of freehold,] by him that hath the right, for one hour, one year, for life or years; this is a good release for ever. [A defeasance may suspend the right of action for a time, for the same reason that a release may be on a condition precedent.]

And if the disseisee release all his right in the land to the disseisor without naming his heirs, or setting down any time how long the releasee shall have the land or the right of the disseisee therein; this is a good release for ever, and doth make the estate of the disseisor good for ever, and so doth make a good estate, [or rather confirmation of title,] in fee simple without these words, "his heirs, &c." And if the disseisor or his heir make a gift in tail, or a lease for life, and the disseisee release all his right to the donee or lessee for life, to have and to hold for life only; this is a good release of his right for ever. [To give effect to the intent there should have been a confirmation.]

But if the disseisee do disseise the heir of the disseisor, [having the right of possession by a descent, tolling the entry,] and make a lease to him for life (which is a release in law); by this [release] the right is released [or rather suspended] during that time only. So if one joint-tenant or parcener release to the other, all his right in the land, without the words "heirs," or any more words; this release doth give to his companion his whole interest for ever; [but one joint-tenant may grant or release to his companion for a time.] And when the lord, or grantee of a rent, release to the tenant, or terre-tenant generally; by these releases, a fee-simple is transferred without any words of his heirs, &c. [But if the lord grant the rent to the terre-tenant, who hath a particular estate, this release will operate as a grant, and the rent will be suspended only during the particular estate.] And yet the lord may release his seigniory [operating by way of grant] to his tenant, to hold to him in tail or for life, and this shall be taken and enjoyed accordingly. But if the lord doth release the seigniory to his tenant, without any words of heirs put in the deed, the same [seigniory] is extinct, [whether the releasee be tenant for life, in tail, or in fee.]

And if I let land to a man for term of years, and after I release to him all my right which I have in the land, without using any other words in the deed; or release to him, to have and to hold for his life; in both these cases, he hath an estate for his life only, [by way of enlargement of estate.] Lit. Sect. 546. 546. 486. Plow. 556. Dyer, 263.

And if I lease land to a man for his own life, and after release to him, to have and to hold for his own life; hereby he hath but an estate for his own life. [This release is merely a confirmation. It would release the rent, if any.]

But if I make a lease to him for another's life, and after release to him, *habendum* for his own life; by this [release] he hath an estate for his own life.

But if I be seised of land in fee simple, and let it to another for life or years, and then release all my right to him, to have and to hold to him and his heirs, hereby he hath the fee simple [by way of enlargement.] And if I [being so seised] release all my right to him, to have and to hold to him and the heirs of his body, hereby he hath an estate tail [by way of enlargement; the word right cannot give the estate in fee.]

And if one be seised in fee of a rent-service or rent-charge, and grant it first for life, and then release it to the grantee, to * hold to him and his heirs, or to him and the heirs of his body; this [release] shall enure as an enlargement according to the agreement. Lit. Sect. 549. *P. 347.

But if one grant a rent-charge for life out of his land *de novo*, and after release to the grantee all his right in the rent, to have and to hold to him in fee simple, or fee tail; this doth not enlarge the estate; [because there is not any further estate in the rent. *Smith* v. *Farnaby*, *Lutw.* 1224; *Chaplin* v. *Chaplin*, 3 *P. Wms.* 229; 3 *Prest. Abstr.* 137. But under appropriate circumstances, the deed might be construed as a grant in fee of a new rent.]

And if tenant in tail, or for life, make a lease for years; and after by deed doth release all his right to the lessee for years in possession, to hold to him and his heirs for ever; this will not make the estate of the lessee good for longer time than the life of the releasor. [*Machell* v. *Clarke*, 2 *Lord Raym.* 778, has finally settled, that such grant or release of tenant in tail, will pass a determinable Lit. Sect. 606. 610. 24 E. 3. 28.

fee, subject to be avoided by the issue, until they be barred.]

Co. super Lit. 273. If one make a lease for ten years, the remainder for twenty years to another, and he in remainder release all his right to the lessee for ten years; in this case, the releasee hath an estate for thirty years and no less, for one lease for years cannot drown in another (31). [This proposition is too general. The authorities and the principles which govern in these cases, are fully examined in 3 *Prest. Convey.* 211. To the authorities, add *Stephens* v. *Bridges*, before *Leach*, Vice-Chancellor, Hil. Vac. 1821, and to be reported by Mr. *Maddock*. The decision is, in effect, that a term of one thousand years in possession, merged in the reversion held for five hundred years.]

Lit. Sect. 526. Co. super Lit. 299, 300. If I let land to a woman sole for her life, or for years, and she take a husband, and after I release to them two to hold for their lives; this shall enure no further than the intent, and in the first case he shall hold jointly with his wife, but in her right, whilst she doth live; and after for his own life if he survive; and in the last case, they shall have the freehold jointly, [and the term of years will merge in the freehold. 3 *Prest. Convey.* 219.]

Co. super Lit. 280. If there be lord and tenant by fealty and rent, and the lord granteth the seigniory for years, and the tenant attorneth, and the lord releaseth his seigniory to the tenant for years and to the tenant of the land, [*viz.* a person having the freehold, or any estate of freehold,] generally; by this [release] the seigniory is extinct for ever, and the estate of the lessee also, [since he cannot be lord and tenant. *Sed quære*, whether as to the tenant for years, there

(31) But he that has an estate for ten years may surrender to him that has an estate for twelve years, and the estate is drowned, and the other shall come into possession; and a surrender to him that has a greater estate for years, is good as to him that has an estate for life; and where the surrender is to a *termor in reversion*, it is all one if the reversioner had a greater estate for years or not. *Cro. Eliz.* 302; *Vin. Abr. Merger* (G.) *Merger* is described to be, whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately annihilated, or is said to be *merged*; that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right and he has a term in right of another, *(en autre droit,)* there is no merger. 2 *Bl. Com.* 177. And see fully, as to the doctrine of merger, in the several abridgments, &c. under titles *Merger* and *Extinguishment*. [The third volume of Conveyancing has discussed this subject a full detail.]

is not merely a release of the seigniory.] But if the release be to them and their heirs; then the lessee shall have the inheritance of the one moiety, and the other is extinct; [so that the joint-tenancy is extinct by operation of law.]

10. *Acquittance. Quid.*

An acquittance is a discharge in writing of a sum of money, or other duty, which ought to be paid or done; as, if one be bound to pay money on an obligation, or rent reserved upon a lease, or the like; and the party to whom the money or duty should be paid or done, upon the receipt thereof, or upon some other agreement between them, maketh a writing under his hand, witnessing that he is paid or otherwise contented, and therefore doth acquit and discharge him of the same; the which is such a discharge and bar in the law, that he cannot demand and recover the same again contrary thereunto, if the acquittance be showed.

Terms of the Law.

11. *Where a man is not bound to pay money without he hath an acquittance.*

*P. 348.

* The obligor is not bound to pay money upon a single bond, unless the obligee will make to him an acquittance or release. Nor is he bound to pay it before he hath the acquittance. And, in this case, the obligor may compel the obligee to make him an acquittance. And so it is in case of a statute merchant; one is not bound to pay the money thereupon, before he hath the acquittance or release of the plaintiff. But otherwise it is in case of an obligation with a condition, for there a man may aver payment (32), [by the common law at or on the day, and by the statute law (4 & 5 *Anne*, c. 16; *B. N. P.* 171,) after the day; the statute giving the plea of *solvit post diem*. Accord and satisfaction is also a large and useful head of law, material to this subject; and equity corrects many injuries on this subject, for which the law had not amply provided; especially in transactions between principal and sureties.]

22 E. 4. 6. 41 E. 3. 25. 1 H. 7. 15. 22 E. 4. 6. Bro. Debt, 43. Oblig. 10.

And because statutes, recognizances, and obligations are often used, and tend to the strengthening of the common assurances of the kingdom, we may not in anywise pass them over, but must take some survey of them. And first, of a *Statute*.

(32) See fully in what cases payment may be refused without an acquittance given, *Fitz. Abr. Acquittance* (A.)

CHAP. XX.

Of a Statute.

Terms of the Law. Stat. de Mercatoribus Acton Burnel, 11 Ed. 1

*A STATUTE is a bond or obligation of record; [now, with the exception of recognizances, grown obsolete in practice, though formerly in very extensive use;] but this word is sometimes used in another sense, *viz.* for a decree made in parliament, called an Act of Parliament. 1. *Statute. Quid.* *P. 353.

And of these obligations there are three kinds: 1. A statute merchant; 2. A statute staple; 3. A recognizance. The statute merchant is a bond acknowledged before one of the clerks of the statute merchant, and the mayor, or chief warden of the city of London, or two merchants of the said city for that purpose assigned, or before the mayor, chief warden, or master of other cities, as York, Bristol, or the like, [which have this staple or privilege;] or the bailiff of any borough or village, or other sufficient men for that purpose appointed and authorized, sealed with the seal of the debtor or recognisor, and of the king, which is of two pieces; the greater whereof is kept by the mayor or chief warden, and the lesser by the said clerk; and the form of it is thus: *Noveritis, &c. me* A. B. *teneri* C. D. *in centum libris solvend. eidem ad festum S. Mich. proxim. Et nisi fecero, concedo quod currat super me et hæredes meos districtio et pœna in statuto domini regis edito apud Westm. dat. &c.* And this, albeit at first it was ordained and used for merchants only, [before bills of exchange were known in the mercantile world,] yet at this day it is and may be used and given by any others, and is become one of the common assurances of the kingdom (1). 2. *Quotuplex.* Statute merchant. *Quid.*

(1) *Statute merchant* and *statute staple* are described by Mr. Justice *Blackstone*, (in vol. 2, *Com.* 160), to be securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, until out of the rents and profits of them his debt may be satisfied; and during such time as the creditor so holdeth the lands, he is tenant by statute merchant, or statute staple. Statute merchant is pursuant to the statute 13 Edw. 1, *de mercatoribus*. Statute staple is pursuant to the 27 Edw. 3, c. 9. Though the statute merchant was first introduced, and wholly calculated for the benefit of merchants, yet they were not long ingrossed by them; for other men finding from their own observation, that they were much of the same nature with judgments, [and in some cases superior to them, as giving a right to take the entirety of the

Statute staple. Quid.

The staple doth signify this or that town or city, whither the merchants by common order and commandment do carry their commodities, as wool, and the like, to utter by the great, [*viz.* wholesale.] And the statute staple is either properly or improperly so called. That which is properly so called, is defined to be a bond of record acknowledged before the mayor of the staple in the presence of one or two constables of the same staple, and is sealed with the seal of the staple, and sometimes also with the seal of the party, the which [seal] it seems is not necessary; [though, by force of such seal, it may be a private bond, though not a statute.] And this [statute] is founded upon the statute of 27 Edw. 3, c. 9, and was invented, and is [*i. e.* at first was] used only for merchants and merchandizes of the same staple: this is of the same nature as the statute merchant is. That which is improperly so called, is also called a recognizance, which is also a bond of record, testifying that the recognisor doth owe to the recognisee a sum of money. And of these there are divers kinds; for there is one recognizance founded upon the statute of 23 Hen. 8, c. 6. The form whereof is this: *Noveritis, &c. me* A. B. *teneri* C. D. *in centum libris solvend. eidem ad festum S. Mich.* * *proxim. Et si defecero in solutione debi. prædict. volo et concedo quod tunc currat super me hæredes et executores meos pœna in statuto stapulæ debit. pro marchandisis in eadem emptis recuperand. ordinat. et provis. dat. &c.* And this is always to be acknowledged before the chief justice of the King's Bench, or of the Common Pleas, in the term time, or in the absence out of term, before the mayor of the staple at Westminster, and the recorder of the city of London for the time being (2). And it is to be sealed with the seal of the conusor, and with the seal of

27 Ed. 3, stat. 2, c. 1, 2, 3, &c. 27 Ed. 3, stat. c. 9. 22 H. 6. c. 6. Co. super Lit. 289. 15 H. 7. 16.

Recognizance. Quid.

*P. 354.

lands in execution,] given in Westminster Hall, but obtained with infinite less trouble and expence, out of regard to their own interest and quiet, easily fell into this way of contracting, and by degrees it came to be improved into a common assurance. See *Hickford's case, Winch. Rep.* 83.

(2) A recognizance is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assises, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record. 2 *Bl. Com.* 341.

the king appointed for that purpose, and with the seal of the chief justice, mayor and recorder before whom it is acknowledged; and they, before whom it is taken, do subscribe their names to it; and this was ordained, and may be and is used by merchants, or any other whomsoever, for payment of debts, or assurance of other things; and this also is of the same nature as the statute merchant is; and both this and the two former, are much of the nature of judgments had upon suits in the courts of King's Bench and Common Pleas, and therefore they are called Pocket Judgments. [8 *Geo.* 1, c. 25; 3 *Prest. Abstr.* 315. 318. 344. A recognizance or statute is but an assurance by consent of the parties, and is but a bond recorded, and therefore not to be compared to a judgment. 3 *Cro.* 822; 6 *Co.* 215; *Phillipps's MSS.* for a judgment is *in invitum.*]

Co. 8. 153.

Pocket Judgments.

There are also divers other kinds of recognizances, that are taken by and acknowledged before the lord keeper, master of the wards, master of the rolls, master of the chancery, justices of the one bench or of the other, (some of which are called bails,) barons of the exchequer, judges in their circuits, justices of the peace, sheriffs, and others; some whereof are by the common law, and some by certain statutes. And amongst these, some are without seal, and recorded only, and some are sealed and recorded also; and some of them are in a sum certain, as the recognizances taken in the Common Pleas for bail are, and some of them are incertain, as those recognizances that are taken for bail in the King's Bench, which are after this manner, *Si judicium redditum, &c. tunc volo et concedo,* that the debt recovered against the defendant shall be levied of my goods and chattels, &c. And these also are much of the nature of the former kind of recognizances. And all obligations made to the king are of the nature, and have the force of a recognizance (3). [See the stat. of 33 *Hen.* 8, c. 39, § 2; and *Vin. Abr. Prerogative* (M. 2.)]

See statutes 33 H. 8, c. 22, 39. 3 H. 7, c. 1. 10 H. 6, c. 1. Dyer, 315. 307. F. N. B. 251, f. 132, c. 133, a. 68, a.

Bail.

Prerogative.

Statutes and recognizances are sometimes single, without any defeasance; and sometimes they are

(3) See more amply as to the nature and description of statute merchant, statute staple, and recognizance, in *Vin. Abr. Statutes* (E. 11); *Com. Dig. Statute Staple* (A.); *Bac. Abr. Execution* (B.)

double, *i. e.* with a defeasance or condition, upon the performance whereof the same are to be avoided.

The debtor, or he that doth enter into the statute or recognizance, is called the recognisor, or conusor; and the debtee, or he to whom it is made, is called the recognisee or conusee.

Conusor.

Conusee.

3. *What shall be said a good statute or recognisance, and what not.*

First, in respect of the persons before whom it is acknowledged.

*P. 355.

* To make a good statute or obligation of record, the form prescribed must be pursued. 1. In respect of the persons before whom; and therefore, the statute merchant, or staple, or the recognizance founded upon the statute of 23 Hen. 8, may not be acknowledged before any others besides the persons appointed by the statutes. Neither may any other recognizance be acknowledged before any, but such as either have power *ex officio*, and by their offices to take them, or have special commission so to do; and therefore a recognizance taken by a constable is void. If a recognizance be made to the lord keeper and two others, and it be acknowledged before himself, this is void as to him. [By a principle of the common law, no man can be judge and party.] 2. In respect of the manner of making and acknowledging of it. And therefore if the substantial form appointed by the statutes be not observed, it will be void. If therefore a statute merchant be not sealed with the seal of the debtor, and there be not a seal of two pieces annexed to it; this is no good statute, neither can it take effect as a statute; howbeit in this case, if it be [sealed and] delivered by the party, it may take effect as an obligation; but if the variance from the statutes be only in some circumstance, [not important,] this will not hurt a statute or a recognizance. And therefore it is held, that albeit there be no time set for the payment of the money in the statute, yet the statute is good, for then it [the money] is due presently. And albeit the statute be written with another's hand, and not with the hand of the clerk of the statutes, or the like, yet is the statute good enough, [for this is form, and not substance.] And if a statute staple be not sealed with the seal of the party that doth acknowledge it, yet it seems it is good enough, for the statute doth not require it; but a recognizance within the statute of 23 Hen. 8, cannot be good, except the seal of the party be to

Dyer, 35. Lit. Bro. Sect. 484. 511. F. N. B. 267, a.

[Constable.]

Dyer, 220.

Secondly, in respect of the manner of making it.

Hollingworth v. Ascagh, Pasch. 35 El. C. B. adjudged.

Obligation.

Perk. three Justices, C. B. Trin. 22 Jac.

it, for so are the words of the statute (4); [*i. e.* the statute requires his seal.]

Co. 8. 153. If a recognizance or a statute be to pay money at several days, it is good enough; and if the conusor fail one day, execution may be sued of the whole statute (5).

Stat. 27 El. c 4. Every statute staple or merchant, not brought to the clerk of the recognizances within four months next after the acknowledging, to enter a true copy thereof, shall be void, against all persons, [*viz.* strangers,] their heirs, successors, executors, administrators and assigns, (except those only, which for good consideration shall, after the acknowledging of the same statute, purchase the land or any part liable thereunto, or any rent, lease or profit out of it.) [3 *Prest. Abstr.* 340.]

Fitz. Accompt. 97. Execution in toto. Bro. Statute in toto. Stat. Acton Burnel de Mercatoribus, 27 E. 3. c. 9. F. N. B. 130, 131, 132. Dyer, 180. 15 H. 7. 15. Co. 4. 67. 7 H. 7. 12. Plow. 61, 62. 82. Co. super Lit. 290. Stat. 23 H. 8, c. 6. 5 H. 4, c. 12. 2 R. 3. 7. 14 Ed. 3. 11. Lit. Bro. Sect. 294. 123. 226. Dyer, 299. Co. 5. 87. 4. 82. 87. 66. Stat. 11 H. 6, c. 10. Kitch. 116.

4. All the proceedings upon a statute or recognisance; and the manner and order of execution thereupon.

* The proceedings upon a statute or recognizance, to have the fruit and effect thereof, are not like to the proceedings in other cases of suits upon obligations and the like, to reduce them to judgment; but as they are in their own nature much like to the nature of a judgment, so is the proceeding and execution thereupon much like to the proceeding and execution upon a judgment; and therefore the conusee may, if he please, bring an action of debt upon a statute, and wave all other proceeding; or otherwise, if he like not this course, he, "or, if he be dead, his executor or administrator, and, if his executor be dead, the executor of his executor," [or an administrator *de bonis non*,] may, as soon as the same is forfeit, have present execution of it after this manner; he must bring his statute to the mayor and clerk and other officer, before whom it was acknowledged; and there, if they find the record of it and the day to be passed for the payment of the money, they are to apprehend and imprison the body of the conusor, if he be a lay-person, and can be found within their jurisdiction; and if he cannot be found there, they are to certify the record into the

*P. 356.

(4) See the statute 8 Geo. 1, c. 25, being an act for supplying some defects in the statute of the twenty-third of king Henry 8, intituled, "An act for obligations to be taken by two chief justices, the mayor of the staple, and the recorder of London, and for setting down the time of signing judgment in the principality of Wales, and counties palatines" [3 *Prest. Abst.* 315.]

(5) See further what shall be deemed a good statute merchant, staple, or recognizance, in *Vin. Abr. Statutes* (F.)

Chancery, which also, if they refuse to do, they
Certiorari. may be compelled thereunto by a *certiorari*; and if that certificate be faulty, or execution be not done upon it by reason of the death of the conusee or otherwise, the conusee or his executor, or administrator, may have another certificate; and
[Statute merchant.] thereupon, in case of the statute merchant, he shall have a writ of *capias* out of the Chancery, directed to the sheriff of the county where the conusor lives, to apprehend and imprison him (if he be not a clergyman), and this is to be returned in the Common Pleas or King's Bench. And when the conusor is taken, he shall have time for a quarter of a year to make his agreement with the conusee, and to sell his lands or goods to satisfy the conusee; and for that purpose he may sell his lands or goods, albeit he be in prison, and his sale is good and lawful; and if in that time he do not
Capias. satisfy the conusee, or if upon the *capias* the sheriff return a *non est inventus*, then by another
[*Extendi facias.*] writ (or by divers writs, if the lands or goods lie in divers counties) called an *extendi facias*. And
[Statute staple.] in the case of a statute staple, presently after the certificate into the Chancery, the conusee shall have a writ to take his body, and extend his lands and
Extendi facias. Quid. goods returnable in Chancery; and this writ is a commission directed to the sheriff of the county where the lands and goods lie, for the valuing of the same; whereby all the lands, goods and chattels of the conusor shall be appraised and valued at a reasonable rate by a jury of sworn men, charged by the sheriff for that purpose; which inquisition so taken is to be returned by the sheriff, and thereupon the lands, goods and chattels are to be taken into the sheriff's hands, and by him to be
*P. 357. delivered to the * conusee, (which the sheriff may do, if he will, without any writ,) to hold unto the conusee until he be satisfied his debt and damages. And if the sheriff refuse so to do, the conusee shall have a writ out of the Chancery, called a
Liberate. Quid. *liberate*, to compel him to deliver to the conusee the lands, goods and chattels so found by inquisition, and taken into his hands upon the extent, which the sheriff need not to return; or the conusee may enter upon the land himself, and take the goods out of the sheriff's hand; and this act of the sheriff and jury upon this writ is called an

Adjudged Butler v. Wallis, Pas. 38 Eliz. B.R.

extent; and if the jurors or appraisors upon the *extendi facias*, overvalue the lands or goods in favour to the debtor, the conusee hath no remedy but by motion in that court where the writ is returnable at the return day, or at least the same term wherein the writ is returnable, to desire that the appraisors may take the lands or goods at the rate they have valued them, in the same manner as the conusee is to have them. But if the conusee accept of the lands and goods from the sheriff, or suffer the term to pass wherein the writ is returnable, he is too late, and hath no remedy at all. And if the appraisors do undervalue the lands or goods in favour to the debtee, it seems the conusor hath no remedy at all, for he may at any time pay all or the residue of the debt and damages unlevied, and have his land again if he please; [settling the account according to the extended value. But in equity the account will be adjusted on the footing of a mortgage; allowing the conusee interest on the one hand, and on the other hand charging him with the actual value and casual profits.] And in case where the inquisition or extent taken and made, is insufficient, as if part of the land only be extended in the name of all the lands, or it is found the conusor died seised of land, and it is not said of what estate, or the like, the conusee shall have a new extent, and this is called a Re-extent; and this he may have, albeit the lands or goods be delivered to the conusee by a *liberate*, if the conusee have not entered upon and accepted it; but if he once accept it, he can never after have a re-extent: and when the conusee is in possession of lands by such an extent as before, then is he tenant by statute; [3 *Prest. Abstr.* 340;] and after the conusee is once settled in peace in the lands extended, he shall hold it until he be satisfied his debt, and his reasonable costs and damages for travel, suit, delay and expence. But it seems the time shall not run out nor be said to begin until the entry of the conusee into the land; for if the land be extended and remain seven years without a *liberate* made, yet he may have a *liberate* at the end of the seven years; and as soon as the conusee shall be satisfied his debt and damage by the goods and chattels of the conusor, and by the ordinary and certain, or extraordinary and casual profits of

Extent. Quid.

Re-extent.

Tenant by statute.

[Time of computation.]

the land, the conusor shall have his land again; and for that purpose, if the conusee refuse to give him an account, and to yield up his land to him the conusor, howbeit he [the conusor] may not enter, yet he may compel the conusee thereunto by a writ called a *Venire facias ad computandum*, in the nature of a *scire facias*; by which the conusor shall call the conusee, his * executors or administrators, to account; and if, upon the account, it shall appear he is satisfied, the conusor shall have his land again; and if it appear he is oversatisfied, he shall answer the overplus to the conusor. But the conusor may not enter upon the conusee until he hath brought this writ, and made it thereupon to appear that the conusee is satisfied (6). [Of course, in the mean time, the possession will be consistent with the title, and while consistent the debtor cannot be barred by the statute of limitations. But after satisfaction by the extended value, time may bar the right to relief in equity, on the like principle as relief is denied on a Welch mortgage. *Fenwick* v. *Read*, 1 *Mer.* 114. *Sed quære.*] And in case the conusee be dead, his executor or administrator may have execution of the statute without any *scire facias*, upon the showing of the statute and the testament in Chancery. And if the sheriff return that the conusor is dead, the execution shall be made of his lands only in the hands of his heir or the purchaser; but if the heir be under age, the execution cannot be done until he be of full age; [*i. e.* the parol shall demur:] and if the conusor die in prison, the execution shall be of his lands, goods and chattels; and if the gaoler that hath him in prison suffer him to escape, he must answer that debt; and if it fall out that the conusee, his executor or administrator be ousted, or disturbed of his execution by the conusor himself, or any

Venire facias ad computandum. Quid.

*P. 358.

Executor.

Age.

Escape.

(6) And when the conusor brings a *scire facias ad computandum*, at common law, the conusee shall not account according to the true value, but according to the extended value; and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind with damages, he shall also recover. But if the conusor will sue the conusee in a court of equity, then he shall bring him to account for what he hath received of the profits above the extended value. *Marsh* v. *Lee*, 2 *Vent.* 338. See further as to the conusor's remedy when the conusee is satisfied, in *Bac. Abr. Execution* (B. 7); *Com. Dig. Statute Staple* (G.); and *Vin. Abr. Statutes Merchant* (P. a); where, in pl. 3, it is said, "*scire facias ad computandum* does not lie against conusee upon a statute merchant or staple." *Per Bank*, J. *quod nota bene.* *Br. Abr. Scire Facias*, pl. 153, cites 22 *Ass.* 44; *Br. Abr. Statute Merchant*, pl. 24, cites S. C.

other during the time of the extent, he may relieve himself against the disturber by assise, [though he has only a chattel interest, for the assise is given by the statute; *Deighton* v. *Greville*, 2 *Ventr. Rep.* 231; *Collins's Parl. Cases*, 64;] or other action, as another in the like case may do. And if he be rightfully ousted or disturbed by one that hath better right, as by one that hath a former statute or the like, or by the act of God, as by fire, water, or the like; in these cases the conusee shall hold the land over after the time of his extent, until he be satisfied. But [if he be evicted he may release his right of entry; 4 *Rep.* 66, b.; and] when it is through his own neglect only that he is unsatisfied, as where the lands are delivered to him by the *liberate*, and he after his entry into them make a conditional surrender of them; [*i. e.* a surrender subject to a condition subsequent;] as if lands of the value of 10 *l.* by the year, be delivered to him in execution for 40 *l.* and he within four years make a conditional surrender of them to the conusor, and after he enter for the condition broken, in this case he shall not hold the land over the four years, for he must take the profits upon his extent presently. The proceeding in execution of the statute staple, and the recognizance founded upon the statute of 23 Hen. 8, is after the same manner throughout as the proceeding in execution of the statute merchant is, with these differences only, that, upon the execution of the statute merchant, there doth issue forth a *capias* against the body before any execution be to be made of the lands, or goods and chattels; and the lands and goods cannot be extended until a quarter of a year be passed after the body is taken, or the sheriff have returned a *non est inventus*; but upon the execution of the statute staple and the recognizance, the body, goods and lands may be taken together at the first; this [the statute staple or recognizance] therefore is a more speedy remedy than the former. Also, upon a statute merchant, one may have an action of debt; but otherwise upon a statute staple; and the *capias* upon the statute merchant may be returnable in the King's Bench, or Common Pleas, but * the writ of execution upon the other is to be returned in the Chancery.

15 H. 7. 16. F. N. B. 130, 131.

*P. 359.

Dyer, 360. 315. Kelw. 100. West. 2, ch. 18.

The proceeding upon the other sort of recognizances is after another manner; for upon recog-

[Recognizances at common law.]

nizances at the common law, if the money be not paid at the day, the conusee, his executor, or administrator, is to bring a *scire facias* against the conusor, or if he be dead, against his heirs when they be of full age; or if the lands the conusor had at the time of entering into the recognizance be sold, against the purchasers of these lands which the conusor had at any time after the recognizance entered into, to warn them to come into that court whence the *scire facias* cometh, and to show cause why execution should not be done upon the said recognizance; and if the party or parties cannot be found to be warned, or being warned do not appear at the time, or appearing show no cause why the debt should not be levied, then the conusee shall have execution of a moiety of his lands by *elegit*, or, if the conusor be living, of all his goods by *levari* or *fieri facias*, at his election; but he cannot have execution of his body, unless he bring an action of debt upon the recognizance, or it be by course of the court, as it is in the King's Bench upon a bail, in which case a *capias* doth lie.

Bro. Execution, 189. Co. 3. 11. 15 H. 7. 16. Kitch. 117.

Elegit.

Levari facias. *Fieri facias.*

Capias.

Sureties. The proceeding against the sureties in statutes shall be as the proceeding against the principal; but in case where there are moveables of the principal to satisfy the debt, the surety (as it seems) shall not be charged (7).

Stat. de Mercatoribus.

5. What things are subject and liable to execution upon a statute or recognizance; and when, and how; and what not.

When a man doth enter into a statute or recognizance, the land of the conusor is not the debtor, but the body; and the land is liable only in respect that it was in the hands [*viz.* tenancy] of the conusor at the time of acknowledging of the statute, or after; and the land is not charged with the debt [directly,] but chargeable only at the election of the conusee, but the person is charged; and the land is chargeable in respect of the person, and not the person in respect of the land. And therefore, albeit the conusor alien his land to another, yet he remains debtor still, and his body and his goods shall be taken in execution; and yet, when execution is sued upon the land, the land is charged and become debtor also.

Plow. 79. Co. 10. 50, 51. Bro. St. Merchant.

[Alienee liable.]

(7) See more amply as to the manner of suing out execution on statutes and recognizances, and wherein the recognisance differs from the statutes, and they from each other, in *Bac. Abr. Execution* (B. 2); *Vin. Abr. Statutes Merchant* (K.); *Com. Dig. Statute Staple* (D.)

Stat. de Mercatoribus. Co. 3. 12. Plow. 72. Co. 2. 59. Lit. Sect. 358. Dyer, 205. Bro. Stat. Merchant, 44. Dyer, 7. Co. super Lit. 374.

First, in respect of the nature and quality of the things themselves.

The body of the conusor himself, but not the body of his heir, executor, or administrator, is liable to execution and may be taken, albeit there be lands, goods and chattels to satisfy the debt; and all the demesne and copyhold lands, tenements and hereditaments, corporeal and incorporeal of the conusor that are grantable over, as his manors, messuages, lands, meadows, pastures, woods, rents, commons, tithes, advowsons and the like; also all his goods and chattels, as leases for years, wardships, emblements, cattle, household-stuff, and the like, are liable to execution upon * a statute. [It is apprehended the freehold only of copyhold lands, that is, the ownership of the lord, not the interest of the copyholder, is extendible.] And therefore if a man make a lease for life, or years, and after enter into a statute, or recognizance; this reversion *cum acciderit*, [*i. e.* the reversion expectant on the term,] shall be subject to execution, and the conusor cannot (as it seems) by any sale thereof prevent it. [In case of a reversion after an estate tail, possibly the judgment may be for execution, *cum acciderit*.] And yet the contrary hath been held for law. *Lit. Bro. sect.* 227. And if one make a feoffment in fee, or lease for life, reserving a rent, this rent is extendable, and the conusee may distrain for it. [a] So if the lessee for life make a lease for years, rendering a rent, and then the lessee for life enter into a statute; this rent is subject to execution; and it seems the conusee may bring an action of debt against the lessee for years for it. [b] And albeit the rent become extinct by the purchase of the conusor or otherwise, yet as to the conusee it shall be said to be in *esse*, and subject to execution still. And therefore if a rent be granted unto me for my life after the death of my wife, and after I do acknowledge a statute, and then my wife die, and then I release the rent to the terretenant; this rent shall be liable to execution. But [personal] annuities, offices in trust, seigniories in frankalmoign, homage, fealty, rights, things in action, [rights of entry,] and such like things, are not liable to execution upon statutes or recognizances, [except in the case of the crown, by its prerogative. *Vin. Abr. Prerogative*, (I.) pl. 11.]

*P. 360.

Dyer, 373.

Doct. & Stud. 53. Bro. St. Marcha. 44. Dyer, 205. [a] Harrington's case, Pasch. 9. Jac. B. R.

[b] Co. 7. 38.

Dyer, 7. Co. super Lit. 374. Doct. & Stud. 53. Co. 2. 59. 1. 62.

Also a remainder in tail, or in fee, after an estate tail in possession, is not liable to execution in these cases, except it happen to come into the possession of the conusor.

Second, in respect of the estate, property, and possession of the conusor in the things.

The lands, tenements and hereditaments that are copyhold, albeit the conusor have the fee simple of them, yet these, [if subject to execution, 3 *Prest. Abstr.* 351,] are subject to execution only for the life of the conusor; [*i. e.* the rents are to be levied rather than the lands taken in execution;] but his demesne lands wherein he hath an estate in fee simple, are liable to execution for ever, if need require. Stat. de Mercatoribus. Dyer, 299. Plow. 82. Co. 7. 39 3. 12. Bro. Recognizance, 7. Co. 1. 62. 13 H. 7. 22. Bro. Stat. Merchant.

The lands the conusor hath in joint-tenancy with another, are [as against the joint-tenant] subject to execution during the life of the conusor and no longer; for after his death the surviving joint-tenant shall have all; but if the conusor survive his companion, then all the land [and all his estate therein] shall be subject to execution; [the like law if the joint-tenancy be severed;] and the lands the conusor hath as tenant in tail, are [as against the heirs in tail] liable to execution only during the life of him being the tenant in tail; for afterwards they shall go to his issue in tail. And yet if the tenant in tail, after he hath entered into a statute, suffer a recovery of the land entailed, [or alien them by any other means;] in this case the land shall [as against him and his common law heirs and alienee] be subject to execution, as if it were fee simple land. And the lands the conusor hath in the right of his wife, shall be charged and subject to execution only during the lives of the husband and wife together, [*i. e.* during coverture,] and no longer, [unless the husband be or become tenant by the courtesy, and in that case during his life.]

If a feoffment be made in condition to make an estate to another by a day of the same land, and before the day the feoffee enter into a statute or a recognizance; this land shall be subject unto execution until the feoffor re-enter, [*i. e.* the estate be defeated] for the breach of the condition. Lit. Sect. 358.

*P. 361. * If one be disseised of land, and then enter into a statute; this land shall not be subject to execution; [because the disseisee has merely a Co. 2. 59.

right of entry, and not any seisin ;] and yet, if the conusor do after recover the land by entry or action, it [the land] shall be liable to execution.

Stat. de Mercatoribus. Co. 3. 11, 12. Plow. 524. Co. 8. 171. 5. 90. Dyer, 67.

The goods and chattels whereof the conusor is solely possessed, and possessed in his own right, and the goods and chattels of which he is jointly possessed with another, and the goods and chattels he hath in the right of his wife, are [to the extent of his share and interest] liable to execution. [Strictly speaking, the husband cannot have goods and chattels, being mere personal property, in right of his wife. He has the absolute property of them.] But the goods or chattels that he or his wife hath as executor or executrix to another, or as pledged only, it seems are not subject to execution. [*Manning's Exch.* 538; *Toller's Exec.* 215.] And if the conusor deliver goods to another to deliver over to *I. S.* these goods, before they be delivered over, are liable to execution, [against *I. S.* or the conusor, as one or the other has the property.] And if he have leases for years in the right of his wife, and die before execution be done, it seems these leases are liable to execution. *Sed quære.* [According to *Roll. Abr.* 344, l. 21; 346, l. 27; *Com. Dig. Baron and Feme* (E. 2); and the principles of law, execution cannot be sued against the term after the death of the husband.] But if the conusor have goods in his custody of another man's, or have goods he hath distrained in the nature of a distress, these [goods] are not liable to execution.

3. *In respect of the time.*

Co. 3. 12. Stat. de Mercatoribus.

All the lands, tenements and hereditaments which the conusor had at the time of the statute or recognizance entered into, or at any time after, into whose hands by what means soever the same are betide and come at the time of execution, are subject and liable to the execution; [but a purchaser for a valuable consideration, and without notice, who has a prior legal estate in the name of himself, or of a trustee for him, may protect himself from the execution by means of that estate, so long as the same estate continues; hence the utility of attendant terms, and of taking actual assignments of them, and of obtaining the legal estate, &c.] But the lands the conusor had and did put away before the time of the statute or recognizance entered into, [or unless there be the

requisites of the several statutes, 3 *Prest. Abstr.* 343,] are not liable to execution. And all the goods and chattels the conusor hath, and are found in his hands, at the time when the execution is to be made by the *extendi facias*, are liable to the execution. But the goods and chattels he had and did *bonâ fide* do away [*viz.* alien] before the time of execution done, are not liable to the execution.

4. In respect of the quantity [of land.]

And of all these things before subject to execution, the conusee may take all or part at his pleasure. And therefore, if the conusor have sold his lands to divers persons, or have sold some of his lands to divers persons, or to one man, and keep the rest in his hands, or it descend to his heir; the conusee may sue execution upon the lands in either of their hands at his election; so that if the conusee, after the statute entered into, and before execution, purchase part of the land of the conusor, he may notwithstanding have execution upon the residue in the hands of the conusor, or in the hands of his heir; and yet so that, in some of these cases, his execution may be afterwards avoided, and he [be] compelled to sue execution again.

Bro. Stat. 10. 48. 25. Plow. 7a. See infra.

[Purchase of part.]

The conusee, upon other recognizances, shall have the same things in execution as a man shall have after a judgment in a suit in the King's Bench or Common Pleas by *fieri facias*, or *levari facias*, all his goods and chattels, and by *elegit* the moiety * of his lands, and all his chattels, besides [*i. e.* exclusive of] the cattle of his plough and implements of husbandry. But in these cases he cannot take the body of the conusor in execution, unless it be upon a new suit, or in case of bail in the King's Bench.

West. 2, c. 18. Plow. 7a. Co. 5, 12. Dyer, 306. Kelw. 100.

*P. 362.

6. Where a man shall have a re-extent or new execution; and where not.

Howsoever, by the common law, after a full and perfect execution had by extent returned and of record, there shall never be any re-extent, yet by a special act of parliament it is provided, that if after lands, &c. be had in execution upon a just or lawful title, wherewith all the said lands, &c. were liable, tied, or bound, at such time as they were delivered or taken in execution, they shall be taken or recovered away from him before he hath received his full debt and damages; in this case, after a *scire facias* had against the conusor, his heirs, executors, administrators or purchasers, he (or his executors or administrators, if he be dead,) shall have a new execution to levy the

Stat. 32 H. 8, 5.

residue of the debt and damages then unsatisfied. Wherein these things are to be observed: 1. In case where the conusee is unlawfully and wrongfully disturbed, either by the conusor or by a stranger, in the taking of the profits of the land delivered to him in execution, there he may and must bring his action and recover damages, and these damages shall go toward his satisfaction; for in this case, and for this disturbance, he shall not hold the land a day the longer. And where he is hindered by his own neglect or act in the taking of the profits of the lands, as where his debt is 40 *l.* and he hath 10 *l.* a year delivered to him, by which he may satisfy himself in four years, and within the time he make a conditional surrender to the conusor, and enter for the condition broken; in this case he shall not hold the land over, neither shall he have any re-extent. And where the let or disturbance is such, as wherein the conusee hath remedy given him by the common law to hold the land over after the disturbance removed; in this case he shall have no new execution nor re-extent within this statute; for where the conusee hath remedy *in præsenti* for part, or *in futuro* for all or part, this statute extendeth not to it: and therefore, where the conusee is hindered in the taking of the profits of land by the act of God, as by fire, overflowing of water, or the like; or the act of the party conusor, or any by or under him, as when one is bound to *A.* in a statute of 100 *l.* and after to *B.* in a statute of 200 *l.* and *B.* extendeth the land first, and then *A.* extendeth the land and taketh it away from *B.* or when the guardian in chivalry doth put out the conusee by reason of the wardship of the heir of the conusor, or the wife of the conusor doth claim her dower and put out the conusee, or one disseise his lessee for life, or oust his lessee for years, and then acknowledge a statute, and after execution is sued against him, and then the land is delivered to the conusee, and * after the lessee for life or years doth enter; in all these cases, because by the common law the conusee may hold over the land after the time given him by the extent, and after the impediments removed, until he be satisfied his debt and damages, therefore he shall have no aid of this statute by re-extent; for he is then only to

*P. 363.

Co. 4. 66. 82. Plow. 61. 15 H. 7. 15. Co. super Lit. 299. Kitch. 116.

[Deighton v. Greville, 2 Ventr. 321.]

be relieved by this statute when he is evicted and disturbed, and is wholly and clearly without any remedy at the common law. 2. Where the statute saith, " until he, &c. or his assigns shall fully and wholly have levied the whole debt and damages," if he hath assigned several parcels to several assigns, yet all they shall have the land but [*i. e.* only] until the whole debt be paid. 3. Where the words be, " for the which the said lands, &c. were delivered in execution," if *A.* disseisor convey the lands to the king, who granteth the same over to *A.* and his heirs, to hold by fealty and 20*l.* rent, and after granteth the seigniory to *B.*, *B.* acknowledgeth a statute, and execution is sued of the seigniory, *A.* dieth without heir, and the conusee entereth and is evicted by the disseisee; in this case he shall have the aid of this statute; but the perquisite of a villain being evicted is out of the statute. 4. Where the words be, " delivered and taken in execution," yet if after the *liberate* the conusee enter (as he may) so as the land is never delivered, yet it is within the remedy of this statute. 5. Albeit the statute speak only of the recoveror, obligee, &c. and not of their executors, administrators or assigns, yet the statute shall extend to them. 6. Where the statute speaks of a *scire facias* out of the same court, &c. if the record be removed into another court and there affirmed, he may have a *scire facias* out of that court. 7. Where the statute gives a *scire facias* against such person or persons, &c. that were parties to the first execution, their heirs, executors, or assigns, &c. this must not be taken so generally as the letter is; for if the first execution were had against a purchaser, &c. so as nothing in his hands were liable but the land recovered, if this land be evicted from the tenant by execution, no *scire facias* shall go against him, his executors, &c. but if he hath other lands subject to execution, then a *scire facias* lieth against him or his assigns, but not against his executor; neither in that case can he have a *scire facias* upon this statute against the first debtor or recognisor, but if there be several assigns of several parcels of lands subject to the execution, one *scire facias* will lie against all the assigns (8).

(8) As to the operation of the statute 32 Hen. 8, c. 5, see *Cowley* v. *Legat's case*, i *Godb.* 257, and *Cro. Jac.* 338; but more fully reported in 2 *Bulst.* 97; and further in C

Dyer, 297. 315. Co. 6. 13. 20. Ass. pl. 7. See Defeasance.

7. *Where and by what means a statute or recognizance, and the execution thereof, shall be discharged, suspended, or avoided in all or in part, and where not.*

A statute or recognizance, and the execution thereupon, may be discharged divers ways, as by defeasance, release, payment of the money, debt, and damages, or the residue thereof unlevied, [and the judgment of a court thereon,] delivery up of the statute, purchase of part of the land by the conusee, or the like. And therefore if there be a defeasance to the statute or * recognizance, and it be to pay money at a day, or to perform some other thing, and the money be paid, or the thing done accordingly, this is a discharge of the statute. And therefore if such a statute or recognizance be afterwards sued against the conusor, he may be relieved by an *audita querela*. And if *A.* bind himself to *B.* by a statute of 20*l.* and *B.* sue execution, and the lands of *A.* are delivered to him in execution until he levy the money, and after *B.* doth make a defeasance to *A.* by indenture, that if *A.* pay 10*l.* by a day certain, then the statute or recognizance shall be void; if this be done accordingly, the statute and the execution thereupon is defeated and discharged. And if the conusee before execution, or after, release to the conusor the statute or recognizance, or the debt; this is a perpetual discharge of the statute and the execution thereupon. But if the conusee before execution release to the conusor all his right in or to the land, this will not discharge the whole execution; for if he may not sue execution of the land afterwards, (as it seems he may, this [release] notwithstanding,) yet he may sue execution of his body and goods. [See *chap. Release*, that he may sue execution of the land afterwards, because, at the time of the release, he hath not any interest in or title to the lands.] But such a release, after execution made of the land, will no doubt discharge the land. [For after execution he hath an estate or interest in the land.] And yet, if a conusee release all his right in the land to the feoffee of the conusor of a parcel of the land, it seems this will discharge the land of execution; albeit it be before the execution sued,

*P. 364.

By defeasance.

Co. super Lit. 76. 10. 47. 50, 51. super Lit. 265. Bro. St. Merchant, 25. See Release.

By release.

Lit. 289, b; *Clerk* v. *Andrew's case*, in *Cro. Jac.* 693; *Vin. Abr. Execution* (U. a, 3); *Com. Dig. Statute Staple* (D. 7.) See also the following statutes, whereby further provisions are made respecting executions, 2 *Jac.* 1, c. 13; 3 *Jac.* 1, c. 8; 21 *Jac.* c. 24; 16 & 17 *Car.* 2, c. 5, (made perpetual by 22 & 23 *Car.* 2, c. 5); 16 & 17 *Car.* 2, c. 8; and 9 *Car.* 2, c. 3; 3 *W. & M.* c. 14, § 5, 6; 5 & 6 *W. & M.* c. 20, § 32; 8 *Anne*, c. 14, § 1; the compass of a note not permitting, with propriety, an enumeration of the several particular purposes for which these numerous acts were made.

that this release is made. [This is contrary to the doctrine in the chapter on releases.] And so it is said it was resolved Mich. 26, 27 Eliz. [This was *Hyde* v. *Morley's case*, *Cro. Eliz.* 40. In that case there were special words; and in *Barrow* v. *Grey*, *Cro. Jac.* 449, the court of B. R. considered *Hyde* v. *Morley*, and denied that the statute could be released by a release of all right and title, &c. 15 *Vin. Abr.* 551; 1 *Inst.* 265.] If the conusee assign the statute or recognizance to the conusor, or to the terre-tenant, by way of discharge of the debt or land; it seems this is a good release and discharge of it in law. And if the conusee purchase any part of the land of the conusor after the statute or recognizance entered into; this is no discharge of the statute or the recognizance, but the conusee may have execution notwithstanding of the lands that are left in the hands of the conusor, or of his body, or goods, or all. But if the conusee purchase parcel of the lands, and a stranger [purchase] another parcel; in this case the lands that are purchased by the stranger shall be discharged of execution. [Because the lands were liable to contribute *pro rata*; and the conusee, by purchasing part, has changed the remedy for contribution.] And if the conusee, after execution sued, purchase any part of the land, or the fee simple of all or part of it doth descend to him; by this the whole execution is discharged. And if the conusee purchase all the lands of the conusor; by this the execution, as to the land, is suspended; [and subsequently purchased lands may be taken in execution;] but this is no[t any] discharge as to the body and goods of the conusor, for they are subject to execution still. And if the conusee re-enfeoff the conusor again, the execution may be revived again against the lands of the conusor; so that they will be subject to execution again, whether they do continue in his hands or be sold away to others. So also if the * conusee enfeoff a stranger after he doth purchase the land, and the stranger doth enfeoff the conusor; in this case also, the execution is revived, and the lands shall now be subject thereunto, as they were before; [not by force of the old lien, but the lien which commences with the new purchase, *viz.* the new seisin and title.]

Barrow and Graie's case, 38 Eliz.

By purchase or surrender of the land.

Plow. 72. F. N. 104. Lit. Bro. Sect. 293. 11 H. 7. 4. Br. Audita Querela, 49. Stat. Merchant, 42. Co. super Lit. 150. 25. Ass. pl. 7. Bro. Stat. Merchant. 25 Lit. Bro. Sect. 441. 5 H. 7. 25.

[Revival of lien.]

*P. 365.

Harrington's case, Pasche, 19 Jac. B. R.

If a lessee for life make a lease for years rendering a rent, and after enter into a statute to *I. S.* and then enter into another statute to *I. D.* and after he doth grant his estate to *I. S.*; by this [union of the estate and the lien,] the execution of the statute made to *I. S.* is suspended; and therefore, during the suspension, it seems *I. D.* albeit he be after [*i. e.* posterior] in time, may sue and have the rent in execution (9).

Plow. 72. Co. 3. 12. 6. 13.

8. *Where the conusor, or his heir, or an alienee, or purchaser, shall have contribution upon a statute, or recognizance; or not.*

If the conusor, after he hath entered into a statute, or recognizance, doth convey away his lands to divers persons, and then the conusee sue execution of the statute upon the lands of one or some of them, and not of all; in this case, he or they, whose lands are taken in execution, may, by an *audita querela* or *scire facias*, have contribution from the rest; wherein these differences must be observed, that one purchaser shall have contribution from another; and therefore, if the conusor sell some lands to *I. S.* and other lands to *I. D.* and the conusee sue execution only of the lands of *I. S.*; *I. S.* shall have contribution against *I. D.* And the feoffee of the purchaser, the feoffee of the heir of the conusor, the feoffee of the feoffee, and another feoffee, shall have contribution of [or rather indemnity from] the heir of the conusor, [as primarily liable;] but the conusor himself [or his heir] shall not have contribution from a purchaser; and therefore, if he sell part of his lands, and keep part in his hands, and the conusee sue execution only of the lands in the hands of the conusor or his heirs; in this case, neither he nor his heirs, shall have any contribution from the purchasers; and one heir shall have contribution from another, [*pro rata*, according to the value; and, in modern practice, equity would most easily and speedily administer this relief of contribution.] And therefore, if one be seised of two acres, the one in borough English, the other of other land, and he enter into a statute and die, and he hath but two daughters, and the execution be sued upon the land of one of them, she [*viz.* one heir] shall

(9) See more amply as to the several methods of vacating or discharging statutes, either before or after execution, in *Bac. Abr. Execution* (B. 7); *Vin. Abr. Statutes* (L.); *Com. Dig. Statute Staple* (F.)

have contribution from the other [heir.] So where some land doth descend to the heir of the part of the father, and some to the heir of the part of the mother.

If one be seised of lands in fee in the county[ies] of *A.* and *B.* and enter into a statute or recognizance, and the conusor die, and then the conusee die also, and his executor doth sue execution of the lands in *B.* only, and hath execution; and after the heir doth sell these lands; in this case, the vendee shall have no contribution. So also it seems the law is, if the heir sell the land to divers, and one of the purchasers appear to the *scire facias*, and the judgment is given against him, and he afterwards sell the land, his vendee shall have no contribution. And in all these cases, where it is said, the one purchaser [as distinguished from the case of several heirs] shall have contribution,
*P. 366. * it is not intended that the rest shall give or allow him any thing by way of contribution; but that the party, whose lands are extended, may, by *audita querela*, or *scire facias*, as the case requireth, defeat the execution, and thereby shall be restored to all the mean profits, and force the conusee to sue his execution upon all the land, that the land of every one of the terre-tenants may be equally extended. [But if he do not take advantage of his right, to have contribution on a *scire facias* sued against him, he, and all persons claiming under him, shall, from that time, be precluded from claiming any contribution, except perhaps in equity.]

And so we fall from an obligation by matter of record, to an obligation by matter of *fait*, which is no record.

CHAP. XXI.

Of an Obligation.

Finches ley, 49. *AN OBLIGATION is a deed in writing, [in writing may be omitted,] whereby one man doth bind himself to another to pay a sum of money or do some other thing. And he that makes this deed is called the obligor, and he to whom it is made is called the obligee. [So several persons may become bound to one person or to several persons; or one person may become bound to several persons.]

1. *Obligation. Quid.* *P. 367. Obligor. Obligee.

Co. super Lit. 172. And it is sometimes simple, or single; which is, when it is to pay a sum of money, or do some other thing, and when [*read*, and then] it is without any defeasance on a condition in or annexed to it; which [*i. e.* and such bond] also is sometimes with a penalty called a penal bill, and sometimes without a penalty. And this, [bond without a condition,] is that which is most properly called an obligation; and sometimes also it, [a bond without a condition,] is called a single bill, or single bond. And sometimes it [a bond] is double or conditional; which is, when it is attended upon and accompanied with a condition. And then it is said to be a bond containing a penalty with condition to pay money, or do or suffer some act or thing, &c. And this condition is sometimes called a defeasance, and then especially when it is (as sometimes it is) in another deed or instrument; [see *chap. Defeasance*;] for most commonly it [the condition] is inserted into the same deed wherein the obligation, being the other part of it, is contained. And then also it is either subscribed under the obligation, or included within the body of it, or endorsed upon the back of it. And *quacunque via* if the condition be performed, the penalty is saved; if not, the penalty is forfeit (1).

2. *Quotuplex.*

(1) See fully as to the nature of the security called an obligation, in *Bac. Abr. Obligation (A.)*; 2 *Bl. Com.* 340; *Com. Dig. Obligation* (A.); *Wood's Inst.* 288; *Vin. Abr. Obligation* (L.)

3. *What shall be said a good obligation in its original creation; or not.*
First, for the manner and form of it; and what words are sufficient to make an obligation.

[a] An obligation may be made upon parchment or paper, and in loose parchment or paper, or in a piece of paper or parchment sowed [*i. e.* sewed] in a book, and either way it is good. [b] But if it be made on a tally, piece of wood, or any other thing but [*i. e.* except] paper, or parchment, [or vellum,] albeit it be sealed and delivered, yet it is void. [2 *Bl. Com.* 297.] [c] And it may be made in the first, or in the third person, (notwithstanding the statute of 38 Edw. 3, c. 4, which [statute] doth intend only obligations made beyond the sea.) [1 *Inst.* 230, a.] And therefore an obligation so made, as *Memorandum quod* A. *de* B. *debeat* C. *de* D. 10*l. in cujus, &c.* is good.

[a] Bro. 6. Obligat. 67. 30.
[b] Trin. 49 Eliz. B. R.
[c] Co. super Lit. 229. Fitz. Obligation, 9.

Albeit the best manner and form of an obligation, is that which is most usual, as, *Noveritis me* A. *de* B. *teneri et firmiter obligari* C. *de* D. *in* 20*l. legalis, &c. solvend. eidem* C. *aut suo cert. attornat. executoribus aut administratoribus suis. Ad quam quidem solutionem bene et fideliter faciendam, obligo me hæredes executores et administratores meos firmiter per præsentes, &c.* yet any words in a writing, sealed and delivered, [being a deed,] whereby a man doth prove and declare himself to have another man's money, [as a debtor,] or to be indebted to him, will make a good obligation (2);

Dyer, 21, 22, 23. Co. 9. 53. 37 H. 6. 9. 22 Ed. 4. 22. Kelw. 34. 21 Ed. 4. 39. 11 H. 7. 6.

*P. 368. * and therefore, if a man by deed say but this, *Memorandum*, that I, *A.* of *B.* do owe to *C.* of *D.* 20*l.* to be paid at Easter next; or, *Memorandum*, that I, *A.* of *B.* have had of *C.* of *D.* 20*l.* of which there is 10*l.* behind, "or of which I owe him 10*l.*"; or, *Memorandum*, that I, *A.* of *B.* have received of *C.* of *D.* 20*l.* to be repaid him again; or, *Memorandum*, that I, *A.* of *B.* do grant to owe "or to pay" *C.* of *D.* 20*l.*; or, *Memorandum*, that I, *A.* of *B.* do promise to pay *C.* of *D.* 20*l.*; or, *Memorandum*, that I, *A.* of *B.* will pay to *C.* of *D.* 20*l.*; or, *Memorandum*, that I, *A.* of *B.* have had 20*l.* of the money of *C.* of *D.*; or, *Memorandum*, that I, *A.* of *B.* have borrowed of *C.* of *D.* 20*l.*; or, *Memorandum*, that I, *A.* of *B.* do bind myself to *C.* of *D.* that he shall receive of me 20*l.*; all these, and such like [deeds,] are good

(2) For various precedents of obligations, see *Mad. Form. Angl.* p. 355; 1 *Horsman*, 174; 2 *Wood*, 701.

obligations. So if one say, [d] *Memorandum*, that I, *A.* of *B.* bind myself to *C.* of *D.* that he shall receive 20*l.* by the hands of *I. S.* when *K.* doth come to his house, and at Michaelmas then next following 5*l.*; this is a good obligation, and the words "by the hands of *I. S.*" are void. [e] So if one bind himself thus, *Memorandum*, that I, *A.* of *B.* owe to *C.* of *D.* 20*l.* for payment of which I bind myself and my goods; this is a good obligation, and will bind the person, but not his goods. [f] So if one, by deed, covenant or promise to do a thing, and then useth these words, *ad quam quidem promissionem perimplendam obligo me in* 20*l.*; this is a good obligation for 20*l.* [g] So if one bind himself thus, [h] *Memorandum*, that I, *A.* of *B.* am bound to *C.* of *D.* to deliver him twenty quarters of corn by a day, *ad quod performandum obligo me*, without more words; this is a good obligation. So if one bind himself thus, *Memorandum*, that I, *A.* of *B.* bind myself to pay *C.* of *D.* 10*l.* at Easter, and if I fail to pay it then, I do grant to pay him 20*l.*; this is a good obligation for the 20*l.* if he fail to pay the 10*l.* [i] And some say he may recover both the 20*l.* and the 10*l.* So if one bind himself thus, [k] *Memorandum*, that in consideration of a bill of 50*l.* wherein *I. S.* is bound for me to *I. D.* for payment of 20*l.* I do bind myself in 20*l.* to the said *I. S.* to save him harmless from all actions of the same; this is a good obligation; and if *I. D.* sue *I. S.* the bill is forfeit. Or if one bind himself thus, Be it known, &c. that I, *A.* of *B.* do owe unto *C.* of *D.* the sum of 14*l.* to be paid at the feast of, &c. together with 6*l.* which I owe him upon bills and recognizances subscribed with my hand; this is a good bill, but it is good for no more but [*viz.* than] the 14*l.* and not for the 6*l.* for the words do only import the time of payment of the 14*l.* [and conesquently, there is not any language, but mere assent, proceeding from the sureties. *Sed quære.*]

If one make a writing in the form of a statute, [and] which the party doth seal, and afterwards legally deliver, but it is not sealed by the king's and the mayor's seal according to the statute; albeit this be not a good statute, yet it may be a good obligation.

[d] Bro. Obligation, 56.

[e] Bro. Obligation, 16.

[f] Bro. Obligation, 52. Dyer, 6.

[g] Bro. Obligation, 40.

[h] Bro. Obligation, 79.

[i] Foxall's case, 9 Jac. B. R.

[k] Fox v. Wright, Trin. 40 El. B. R.

Adjudged Parret and Woolward's case, M. 38, 39 El. in the Exchequer Chamber.

Trin. 37 El. B. R. Fitz. Accompt, 79.

If one bind himself to pay money, or do any other thing, and afterward doth add this clause in the deed, *et ad majorem hujus* * *rei securitatem inveni* A. *de* B. *et* C. *de* D. *fide jussores, quorum unusquisque* [being the language of the sureties,] *obligat se in toto et in solid.* and these two do also seal and deliver the deed; it seems this is a good obligation to bind them, albeit there be no other words in the deed. Perk. Sect. 158. Fitz. Ob. 1.

*P. 369.

If an obligation be made to *I. D.* to the use of *I. S.* this is a good obligation for *I. S.* in equity; and some have said he may release it, but this is much to be doubted; for it is certain *I. S.* cannot sue the obligor in his own name. [See *Barfield* v. *Stuckey*, 2 *Brod. & Bing.* 333; the like point as to covenants, 2 *Prest. Convey.* 397. 415.] But when he hath cause of suit, he may compel *I. D.* in chancery to sue the obligor; [and *I. S.* may make a release, which would be effectual in equity, though not at law.] Bro. Obl. 72. Cromp. Jer. 63.

If *A.* of *B.* bind himself to *C.* of *D.* to pay 20*l.* and say not when, yet the obligation is good, and the money is due presently. So if the obligation be *solvendum nunquam*, or *solvendum* at doomsday, the obligations are good, and the *solvendum* void, and the money is due presently. So if *A.* of *B.* bind himself to *C.* of *D.* in 20*l.* *solvendum* A. *de B.* (where it should be *solvendum* C. *de* D.) the obligation is good, and the *solvendum* void. Bro. Obl. 47. 14 H. 8. 29. 21 Ed. 3. 46. 4 Ed. 4. 29.

If the obligation be made thus, "*obligo me, &c.*" leaving out these words following "*hæredes, executores et administratores*," this is a good obligation, and the executors and administrators, but not the heir, are bound by it; [for the heirs cannot be bound, unless they be expressly named.] And if it be made thus, "*solvendum* to the *obligee et successoribus suis*," and not "*executoribus, &c.*" this is a good obligation; and the executors and administrators, and not the successors, except it be in case of a corporation, shall take advantage of it, [the bond, by suit.] Dyer, 13. Bro. Obl. 15. 68.

An obligation may be good, albeit it contain false or incongruous Latin or English, or Latin be put for English, or *è contra*, if the intent of the parties may sufficiently appear (3); and therefore Co. 10. 133. Fitz. Obl. 12. 2 H. 4. 14.

(3) By stat. 4 Geo. 2, c. 26, bonds must be in the English language only, and not in Latin or French, or any other language whatsoever.

if one be bound by the name of *Johannes* for *Johannem*; or one bind himself in *octogenta*, for *octoginta libris*; or in *septungentis* for *septingentis libris*; in *viginti* for *viginti libris*; in sewteen for seventeen pounds; in *quinquegentis* for *quingentis libris*; [l] in *septuagessimo* for *septuaginta libris*; [m] *sexingentis* for *sexcentis libris*; in *quinquagessimus*, or *quinque decies*, for *quinquaginta libris*; in *octogenta* for *octoginta libris*; or in *viginti livers*, for *viginti libris*; in *viginti nobilibus* for twenty nobles; [n] or in *octigenta libris*, for *octoginta libris*; or *quinginta libris* for *quinquaginta libris*, or the like; these misprisions will not hurt the obligations, for they are good notwithstanding. But if one by the obligation bind himself in [o] *quinqueagentis libris*, or in *quinqeagentis libris*, or in *quinagentis libris*, or in *segintis libris*; these obligations are void; for, in these cases, the meaning is so uncertain, that it cannot be discerned, and no averment will serve to supply it in this case. [p] So if an obligation be dated 23 *die Aprilie*, instead of *Aprilis*, this is a good obligation; and this mistake will not hurt. [Uncertainty.]

[l] Adjudged Vernon's case, M. 13 Jac. C. B.
[m] Graie's case, 5 Jac. B. R. Mich. 10 Car. B. R. adjudged.
[n] Fits. hugh. tres. Bridges, 3 & 4 Eliz. C. B.
[o] Paris' case, M. 4 Jac. B. R.
[p] Trin. 21 Jac. Nowel's case.

And if an obligation have no date, or a false and impossible * date, or have but half the date, as the year of our Lord only; or if it want these words, *in cujus rei, &c.* or the like, if it be sealed and delivered, it is a good obligation (4). *P. 370.

Co. 2. 5. See at Fait, numb. 5.

A single obligation may be to pay money, or to do any other thing that is lawful and possible, and such obligations are good. But if the obligation be to bind a man to do a thing unlawful or impossible, it is void; and therefore if one bind himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void. So if the obligation be made for maintenance, or to that end, or if it be made pursuant to and in execution of an usurious contract, or the like, it is void. So if an obligation be made against the statute of 23 Hen. 6, [a statute against sheriffs letting their bailiwick to farm,] it is void. So if one bind himself in an obligation, and the matter thereof is altogether uncertain, or insensible, it is void; but if there be any reasonable certainty in it, it is good enough, Secondly, for the matter and substance of it.

Co. 10. 110. See Fait or Deed, numb. 51.

See more, infra.

(4) See accordingly *Wood's Inst.* 290; 1 *Wood*, 767; and more amply by what words an obligation may be made, in *Com. Dig. Obligation* (B.); *Vin. Abr. Obligation* (D.); *Bac. Abr. Obligation* (B.)

[and *certum est quod certum reddi potest*, or which can receive a reasonable interpretation.] So if one bind himself to go to Rome in three days under pain of 20 *l.* this is void.

4. What shall be said a good condition of an obligation; or not.
First, for the manner and frame of it.

The condition of an obligation may be either in the same, or in another deed, and it may be endorsed on the back of the obligation, subscribed under it, or contained within it; but the best way to make it, is the usual way, *viz.* The condition of this obligation is such, &c. And yet, if it be otherwise, it may be good; for if an obligation be made from *A.* to *B.* and on the back of the same these words are endorsed "that whereas the within bounden *A.* is bound to *B.* in 20 *l.* yet *B.* willeth and granteth that if *A.* pay to *B.* 10 *l.* at Easter, that then the obligation shall be void;" it seems this is a good condition. So if in the close of an obligation of 20 *l.* these words be added "that if *A.* (the obligor) pay 10 *l.* to *B.* (the obligee) at Easter, that the obligation shall be void;" this is a good condition. So if an obligation be made from *A.* to *B.* of 20 *l.* and these words are subscribed, "now therefore if the obligor pay 5 *l.* quarterly for four years, then it is agreed that the obligation shall be void;" this is a good condition. So if a single obligation be made from *A.* to *B.* of 20 *l.* and after the obligation is made, *B.* doth by another deed grant, that if *A.* pay him 10 *l.* at Easter, the obligation shall be void; this is a good condition or [rather] defeasance. But if *A.* do bind himself in an obligation to *B.* of 20 *l.* and after *B.* doth bind himself in another obligation to *A.* to perform the covenants of an indenture, and in this second obligation there is a proviso that *B.* shall not sue upon the first obligation till such a time; this is not a good condition. For want of the concluding words of a condition, it is a mere covenant or agreement.]

Plow. 141. 21 H. 6. 51. Fitz. Barre, 157. Bro. Obli. 89. Fitz. Barre, 265. Pasche, 8 Jac. B. Simpson's case. 21 H. 6. 51. 21 H. 8. 9.

If *A.* be bound to *B.* in 20 *l.* with condition that if *B.* do not bring *A.* a horse before Easter, that [*omit* that] the obligation shall be void; this is a good condition: and if the obligee will have advantage of it, he must perform the thing; *et sic de similibus.* So if *A.* be bound in an obligation to *B.* in 20 *l.* with condition that if *B.* shall bring twenty load * of wood to the house of *A.* that *A.* shall pay him the 20 *l.* or that *A.* shall pay him

26 H. 8. 8. Bro. Count. 69

*P. 371.

20*l.* when *B.* shall bring him twenty load of wood to his house; these are good conditions; and the thing must be done before the money is to be paid.

Bro. Oblig. 42. If the condition of an obligation be, that if *A.* (the obligor) do not pay to *B.* (the obligee) 10*l.* that [*read*, then] the obligation shall be void; this is a good condition; but it shall be taken according to the words, and therefore the obligor is not to pay it; and if he be sued, he may plead performance of the condition in the not paying of it.

Curia, B. R. Pasche, 90 Ja. Trueman and Parram's case. If these words be omitted in the close of the condition, "that then the obligation to be void," the condition is void; but it doth not hurt the obligation, for that remains single: but if the next words, *viz.* "or else shall stand in force," be omitted, the ad[*read*, condition] is never the worse; for as the addition of them doth nothing add to, so the omission of them doth nothing detract from, the strength of the obligation.

See in West. Symb. The condition of an obligation may be to do any lawful or possible thing, as to pay money, deliver goods, or cattle, acknowledge a statute, enter into an obligation, make a release, make an estate, surrender an estate, make reparations, for quiet enjoying, to save harmless, to defend a title, to perform covenants, to abide an award, to perform a will, to give so much land or money in legacy, to purchase lands, to appear in a court, to marry another, not to sue, not to meddle with an executorship, not to revoke a letter of attorney, not to be surety, not to play at cards or dice, or any such like thing; and such conditions are good. So also it seems a condition, that a man shall not sell his goods, is good; but when the matter or thing to be done by the condition is unlawful or impossible, or the condition itself is repugnant, insensible, or incertain, the condition is void, and in some cases the obligation also. And herein these differences are to be observed:

Secondly, for matter and substance of it.

Pasche, 8 Ja. Co. B.

Co. 10. 101. 11. 53. super Lit. 206. Dyer, 304. Plow. 64. Fits. Obligation, 13. See before in Condition and in Covenant. 1. When the thing enjoined, or restrained, to be or not to be done by the condition, is such a thing in its own nature, as that the commission or omission thereof is *malum in se*, there not only the condition, but the whole obligation also, is void *ab initio:* and therefore if one be bound in an obligation with condition, that he shall kill a man, burn

Against law.

a house, do any other felony, commit any trespass, maintain any suit unlawfully; or (being an officer) that he shall take fees by extortion, or that he (being a sheriff, &c.) shall let a prisoner escape, or that he shall save the obligee harmless against an unlawful deed, or that he shall not save [*read*, sell] his land. [Note, a bond that a man shall not sell his lands is good, but a condition in general restraint of alienation, if applied to an estate tail, or in fee simple, as a condition to the estate, is void; but a condition not to alien to a particular person, or by a mode which is not rightful, or for a particular time, is good;] or that he (being a tradesman) shall not use his trade, (and yet it seems, a condition, that a man shall not use his trade in one place, [or within reasonable limits,] or at one time, [or even for a limited time, or for his life. *Thom. Co. Litt.* vol. 2, p. 24, n. (*p*),] or if he do that he shall pay so much by the year unto another, is
*P. 372. not * a condition against law;) or that a man (being an officer and an officer *pro bono publico*) shall not exercise his office, or the like, this condition is void, and makes the obligation and so the whole deed void. But when the thing, to be or not to be done by the condition, is such a thing as the omission or commission thereof in its nature is not *malum in se*, but only against some maxim of law; as that a man shall make a feoffment to his own wife: or is but *malum prohibitum* only; as that a man shall erect a cottage contrary to the statute of 31 Eliz. [a statute repealed by 15 Geo. 3, c. 32:] or is repugnant to the estate; as that a feoffee of land shall not alien it, or take the profits of it; or that a tenant in tail shall not suffer a recovery of his land, or the like; in these cases, the conditions only are void, and the obligations remain single and without a condition (5). And yet

(5) In *Mitchell* v. *Reynolds*, 1 *Pr. Wms.* 181, *Parker*, Ch. J. in delivering the resolution of the court, says, All the instances of conditions against law in a proper sense, are reducible under one of these three heads; 1st. Either to do something that is *malum in se*, or *malum prohibitum*. *Co. Lit.* 206; 2dly, To omit the doing of something that is a duty. *Palm.* 172; *Hob.* 12; 3dly, To encourage such crimes and omissions. *Fitz. Obligation*, 13; *Bro. Obligation*, 34; *Dyer*, 118. Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in *Co. Lit.* 206, a feoffment shall be absolute for an unlawful condition, but a bond void. See more amply as to the operation of obligations where the conditions are against law, in *Bac. Abr. Obligation* (E. 3.); *ante*, in p. 129, and the notes and references thereto.

perhaps, if the obligors be sued upon these obligations, they may have relief in equity (6). Equity.

Perk. Sect. 735. Co. super Lit. 207. Fitz. Oblig. 17. 27. H. 8. 29. 21 Ed. 4. 54. 42 Ed. 3. 6.

2. When the matter or thing to be done by the condition is such a thing, as in its nature is impossible to be done at the time of the making of the obligation, there the obligation is good, and the condition only is void. And therefore if I be bound in an obligation with condition, that I shall stand to the award of certain persons, &c. provided that the award be made before the 10th day of May next, and provided that I have warning fifteen days before the 10th of May, and this obligation is made the 9th day of May; this is a void condition, [because there cannot be fifteen days warning:] and so if I be bound in an obligation with condition, that I will go to Rome within three days; or that I will make an estate of white acre in *Dale*, worth 10*l.* per annum, when *re vera* it is worth but 5*l.* per annum; or that I will be nonsuit in such an action; or assure such a piece of ground, when in truth there is no such action, or piece of ground; this condition is void, and the obligation remains single and good. Impossible.

Hil. 17 Jac. B. R.

So if the condition be, that whereas *A.* had a judgment against *B.* the obligor for 20*l.* and the obligee hath acknowledged satisfaction, if therefore the obligor shall before such a day get a warrant from *A.* whereby the obligee may be saved harmless for the same acknowledgment, that [*omit*, that] then, &c. this condition is void; and, as it seems, the obligation also, for that it is not only impossible, but against law also. But when the thing to be done by the condition, is a thing possible at the time of the making of the obligation, and after by matter *ex post facto*, by the act of God, the act of the law, or the act of the obligee, it is become impossible; in this case, the obligation, and the condition both; are become void: and therefore if a man be bound with a condition, that he shall appear the next term in such a court, and before the day the obligor dieth; hereby the obligation is saved.

(6) A court of equity will in such case decree the bond to be delivered up to be cancelled, according to the cases of *Tatton* v. *Mollineux*, *Mo.* 109; and *Jervis* v. *Bruton*, in 2 *Vern.* 251. Equity affords extensive relief in obligations; as, if they are obtained by fraud; if the consideration is not performed; or if it be illegal; or if there was no consideration at all; if the condition by accident becomes unreasonable; if the obligation was obtained by duress, force, or terror; and in various other cases, explained and well supported by authorities, in *Com. Dig. Chancery* (4 D); and *Eq. Ca. Abr.* tit. *Bonds and Obligations*.

So if *A.* be bound to *B.* that *I. S.* shall marry *Jane G.* by such a day, and before the day, *B.* himself marry with *Jane G.* [thus by his own act rendering it impossible that *I. S.* should marry her,] hereby the obligation is discharged, and *B.* shall never take advantage of it (7). 21 Ed. 4. 53.

Insensible incertain.

*P. 373.

* 3. When the condition of an obligation is so insensible and incertain, that the meaning cannot be known, there the condition only is void, and the obligation good; as if an obligation be made by *A.* to *B.* with condition, that *A.* shall keep *B.* without damage against *I. S.* for 10 *l.* in which the obligee is bound to the obligor; this condition is void, and the obligation single. So if the condition be, that *A.* shall pay his part of the sums of money, that shall be levied for the trying of the customs of *M.* unless the word "levied" be used for taxed in that country, the condition is insensible and void. So if *A.* be bound to *B.* with condition to save him harmless, and say not for what, or against whom; this condition is void, and the obligation single: but if any sense or certainty may be made of it [by a reasonable interpretation,] the obligation and condition shall be both good (8). Pasche, 9 Jac. B. R.

Repugnant.

4. When the condition of an obligation in the matter of it is repugnant to the obligation itself, there the condition is void, and the obligation good; and therefore if the condition of an obligation be, that the obligee shall not have benefit by the obligation, or that he shall not [at any time] sue for the money in the obligation, or the like; this condition is void, and the obligation single: and yet this by a defeasance made after the obligation may be done (9). [But if the defeasance restrain the right to sue generally, it operates as a release. *Salk.* 573. It operates as a defeasance only when it restrains the right for a particular time, or till an event shall happen; or is applicable only to one or more of several persons who are jointly and severally bound.] 7 H. 6. 44. 21 H. 7. 24. 30. See Defeasance.

(7) See accordingly *verbatim* in 1 *Wood*, 769; and further, as to the doctrine of impossible conditions in obligations, *Bac. Abr. Obligations* (E. 1.); *Vin. Abr. Conditions* (C. a.) to (E. a.)

(8) For the doctrine of conditions in obligations where the words are insensible, see 1 *Vent.* 238; 2 *Mod.* 285; 3 *Lev.* 21; 2 *Salk.* 462.

(9) See accordingly *Trot.* v. *Spurling*, *Mo.* 811; and further, as to repugnant conditions, in *Vin. Abr. Conditions* (B. a.); *Bac. Abr. Obligations* (E. 2.)

10 H. 6. 14. 21 Ed. 4. 10. Not triable.

5. When the thing, to be done by the condition, is to be done beyond the sea, it hath been held that the condition is void, and the obligation single, because the thing was not triable here. But it seems the law is otherwise now, and that the matter is triable here, and the condition good. And in all other cases where a deed in general is void for misnomer, disability, or otherwise, there an obligation is void.

Trin. 7 Ja. B. R.

Fitz. Oblig. 2. 11.

All bonds with conditions, for the enjoying of spiritual livings, contrary to the statute of 13 Eliz. c. 20, are void by the statute of 14 Eliz. c. 11, (10).

If any ladies or gentlewomen be drawn by flattery, or threatening, to enter into any obligation simple or conditional, to pay any money not truly due, they may be relieved by a course in the Chancery, for which see the statute of 31 Hen. 6, c. 39. [So equity will relieve against marriage brocage bonds, &c.]

Stat. 23 H. 6, c. 10.

No sheriff or his officers shall take any obligation, by colour of their offices, of any person in their ward, but only to themselves, and in the name of their office, with condition with sureties sufficient, that the prisoner shall appear at the day in the writ. And all others, taken in any other forms, shall be void. And persons that are in his ward, by execution, condemnation, *capias utlagatum*, excommunication, surety of the peace, or some other special case, being sent for by a justice for felony or the like, may not be bailed; and others that are arrested on a *capias* for debt, or an * indictment, or otherwise by writ, bill, or warrant, that are mainpernable, must be bailed. For the better understanding of which statute, these things must be observed; that such obligations as differ and vary from the form of this statute in words and circumstances only, are good notwithstanding this statute. And therefore if a prisoner make an obligation with a condition to appear and answer in a plea of

5. When an obligation shall be void, for that it is made to another, and not to the sheriff, or to the sheriff in another manner than is appointed by the stat. of 23 H. 6, c. 10.

*P. 374.

Villar's case, M. 9 Jac. B. R.

(10) Bonds, entered into for some other particular purposes, are by several subsequent statutes declared to be void. By stat. 5 & 6 Ed. 6, c. 16, bonds which concern the buying and selling of offices which relate to the administration of justice, the king's revenue, &c. are made void; and see the cases of *Lee* v. *Coleshill*, *Cro. Eliz.* 529; and *Hill* v. *Farmer*, *Style*, 29, determined under that statute. By the stat. 13 Eliz. c. 5, bonds made to avoid the debt or duty of others are void. Bonds given for money lost by gaming, are declared void by statute 16 Car. 2, c. 7.; 9 Ann. c. 14. By statute 7 & 8 Wm. 3, c. 5, bonds given to procure any return of any member of parliament, or any thing relating thereunto, are declared void. By stat. 12 Ann. sess. 2, c. 16, bonds upon usurious contracts are made void.

debt, and say no more, nor do set down the cause of the debt; this is a good obligation. And if the sheriff take an obligation with one surety only, or with two sureties that are insufficient, or with two sureties of another county; this is a good obligation. So if the debt, for which the party is arrested, be 300*l.* and the sheriff take an obligation of 100*l.* for his appearance, this is a good obligation; for in these cases it is left to his discretion, and it doth concern him only. So if the condition of the obligation be for appearance *mense Pasche*, omitting *proximè futuræ*, yet it is a good obligation, [for next may be supplied by construction.] So if the party be arrested by an attachment out of the Star-chamber upon a contempt, and the condition of the obligation is, that if the obligee shall appear, and then and there shall answer a contempt by him committed against the king and his council, this is a good obligation. And if the party that doth make the obligation be not in the sheriff's custody, albeit the obligation be made in any other manner essentially differing from the form prescribed in the statute, [yet,] if it be not against the common law, it is a good obligation. And therefore if, when a *capias utlagatum* be delivered to the sheriff against a man, the sheriff take bond of him for his fees, and his travel; this bond if [*i. e.* even though] it be not within this statute, yet it is against the common law, and therefore void, because it is by colour of the statute an extortion. But where the obligation, whether it be single or double, made by a prisoner, doth essentially differ by addition, alteration, or diminution, from the form prescribed in the statute, there the condition and obligation both are void. And therefore if such a prisoner make an obligation to any other besides the sheriff, albeit he to whom it be made be called sheriff; or if he make an obligation to the sheriff himself, and not by the name of his office; or if he make an obligation to him by the name of his office, and doth not rightly name him; as if he make it to *I. S. vicecomiti in comitatu prædicto*, whereas it should be *de comitatu prædicto*; all these obligations are void by this statute. And if the sheriff take an obligation of a prisoner for his appearance, in case where he is not bailable by the statute, and so let him go free; or if he take an obligation of a prisoner that is bailable

Co. 10. 101.

Villar's case.

Dyer, 364.

Antley's case, Hil. 7 Jac. Co. B.

Co. 10. 101.

Nowel's case, Trin. 21 Jac. Curia.

for his appearance, and doth insert other things into the condition, as to pay money for meat, drink, or fees, or the like; or if he deliver a man in execution, and take bond of him to save him harmless, or to * be a true prisoner; all these, and such like *P. 375.
Dyer, 118, 119. obligations as these, are void by this statute. If a man be a prisoner in Ludgate upon a *capias utlagatum*, and the gaoler take an obligation of him with two sureties, with condition to save him harmless, and to discharge his fees, and to yield his body at all times upon summons, &c. this is a void obligation, as well against the sureties, as against the principal. If the under marshal of the King's Bench take an obligation of one in execution and a
Dyer, 324. stranger, with condition to save him harmless of all escapes, and so suffer the prisoner to go at large, this is a void obligation. If the sheriff of Bedford, having a prisoner by force of an execution, let him
Plow. 61, 62. go at large, and take an obligation of him, with condition that he shall keep the sheriff without damage against the king and the plaintiff, and be at all times at the commandment of the sheriff as a true prisoner, and appear before the justices of the king at Westminster, &c. this is a void obligation.

Fitz. Obl. 1. If a man be a prisoner to the sheriff for suspicion of felony, and after a writ comes to him to have all his prisoners at a certain day before the justices of goal delivery of the same county, and thereupon the prisoner doth make a single obligation to the sheriff to appear before the justices the day of the writ; this is a void obligation, because it is single and not with condition. And if the sheriff bail one not bailable by a single obligation, it seems this is a void obligation.

10 H. 7. 11. 16. A single obligation is always taken most in advantage of the obligee and against the obligor; but it is otherwise of the condition of an obligation; for this is always taken most in advantage of the obligor, and against the obligee, [because it is introduced for his benefit. See *chap. Exposition of Deeds*, and *infra*, 377.] *6. How a single obligation shall be taken.*

Dyer, 19. 310. Co. 5. 119. 9. 53. Old N. B. 62. Bro. Jointtenancy, 4. 16. Dec. 69. If two, three, or more, bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is and shall be taken to be joint only, and not several; but if it be thus, *obligamus nos et utrumque nostrum*; or *obligamus nos et unum-* Joint and several.

quemque nostrum; or *obligamus nos et quemlibet nostrum*; or *obligamus nos et alterum nostrum*; in all these cases, the obligation is both joint and several, [but the more proper form is, "we bind ourselves, our heirs, executors and administrators; and each of us bindeth himself, his heirs, executors and administrators;"] so as in these cases the obligee may sue all the obligors together, or all of them apart at his pleasure; but it seems he may not, [unless the obligation be special for this purpose,] sue some of them and spare the rest, but he must sue them altogether, or all apart by several *præcipes*; and in this case, he may have several judgments and several executions against the obligors, and take all their bodies in execution; but he shall have satisfaction but once, or from one of them only; for after he hath been satisfied by one, the rest shall be discharged; [*i. e.* may be discharged by *audita querela*, motion to the court, or by bill in equity.] But in the first case, where the obligation is joint and not several, the obligee must sue all the obligors together, for he cannot sue one alone [or some] with effect without the rest, [or without outlawing them,] unless it be in some special cases, as where one of the obligors alone doth seal the deed, or where all of them do seal, but one of them is an infant, a woman covert, a monk, or the like, [so that the bond is good against them;] * or where one of them is dead; for in these cases, one, or some of them, [*i. e.* the survivors or others, &c.] may be charged without the rest. But otherwise the plaintiff cannot proceed in his suit against one, or some of them, without the rest, except the defendant give him advantage; for howsoever the suit be well begun, when one or some of them alone is or are sued, (for it shall not be intended that the rest are living, until it be showed by the other party,) yet the defendant is not bound to answer, unless the rest be sued also; and therefore in this case, he or they that is or are sued alone, are thus to take advantage of it, *viz.* to show the matter to the court, and to plead in abatement of the writ: for if he appear and show it not, but plead *non est factum*, or the like, to the obligation, the jury must find against him, and he will be charged with the whole debt. And so also if one appear, and the other make default and is

*P. 376.

Hil. 39 Eliz. B. R. adjudged.

outlawed, it seems he that doth appear must answer all (11). [If the bond be joint, and some of the obligors die, the representatives of the deceased are not liable to be sued at law; but equity will relieve, on the ground of the mistake, from the injury of a joint bond, unless the deceased was only a surety. So after judgment, even on a joint bond, execution may be sued against the assets of the deceased obligor.]

Dyer, 14. 271. Executors and administrators shall be bound by the obligation of the obligor, albeit they be not named (12); but the heir of the obligor shall not be bound by the obligation, unless he be named in the obligation, *viz. obligo me, hæredes, &c.* Executors. Heir.

See before. If an obligation be made to one and his heirs, or to one and his successors, the executors and administrators, not the heir or successor, shall take advantage of it; [for the heirs do not, as to this matter, represent the obligee, and the executors, &c. are in law the successors.]

Dyer, 350. If one bind himself in an obligation of 200 *l.* to *A.* and *B. solvend.*, 100 *l.* to *A.* and 100 *l.* to *B.*, and *A.* die, it seems the executors of *A.* shall not have 100 *l.* but that *B.* shall have the whole 200 *l. Sed quære.* [The equitable right is clear.]

Bro. Obligation, 59. If one bind himself by obligation to *I. S.* to pay him a 100 *l.* when *K.* doth come to his house, and at Michaelmas then next following 100 *l.* more; Michaelmas then [the expression in the bond must have been *now*] next following, shall be taken for next following the making of the obligation, and not next following the coming of *K.* to his house. [The words then next following would, if such had been the language, have referred to the Michaelmas after *A.* came to the house.] For the time of payment.

Dyer, 128. Per 3 Justices, Trin. 22 Jac. Co. B. If one bind himself to pay money upon a single obligation, and doth not say when; in this case, it must be paid presently (13), [or on demand.]

Curia, in the Marches of Wales, Trin. 8 Car. If one bind himself by obligation to pay money at Michaelmas, and doth not say which Michaelmas, this shall be taken for Michaelmas next after the

(11) See more amply as to joint and several obligations, in *Com. Dig. Obligations* (F.) and (G.); *Vin. Abr. Obligations* (G.) and (P.); *Bac. Abr. Obligations* (D. 4.)

(12) See accordingly *Br. Abr. Obligation*, pl. 15. Also the ordinary shall be bound if he ministers, *ibid.*; and *Vin. Abr. Obligation* (K.)

(13) That is, in convenient time, if the act is of a transitory and not of a local nature, as in the instance in the text of payment of money; or the delivery of charters, or the like. *6 Co.* 30, b.; *Co. Lit.* 208, b.; and *infra.*

date of the obligation; and so also it shall be taken in the condition of an obligation.

7. How an obligation with a condition, or the condition of an obligation, shall be taken. And how it must and ought to be performed.

If one bind himself to pay 20*l.* in the year of our Lord which shall be 1599, in and upon the thirteenth of October next ensuing the date of the obligation; this shall be taken to be due the 13th of October 1599, and not next after the obligation, [being the year 1598.] See more *infra*. Agreed, M. 9 Jac. B. R. Hil. 37 Eliz. B. R. Sharpius v. Hauckington.

The condition of an obligation when it is doubtful, is always taken most favourably for the obligor, in whose advantage it is made, and most against the obligee; yet so as an equal and reasonable construction be made according to the minds of the parties, albeit the words sound to a contrary understanding. Dyer, 14 51.

First, in respect of the persons that are to do the thing.

*P. 377.

* If something be by a condition to be done, and it is set down indefinitely, and not set down who shall do it, if the obligee hath more skill to do the thing than the obligor, it shall be done by him, otherwise it shall be done by the obligor; as if a taylor be bound to me in an obligation with condition, that if I bring him three yards of cloth which shall be measured and shaped, and if he make me a cloak of it, &c. and it is not said by whom it shall be shaped, this must be done by the taylor (14). [This is a questionable interpretation.] Perk. Sect. 786.

Secondly, in respect of the time when the thing is to be done.

If the condition of an obligation be to pay money, or do any other transitory act to the obligee himself, and no time is set for the doing thereof, but a place only; this regularly must be done in convenient time, and that without request. So also in case where the thing to be done is in its nature local, but yet such a thing as may be done in the absence of the obligee, and without his concurrence, as to acknowledge satisfaction on a judgment, make a lease for years, or the like, it must be done in convenient time, and that without request. So also in case where the thing to be done is local, and the concurrence of both parties necessary thereunto, yet when it is to be done to a stranger and not to the obligee, as if the condition Co. super Lit. 208. a. 79. 8a. 9. Ed. 4. 22. 9. H. 7. 16.

(14) The contracts of parties are to be interpreted according to their intent and the subject matter; as if a taylor be obliged or promise to make a suit of cloaths for me, I ought to deliver him the cloth, for that it is usual, and not for him to provide it; but if a shoemaker be obliged to make a pair of shoes for me, he is also to find the leather, because it is usual, *per Cur.* in *Oats* v. *Thornhill*, 1 *Lev.* 93; see further by whom and to whom the condition of an obligation is to be performed, in *Bac. Abr. Obligations* (F. 3.)

be that the obligor shall make a feoffment to *I. S.* it must be done in convenient time without request. But where the thing to be done is local, and the concurrence of both parties necessary thereunto, and the act is to be done by the obligor himself, or by a stranger, to the obligee himself, as where the condition is that the obligor, or a stranger, shall enfeoff the obligee; in this case, the obligor, or the stranger, shall have time to do it during his life, unless the obligee do hasten it by request, and if he request it sooner, then it must be done in convenient time after request made. And yet if the thing to be done, be to be done wholly by the obligor, or a stranger, and doth nothing concern the obligee, as where the condition is that the obligor shall go to Rome, or that *I. S.* shall preach at Paul's Cross, or the like; in the first case, it may be done at any time during the life of the obligor; and in the last case, it may be done at any time during the life of *I. S.* and request in this case shall not hasten it. 1

Co. 2. 80. super Lit. 208.

If an obligation be with condition to grant a rent, or an annuity, to the obligee during his life, to be paid at Easter, and no time is set for the doing of it; this rent must be granted before Easter next after the obligation, [so as to give before Easter, a right to the rent, and a remedy for it,] or else the obligation will be forfeit. And if the condition be to grant an advowson, and no time is set for the doing thereof; it must [and for the like reason] be done before the church become void, or otherwise the obligation shall be forfeit.

Dyer, 77.

If the condition be to do a thing upon a day in the year, and there be two days of that name in the year; in this case, it seems, it must be done that day that is furthest off [*query*] from the time of the making of * the obligation, especially if that day be the more notorious of the two days. *P. 378.

Adjudged M. 20 Jac. B. R. Prescot's case.

If the condition be to pay 10*l.* the 11th of May next following, and the obligation is dated the 5th of May; in this case the money must be paid the 11th day of the same month of May, [*sed quære,*] and not of the next month of May (15), [since the words "next following" are applied to the day, and not to the month. [There are authorities for a different interpretation. *Prest. on Est. ch. Years.*]

(15) Adjudged accordingly, *Cro. Jac.* 646; but a writ of error being brought, the parties compounded. See further in *Buckley* v. *Guildbank*, *Cro. Jac.* 677.

If the condition be to stand to the award of *I. S.* and *I. S.* award money to be paid, but set no time for the payment of it; this [money] must be paid in convenient time, else the obligation shall be forfeit. 22 Ed. 4. 25.

If one be bound to me in an obligation, with condition, that if I enfeoff him of white acre he will pay me 10 *l.* but doth not say when; this must be done as soon as I make him the feoffment. So if one be bound to me, that if the goods I have delivered to *B.* shall be lost, that *C.* shall satisfy me for them, and doth not say when; this shall be presently after the losing, [*read*, loss.] Perk. Sect. 197. 799.

If the condition be to pay *I. S.* money when he shall come to the age of twenty-one years; in this case it must be paid the very day *I. S.* doth come to his full age, and payment after is not a sufficient performance of the condition. [The plea of *solvit post diem*, will be a good plea. *B. N. P.* 174. under the statute of 4 & 5 Ann.] M. 2 Jac. B. R. Cranedenet Morse's case.

If the condition be, to come at a day to such a place to do a thing, [and the hour be not fixed,] and the thing cannot be done without the concurrence of the other party; in this case the obligor must stay until the very last instant of the day for his coming; and it seems also he must stay at the place all the day long. 39 Eliz. B. R. Fitz. Barre, 92.

If the condition be to pay a rent at Michaelmas, or within twenty days after, the obligation is not forfeit before the twenty days be past. Adjudg. Pas. 39 Eliz.

If one be to do a thing on a day certain, he may do it [on] any part of the day whilst the light doth last; and if the condition be to do a thing by or before a day, it may be done the last instant of the day before, and it is sufficient (16). Bro. Condition, 145. Dyer, 17. 7. Ed. 4. 3.

Thirdly, in respect of the place where the thing is to be done.

If the condition of an obligation be to pay money, or do any like transitory act to the obligee on a day certain, but no place is set down where it shall be done; in this case it must be done to the person of the obligee, wheresoever he be; and for this purpose the obligor must at his peril seek out the obligee, if he be *intra quatuor mœnia*, [read, *maria*,] otherwise the obligation is forfeit; but if the obligee be not within the kingdom at the time Perk. Sect. 780, 781. 7 E. 4. 4. 22 Ed. 4. 25. Lit. Sect. 340, 341.

(16) See accordingly *verbatim* in 1 *Wood*, 773; and more amply as to the time when the condition of the obligation is to be performed, *ante*, p. 131; and in *Bac. Abr. Obligation* (F. 4.)

when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing. So if one grant an annuity to another, and doth not set down where it shall be paid, and gives a bond with condition for the payment thereof; in this case it must be done to the person of the obligee, wherever he be: and the like law is, as it seems, where the thing to be done by the condition, is to be done by or to a stranger: but when the thing the party is bound by the condition to do is local, he is not bound to go any * further, or to any other place, but to the place itself: and therefore, if the condition be to make a feoffment of a piece of land, the party that is bound to do it, is not bound to go to any other place, but to the piece of land, to do it: and if a man make a feoffment in fee, or lease for life or years, of land, rendering rent generally, and gives an obligation with condition for the payment of the rent, the feoffee or lessee is not bound to go to any place from the land, to seek the feoffor or lessor, to pay him this rent. *P. 379.

Perk. Sect. 785. If the condition be, to deliver twenty quarters of corn such a day to the obligee, and no place is set down where it shall be delivered; in this case, [because the article is cumbrous, and to avoid the inconvenience of carriage,] it is sufficient if the obligor, when the corn is ready, do give notice thereof to the obligee, and to wish, [*i. e.* to require] him to appoint a place whereunto the obligor may bring it, and if he refuse to appoint a place, it is at his own peril; or the obligor may bring [*i. e.* carry,] the corn to the house of the obligee (and this is the safest way,) and if the obligee refuse it, the condition is performed, and the obligation is discharged (17).

Fourthly, in respect of the thing itself to be done.

Co. 4. 80. Dyer, 267. If the condition be, to perform all the covenants in an indenture; this shall be taken as well for the covenants in law, as for the covenants in deed.

To perform covenants.

Plow. 67. If a lease be made of a manor, excepting a close, and the lessee make an obligation to the lessor with condition, that the lessee shall perform *omnia et singula in scripto prædicto contenta*; by this [expression] the close shall be taken to be within

(17) See further at what place a condition must be performed, in *Bac. Abr. Obligations* (F. 5.)

the condition, so that if the lessee disturb the lessor in the close excepted, this shall be a breach of the condition.

To make a feoffment, lease, &c.

If the condition be, to make a feoffment to the obligee of land; in this case the feoffment may be made with or without writing; [now a writing is essential, by 29 Car. 2, c. 3;] and if it be made by writing, it may be made without any warranty or covenants, [unless there be a stipulation for them in the condition,] and this will be a sufficient performance of the condition (18). See Covenant, numb. 6.

If the condition be, that the obligor shall make a lease to the obligee for twenty years, and it is not set down when the lease shall begin, it shall begin presently. Co. 6. 33.

To make a release, or other assurance.

If the condition be, that the obligor shall do any act upon request, that the counsel of the obligee shall think reasonable; as for example, shall do any act, &c. for the releasing of an obligation, wherein the obligee is bound to the obligor, and the obligee by advice of counsel deviseth and requesteth a release of all demands to the obligee, and to *I. S.*; in this case the obligor may refuse to seal it, albeit it be devised by the counsel of the obligee, because it is unreasonable, for it must be a reasonable act that the obligor by this condition is bound to do; [and it is not reasonable that he should be required to release *I. S.* in addition to the obligee.] Dyer, 218.

To pay money or rent.

If the condition be to pay 10*l.* at Michaelmas next, [being one distinct duty,] and 10*l.* yearly after, until *I. S.* be made knight; in this case, albeit *I. S.* be * made knight before Michaelmas, yet the first 10*l.* at Michaelmas must be paid. Adjudg. Hil. 39 Eliz. Co. B.

*P. 380.

If the condition be thus, that if the obligor shall for ever pay yearly to the obligee, &c. 10*l.* at the two usual feasts, by equal portions, or if his heirs shall at any time hereafter pay 100*l.* at one payment to the obligee, that [*omit*, that] then the obligation to be void; in this case, albeit the obligor hath election which of these two things to do, yet, because the intent is apparent that one of these things should be done, if therefore the 100*l.* be not paid before the first feast, [why so? this seems Adjudg. M. 18 Jac. B. R. Harbert v. Rockesy.

(18) Before the statute of 29 Car. 2, c. 3; but since that statute a feoffment must be in writing, as was observed before in p. 208.

to be an erroneous qualification,] the 10*l.* must be paid yearly.

Dyer, 42, 43. If the condition of an obligation from *A.* to *B.* be thus; that whereas *A.* hath sold to *B.* certain meadow in *Dale*, that [*omit*, that] the said *A.* [without naming his heirs, &c.] shall warrant the same against the lord and king, and all others, if the said *B.* shall peaceably enjoy it to him, and his heirs of the lord of the manor of *M.* by the services due after the custom, &c.; in this case, the substance of this being for quiet enjoying, it shall be extended that way, and albeit it be not said what he shall warrant, yet it shall be taken to be the land in question, and the warranty shall be construed to last only for the life of *B.* and not to extend to any new titles after the covenant, especially such as are by the act and default of the obligee himself, as if he commit a forfeiture and the lord enter, or the like. To warrant land, and for quiet enjoying.

Perk. Sect. 791. 10 Ed. 4. 11. If the condition be, that the obligor shall sufficiently prove such a thing; this shall be taken for proof by inquest, and accordingly it must be done: but if the condition be, that it shall be done by such a time, or before such persons, as when or where such proof cannot [*omit*, not] be had, then it is otherwise. Where the word "proof" is put generally, it shall be understood of proof by justice; but when the parties agree upon another form of proof, that [form] shall prevail against that which is but in[*read*, con]struction of law. To prove a thing.

Gold's case, in Herbert's Rep. 127. [Infra, 382.]

Curia, Trin. 7 Jac. Co. B. If one be bound in an obligation, with condition to suffer his wife to give to her kinsfolks, children, or others, portions of his goods to the value of 100*l.* and that he will perform it, and she give part to one and part to another; in this case the husband must perform it accordingly: but if the condition be to suffer her to give to *A.* and *B.* 100*l.* and that he will perform it, and she give 100*l.* to *A.* he is not bound to perform this, [unless *A.* had survived *B.*] To suffer his wife to make a will.

Adjudg. Hil. 7 Jac. B. R. If the condition be, that he shall perform his wife's will, so [that] it do not exceed 20*l.* and she make a will and devise 100*l.*; in this case he is not bound to perform the will for the 20*l.* [But equity would, it is apprehended, support the will to the extent of 20*l.* In powers, equity merely

rejects the excess, if the excess can be distinguished.]

Fifthly, in respect of the manner and order of doing the thing, and other matters.

If the condition of an obligation be, that the obligor shall enfeoff the obligee, and such others as he shall name, by a day; in this case the obligee must do the first act, *viz.* name the others; otherwise the obligor doth not forfeit his obligation by the not doing of it: but if the condition be to enfeoff me, or such others as I shall * name before such a day; in this case, if I do not name others, it seems he must enfeoff me before the day at his peril. Kelw.

*P. 381.

If the condition be, that the obligor shall make such an estate of land as *I. S.* shall advise, [for the advice is of the substance of the contract;] *I. S.* must first advise, and this [advice] must be made known unto the obligor ere he is [*i. e.* will be] bound to do any thing, and if he [*I. S.*] never advise, he [the obligor] is never bound to do any thing; for it is in this case as if one be bound to stand to the award of *I. S.* and *I. S.* never make any [award,] or make a void award, which is all one. Co. 5. 25. 7. Ed. 4. 13. Perk. Sect. 776.

If the condition be, to make such a discharge in such a court as the obligee or his counsel shall advise; in this case the obligee must do the first act, *viz.* advise and give notice of the advice to the obligor, before he is [will be] bound to do the thing. But if the condition be to make such a discharge in such a court, such a day as the judge of that court shall advise; in this case the obligor must at his peril procure the judge to advise a discharge, and it must be done that very day, or the obligation will be forfeit. Co. 5. 23.

If the condition be, to pay 20*l.* to the obligee when he doth come to London; in this case the obligee must do the first act, *viz.* make known to the obligor when he doth first come to London; for otherwise it seems the obligor is not bound to pay the money. Per Just. Nichols, M. 13 Jac. Co. B.

If the condition be, that the obligor shall levy a fine to the obligee before such a day, the obligee must do the first act, *viz.* sue out the writ of covenant. Co. 5. 127. Dyer, 371.

If the condition be, that the obligor shall deliver twenty cloths to the obligee such a day, the obligee 21 Ed. 4. 68.

paying for every cloth immediately after the delivery 20*l.*; in this case, the cloths must be delivered, albeit the obligee refuse to pay the money; but if "immediately after" be left out, it seems the obligor is not bound to deliver the cloth, unless the obligee first pay the money. [*Thorp* v. *Thorp*, 1 *Lord Raym.* 662; and Mr. Justice *Bayley*'s notes exhibit the distinctions.]

Co. 2, 3, 4. Dyer, 337. If the condition be, that the obligor and his heirs shall at any time, upon request made, do any act, &c. that the obligee shall require, &c. and the obligee tender a release or other deed to [be] seal[ed]; in this case, if the obligor, or his heir that is to seal the deed, be an illiterate man, he may refuse to seal it, until he can get somebody to read it unto him; but he may not refuse or delay to seal it until he can have a lawyer's advice upon it; for thereby [by such delay] he will forfeit his obligation. [*Query.*]

Perk. Sect. 773. Co. 5. 21. If the condition be, to do any thing upon request; the obligor until request made, [for request is of the essence of the contract,] is not bound to do any thing towards it, neither can he forfeit his obligation till then. And yet if, in this case, the obligor disable himself to do the thing he hath undertaken to do upon request, before the request made, [then, because a request would be useless,] the obligation may be forfeit without any request made.

14 H. 8. * If the condition be, that the obligor shall within a certain time surrender such land of his, for an annuity of so much as they shall agree upon, and they agree upon 10*l.* per annum; in this case, the obligor is not bound to make the surrender until the annuity be made and tendered unto him. *P. 382.

Hil. 37 Eliz. Co. B. Greeningham's case adjudged. If the condition be, to deliver to the obligee an obligation wherein the obligee is [shall be] bound, &c. or to seal and deliver to the obligee such a release of it as shall be devised by the counsel of the obligee before Michaelmas, and the counsel do not advise any release before Michaelmas; in this case, the obligor is discharged of the obligation, for the obligee is to do the first act; [but in these and the like cases, equity may afford relief.]

Trin. 4 Jac. B. R. If *A.* be bound to *B.* in an obligation with condition, that *A.* and his wife shall levy a fine of land to *C.* and *D.* and their heirs, and at their costs and charges; this shall be construed to be at

the costs of the obligor, and not at the costs of the conusees, [*query*,] but if the word "and" be omitted, perhaps it may be otherwise.

If the condition be thus, that if the wife die before Michaelmas, without issue of her body then living, that the obligation shall be void; in this case, "then living" shall relate *ad proximum antecedens*[read, *ntem*,] and not to the death of the wife; and therefore, if she hath issue and die, and after, before Michaelmas, the issue dieth also, the obligation is void. [*Query*. In general, the words "then living" are referrible to the period of death.] Dyer, 17.

If the condition be, that if the obligor shall waste the goods of the obligee (his master), and this waste within three months after due proof of it, either by confession or otherwise, be notified to the obligor, that the obligor shall satisfy the obligee for it, and the obligor do confess the waste under his hand and seal; in this case, it seems, this proof, though it be *extra-judicial*, is sufficient. [See p. 380.] Gold's case, M. 13 Jac.

Conditions impossible.

When the condition of an obligation is to do [one of] two things by a day, and at the time of making of the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself; in this case, the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of the making of the obligation one of the things is, and the other of the things is not, possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor, or a stranger, the obligor must see that he do the other thing at his peril. And when the condition of an obligation is to do one single thing, which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be. Co. 5. 21. super Lit. 207. Dyer, 282. 15 H. 7. 2. 4 H. 7. 4. [Com. Dig. Condition (K. 1.)

*P. 383. * If the condition be, to do one of two things, as to make a feoffment to me, or pay me 20*l*.; in this case, if the obligor do either of them, it is 21 Ed. 3. 29.

sufficient. But if the condition be in the copulative, as to enfeoff me and pay me 20*l.*; in this case, the doing of one of them will not suffice, but he must do both.

Per Justice Dodridge, M. 2 Car. B. R.

If the condition be, to pay to *A. B.* and *C.* 30*l.* a-piece within a week after they come to eighteen years of age, or within forty days after their days of marriage, after notice given thereof, which shall first happen; in this case, this notice must go to both the parties, so that notice must be given when they are eighteen years of age; otherwise, and until notice given, it seems the obligor is not bound to pay the money. See more in *Condition, numb.* 8, and *Covenant, numb.* 6.

8. *When the condition of an obligation shall be said to be performed, and the obligation saved; or not.*

The matter of a condition of an obligation is sometimes affirmative and compulsory, and doth consist of something to be done; and sometimes it is negative and restrictive, and doth consist of something not to be done; the not doing in the first case, and the doing in the latter case, causeth the obligation to be forfeit; and the doing in the first case, and not doing in the latter, saveth the obligation.

To make a feoffment.

Co. super Lit. 207. Plow. 67. 17 Ed. 4. 3.

If one be bound in an obligation to me, with condition to enfeoff me of land, and the obligor do first make a lease to me of it, and afterwards he doth make a release of it to me and my heirs; this is a good performance of the condition; [and to this purpose it is said, that a lease and release do countervail, *i. e.* are equivalent to a feoffment.]

Tender and refusal.

Perk. Sect. 784. *Fitz.* Barre, 82. Perk. Sect. 758. 15 Ed. 4. 5.

If a condition be to make me a feoffment of land, and he tender me a feoffment, and I refuse it; by this the condition is performed. So if the condition be, to make a feoffment to my use, and when it is made I refuse it; this is a good performance of the condition. But if a man bind himself in an obligation to me, with condition to make [a] feoffment to a stranger, and he tender the feoffment to the stranger, and he doth refuse it; this is no good performance of the condition, but the obligation is forfeit; [for he must take care to procure agreement, so as to render the feoffment effectual.] If the condition be, to enfeoff me and my wife, and he tender it to me, and I refuse it; it seems this is a good performance; [or rather, the refusal is a dispensation, and the obligee cannot profit by his own wrong or refusal.]

If one bind himself in an obligation to me, with condition to make me a feoffment of the manor of *Dale* by a day, and he, before the day, grant a rent-charge out of the same manor to a stranger, and afterwards, and before the day also, he doth make me a feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. [Surely this conclusion is wrong.] But if the obligor sell away part of the manor before, or make a feoffment to me but of a moiety or a third part of the manor; this is no good performance of the condition. And if in this case, the obligor, before the day, take a wife, [who becomes dowable,] and before the day make his feoffment according to the condition, but the marriage doth continue until after the day; in this case, it seems the condition is broken. 3 H. 7. 4. 4 H. 7. 4. Perk. Sect. 757.

Acceptance.

*P. 384.

* If the condition be, that the obligor shall enfeoff me of the manor of *Dale*, and he make a feoffment of the manor of *Sale*, and I accept thereof; it seems this is no performance of the condition, and that my acceptance in this case will not help: [but equity would relieve.] So if the condition be to make me a feoffment of land, and he give me money, a horse, or the like, in recompence of this, and I accept thereof; this is no good performance of the condition. And the like law is in all cases where the condition is to do any collateral thing, as to account, build a house, enter into a recognizance, or the like, and the obligor doth give, and the obligee accept, some other thing in lieu thereof. And so also it is where the condition is to make a feoffment to a stranger, and the obligor give, and the stranger take, another thing in lieu thereof. But if the condition be to enfeoff me of land such a day, and he make, and I take, the feoffment before the day; this is a good performance of the condition. Perk. Sect. 749. 759. Dyer, 1. Perk. Sect. 751. 9 H. 7. 17. 3 H. 7. 4. 27 H. 8. 1. 14 H. 8. 15. 10 H. 7. 14.

If the condition be to enfeoff me or my heirs, in the disjunctive, and the obligor enfeoff me and my heirs; this is a good performance of the condition; for it is impossible to enfeoff my heirs whilst I live, and when two things are to be done by a condition, whereof the one is possible at the time of making the obligation, and the other is not; in this case, it is sufficient if he do the thing which is possible. 14 H. 8. 15. Co. 5. 112.

21 Ed. 3. 39. If the condition be, to make me a feoffment, or [in the disjunctive] pay me 20*l.*; if the obligor do either of them, [for he has an option,] it is sufficient. But if the condition be to enfeoff me, and [in the conjunctive] pay me 20*l.*; in this case [two things are to be done, and] the obligor must do both, or the condition will not be performed: *Et sic de similibus.* [*Com. Dig. Condition*, (K. i.)]

Perk. Sect. 776. Kelw. 95. To make an estate. If the condition be, that the obligor shall make me a sufficient estate of land by the advice of *W.* and *S.* and they advise an insufficient estate, and the obligor do make the estate according to that advice; this is a good performance of the condition, [for it was the folly of the obligee to have selected such advisers.] But if the condition be, that the obligor shall make a good and sure estate, and he by advice of counsel make an estate that is not good and sure; this is no good performance of the condition; [for it is the act of the obligor, and he must be responsible for the advice he has selected.]

Fitz. Barre, 55. If the condition be, that the obligor shall make me an estate of land, and make the estate to another by my appointment; it seems this is no[t a] performance of the condition.

Trin. 17 Ja. B. R. If the condition be, that the obligor or his feoffees in trust shall make an estate to the obligee such a day, and the feoffees do it without the consent of the obligor; this is no performance of the condition, [for there is a right to have his equitable title transferred.]

Pasche, 8 Ja. Co. B. To make further assurance. If the condition be, to make further assurance, and the obligor make further assurance upon condition, without the agreement of the other party; this is no good performance of the condition, [for the addition of the condition is not warranted.]

37 H. 6. 18. Perk. Sect. 792. To save harmless. If the condition be, to save me harmless from an annuity wherewith my land is charged, and the obligor doth pay the same yearly, * and get me an acquittance for the same from the party; this is a good performance of the condition. But if the condition be, to discharge me of such an annuity; in this case, payment, and procuring me a release [of the sum paid,] is no good performance of the condition. [The stipulation requires that there should be a release from the annuity itself.]

*P. 385.

Perk. Sect. 790. Fitz. Barre, 7. To grant a rent, or to procure a rent to be granted. If the condition be, that the feoffees or lessees of the obligor of such land which they have in

trust, shall grant me a rent-charge, or release their right to me before such a day, and there be three feoffees or lessees, and two of them only do grant this rent or make this release; this is no good performance of the condition. [It is requisite that all of them should join.]

If the condition be, that the obligor shall purchase and procure to me and my heirs a rent of 5*l.* per annum, and a stranger hath such a rent out of my land, and he doth get him to release this to me; this is a good performance of the condition. And if one be bound with condition to grant me the rent and farm of such a mill before Michaelmas, to be had and perceived until I be paid 10*l.* and before that time he lease the mill to me at a rent, and then suffer me to detain so much of the rent; it seems this is a good performance of the condition. Dyer, 15. Fitz. Barre, 77

To deliver a horse. Tender and refusal.

If the condition be to deliver me a horse, and the obligor tender the horse unto me, and I refuse him; hereby the condition is performed; and so in all such like cases where the obligor is to do any collateral thing, as stand to an award, or the like; if the obligor offer to do it, and the obligee refuse, the condition is performed, and the obligation discharged for ever. Co. super Lit. 207.

To pay money.

If the condition be, to pay money at a day certain, and the obligor pay a little before night, time enough for the receiver to see to number his money by day-light; this is a good performance of the condition. And if the condition be to pay money by or before a day, payment in the last instance [*read*, instant] of the day before, is a sufficient performance of the condition (19). Dyer, 17. super Lit. 202. Bro. Condition, 145.

Acceptance.

If the condition be, to pay me a sum of money at a day certain, and the obligor pay me less money before the day, or all the money before or at the day, or give me something else before or at the day of payment in lieu thereof, or pay me all Perk. Sect. 748. 34 H. 6. 17. 21 Ed. 3. 13. Co. 5. 117. 9. 79. Bro. Obl. 64.

(19) And if the money was not paid at the day, the bond became forfeited, and the whole penalty became recoverable at law: and the obligor was obliged to have recourse to a court of equity, which would restrain the obligee from taking more than in conscience he ought, *i. e.* his principal, interest, and costs. The stat. of 4 Ann. c. 26, § 13, affords the like assistance to obligors, as the 7 Geo. 2, c. 20, (mentioned before in note 55, page 140,) does to mortgagors; for it enacts, that if at any time, pending an action on bond with a penalty, the defendant shall bring into court the principal, interest, and costs, the money so brought into court shall be in full discharge of the said bond, and the court may give judgment for the defendant accordingly.

the money or a lesser sum at the day appointed, but in another place, and not the place mentioned in the condition, and I accept thereof; in all these cases, the condition is well performed, [and accord and satisfaction may be pleaded. *Com. Dig. Condition* (L. 2.)] But if a stranger to the condition do so, and I accept thereof; this is no good performance of the condition, as hath been adjudged.

Trin. 36 Eliz. And if the obligor pay less than the whole money at the day of payment, and the obligee accept thereof; this is no good performance of the condition.

Adjudged, 7 Eliz. And if the thing to be done be a collateral thing, as to account or the like, and the obligor give unto the obligee money, or a horse in lieu thereof, and the obligee accept it; this is no good performance * of the condition. And if the obligor pay the money to the obligee after the day of payment; this is no performance of the condition, but the obligation is forfeit, and the money paid shall go in part towards the forfeiture; and yet, in this case, the defendant at this day, being sued upon this obligation, doth usually adventure to plead conditions performed, and give this special matter in evidence to the jury, who for the most part doth find against the obligee. [*Bull. Nisi Prius*, 174.] *P. 386.

Dyer, 18. And yet, if the condition be, to pay me money at a day certain, or to pay another money at a day certain, and the obligor pay me or the stranger at several times before the day, and I, or the stranger, accept thereof; this is a good performance of the condition.

18 Ed. 4. But if the obligee do only promise to accept of a horse for his money at the time of payment, and when the time of payment comes, and a tender of the horse is made to him, he doth refuse him; this tender is not a sufficient performance of the condition. Tender and refusal.

Co. super Lit. 208, 209. 27 H. 8. 10. Perk. Sect. 784. If the condition be, to pay money at a day and place certain, and the obligor tender it at the time and place, and the obligee is not ready to receive it; or, being ready, doth refuse to receive it; this is a good performance of the condition to save the forfeiture of the obligation; and yet, if the obligor be afterwards sued for this money, he must say in his pleading, that he is still ready to pay it, [this plea is called *tout temps prist*,] and he must tender it in court. But if one be bound by a single obligation to pay money, and after, at the same or

some other time, he hath a defeasance from the obligee, that upon payment of a lesser sum the obligation shall be void, and the obligee refuse the money when the same is tendered, at the time when, by the defeasance, it is to be paid; in this case, the obligor is not bound to tender the money in court, neither hath the obligee any remedy for it.

If the condition be, to pay me money at a day and place certain, and the obligor doth tender it to me the same day in another place, this is no performance of the condition; and therefore, in that case, I may refuse it. 41 Ed. 3. 25.

If the condition be, to pay money between two days; payment of the money upon either of those days, is not a good performance of the condition; but the payment must be between the two days. Dyer, 17.

If the condition be, to pay me money at a day certain, and I bid the obligor pay the money to one that I do owe so much more unto; or I bid him lay out the money for me; or I bid him keep it for such a debt I owe unto him; and he do so, and I accept hereof; it seems this is a good performance of the condition, [being in law a payment.] Perk. Sect. 748. 27 H. 6. 6. Fitz. Barre, 43.

If the condition be to pay me money, and I appoint another * to receive it, and the obligor pay it unto him; this is a good performance of the condition; [for a payment to my agent is, in law, a payment to me.] *P. 387.

Acceptance. If the condition be, that a stranger shall pay to the obligee 10*l.* and the obligee accept a horse for it; this is a good performance of the condition. But if the condition be, that one stranger shall pay to another stranger 10*l.* and the one doth give, and the other take, a horse in lieu of this [sum]; this is no[t a] good performance of the condition. Co. super Lit. 208, 209. Dyer, 56.

If the condition be, to pay me 20*l.* of lawful English money, and the obligor pay me in Spanish or in any other money current in this realm; this is a good performance of the condition. But payment in farthings is no[t a] good payment (20). [The proclamation for copper money, restrains its circulation or currency, as a legal tender, within a given amount.] If the condition be, to pay me 20*l.* and the obligor pay me some of the 20*l.* New Terms of the Law, tit. Coin. Per Just. Bridgman, and Curia in the Marches of Wales, 8. Terms of the Law, idem.

(20) See accordingly *Wood's Inst.* 292. Money of England must be either of gold or silver, 2 *Inst.* 577. [At this day, it is apprehended, gold only is the standard coin of the country.]

in counterfeit pieces, which I, not perceiving at the time, do put up and accept, but after, upon a review, I do perceive some of them to be naught, and thereupon I do send it back to him again; in this case it seems the condition is well performed, [unless the fraud, in payment of counterfeit pieces, could be clearly proved,] and therefore the sending back of the money again will not cause a breach afterwards.

To stand to an award.

22 Ed. 4. 2. If the condition be, that I shall stand to the award of *I. S.* and he doth award me to pay 20*l.* to *W. S.* by a day, and at the day I do tender him the 20*l.* but he doth refuse it; in this case I have sufficiently performed the condition, and the obligation is saved.

22 Ed. 4. 25. If the condition be, that I shall stand to the award of *I. S.* and he award that I shall enter a *retraxit* in a suit depending between me and the other party, and I do not so, but am nonsuit, or do discontinue my suit; this is no[t a] good performance of the condition. [The *retraxit* would have saved the expence of further proceedings.]

To show a release.

22 Ed. 4. 40. If the condition be, that the obligor shall come such a day to such a place, and show me a release, and he doth come to the place the latter part of the day, and doth stay there until the light of the day be gone, ready to show his release, but I come not thither; this is a good performance of the condition; [for the fault is in the obligee.]

For quiet enjoying.

Dyer, 255. 17 Ed. 4. 3. If one make a lease of land to me, and bind himself in an obligation, with condition, to suffer me quietly to enjoy the land without the let of him or any other; in this case, if neither he himself, nor any other by his incitement, do disturb me, the condition is performed; and if a stranger that hath title, do enter without his procurement or occasion, this is no breach of the condition. [For such general covenants extend to lawful evictions only; *i. e.* evictions by title, and evictions by the covenantor himself, with or without title.]

To appear.

Perk. Sect. 760. 758. 2 Ed. 4. 3. If the condition be, to appear in the King's Bench such a day, to answer *I. S.* and at the day the obligor doth appear, [which is the only fact required,] but the plaintiff is essoigned, so that the defendant cannot answer him; or the suit is discontinued by the demise of the king, [now altered

by the statute law,] before the day of appearance; in these cases, the condition is performed and the obligation saved. But if the obligor in this case, *P. 388. when he doth * appear, doth not cause his appearance to be entered of record, the obligation is forfeit; [since the record is the only evidence that the party was before the court.]

If the condition be, to appear *coram domino rege*, and the obligor appear before the king's person; this is no performance of the condition. [The appearance must be before the king in his court of King's Bench; *i. e.* before the judges who there represent the king.] And if the condition be, to appear *coram justiciariis domini regis*, and the obligor appear before them out of court; this is no performance of the condition; [for the words only, and not the sense and true import of the condition, are performed.] 8 H. 4. 6.

To make a bond. If the condition be, that a stranger shall make an obligation to the obligee, and the stranger tender it, and the obligee refuse it; this is a good performance of the condition: but if the condition be, that the obligor shall make an obligation to a stranger, and the obligor tender it, and the stranger refuse it; this is no performance of the condition. [So of a feoffment, &c. (*supra*, 383); for there is in law, an undertaking to obtain consent, &c.] Co. super Lit. 208, 209. 10 H. 6. 16. 27 H. 8. 1.

To marry a woman. If the condition be, that the obligor shall marry the daughter of the obligee by a day, and he doth tender himself, and she doth refuse; in this case the obligation is forfeit, notwithstanding this tender and refusal, [and for the same reason.] Perk. Sect. 756. 4 H. 7. 3.

To leave possession. If the condition be, to deliver the key of a house, and the quiet possession to *I. S.* to the use of the obligee, and the obligor (the house being rid, [empty] and every one out of the house, and the door locked,) doth deliver the key to *I. S.*; it seems this is no good performance of the condition, but that *I. S.* or the obligee, or his deputy, ought to come and receive the possession. [*Query*, the good sense of this point.] See more in *Condition*, at *numb.* 9, and *Covenants*, 6. (21.) Dyer, 219.

(21) See accordingly *verbatim* in 1 *Wood*, 776 to 779; and more amply, as to the performance or the breach of a condition in obligations, in *Bac. Abr. Obligations* (F. 1.); *Vin. Abr. Condition* (Q. a.)

Co. 8. 153. super Lit. 292. F. N. B. 267.

If an obligation that is single, be not performed; as when it is to pay money at a day, and the money is not paid, the obligation is broken. But if a man be bound by an obligation to pay money at several days, the obligation is not forfeit, [*query*] nor can be sued, until all the days be past. And yet if the condition of an obligation be to pay money at several days, and the obligor do fail to pay the money the first day; in this case the obligee may sue for the money due by the obligation presently, [for the bond is forfeited.]

9. *When a single obligation shall be said to be broken and forfeit, or not.*

Bro. Obli. 62. Fait, 105. Fitz. Verdict, 13.

If one be bound to pay money at a day certain by a single obligation or bill, and the obligor tender the money at the day to the obligee, so as he will give him his bill, or a release for the money, and the obligee refuse so to do, and thereupon he doth refuse to pay the money; in this case the obligation is not forfeit; for, in this case, the obligor is not bound to pay the money, unless the obligee will give up his bill, or give him a release. But otherwise it is in case where one is bound to pay money by the condition of an obligation; for there the obligor must pay the money at his peril, [to save the forfeiture of the bond,] albeit the obligee refuse to deliver up the obligation, or to give him a release. [Equity would compel the delivery of the bond, &c.]

If one be bound to pay money on a single bill at a day, and the obligor tender the money at the day to the obligee, and he refuse * it; in this case, it seems, [t]he [obligee] hath no[t any] remedy for his money. *Sed quære*; [and see *supra*, 385.]

*P. 389.

Bro. Oblig. 17.

In all cases when the condition is not performed, or is broken, the obligation is forfeit, and till then it cannot be forfeit; and therefore, if one be bound in an obligation, with condition to pay me 10*l.* at Easter; before the day come, the obligation cannot be forfeit; but if it be not paid at the day, the obligation is forfeit: and yet if the obligee himself be the cause of the breach of the condition; or the thing to be done by the condition is now become impossible by the act of God, the obligation is now become without penalty, [*i. e.* it is discharged;] as if in the old days, I had been bound in an obligation to an abbot, that *A.* should enfeoff him before Christmas; if *A.* enter into religion, [by which he was *civiliter mortuus*, and incapable of being a

10. *When the condition of an obligation shall be said to be broken, and the obligation forfeit; or not.*

1 H. 7. 4.

To make a feoffment.

grantee,] my bond had been presently forfeited: but otherwise it had been if *A.* had been professed under the obedience of the obligee himself. Perk. Sect. 768, 769.

If the condition be, to make a feoffment of land to me such a day, and he be not upon the land ready to make the feoffment; albeit I come not there to receive it, yet the condition is broken, [for he cannot aver and prove the performance of his duty.]

If the condition be that, when the obligor shall come to his aunt, he will enfeoff the obligee, or the heirs of his body; in this case, he must do it as soon as he doth come to her and the obligee shall request the feoffment, or the obligation is forfeit. 21 Ed. 3. 29. Co. 5. 119.

If the condition be, to enfeoff me of a manor by a day, and before the day the obligor doth make a feoffment of it to another; hereby the condition is broken, and the obligation forfeit: and though the obligor repurchase it again before the day, and then make the feoffment, yet this will not cure the breach, [since he had at one time disqualified himself.] 21 Ed. 4. 65.

If the condition be, to enfeoff *B.* and *C.* and one of them die before the time be past wherein it should be done; in this case, he must enfeoff the survivor of them, or the condition is broken. 4 H. 7. 4.

To make a lease. If the condition be, that if the obligor before Michaelmas make a lease to the obligee for thirty-one years, if *A.* will assent, and if he will not assent then for twenty-one years, that then, &c. if *A.* do not assent, and the lease for twenty-one years be not made before Michaelmas, the obligation is forfeit. Dyer, 347.

To make an estate. If the condition be, that the obligor shall make me an estate upon request, and he tender me an estate before I request it, and afterwards I do request it, and he doth refuse it; in this case, the condition is broken, and the obligation forfeit. 7 H. 6. 24.

If the condition be, that the obligor shall make me a good estate of land (being copyhold land) and he doth surrender it absolutely, and the homage, when they present it, do present it conditionally; this is no breach of the condition; [for the presentment is, as to the condition, void.] Pasche, 8. Co. B. Jac.

*P. 390. * If the condition be, to make a good estate of land in fee-simple to *A.* (a woman) before such a time, and before such time the obligor taketh *A.* to wife, and the day pass, and no estate is made; in 4 H. 7. 4. Kel.

this case, the condition is broken, and the obligation forfeit; [because he cannot grant to her, being his wife.] But if the obligation be made to the woman herself, then it is dispensed with by the inter-marriage, [*i. e.* the wife cannot sue the husband. A conveyance to *A.* and his heirs, to the use of the wife and her heirs, would in equity, if not at law, be a due performance of such a condition.]

Co. 2. 3. Dyer, 337. To make further assurance.

If the condition be, that the obligor and his son shall do all such acts for the better assuring of land, as the obligee or his counsel shall devise; and the obligee devise and tender a release to the obligor and his son to seal, and they delay and refuse to seal it, until they can show it to their counsel to be advised upon it; this is a breach of the condition. But if they be illiterate and refuse to seal it until they can get it read; this is no[t any] breach of the condition.

Dyer, 186, 187. 18 Ed. 4. 27. 28. Co. 5. 24. Old Book of Entry, 12. To save harmless.

If the condition be, that the obligor shall save the obligee harmless from such a debt, for which the obligee is surety for the obligor, and the [second] obligee cometh at the time, and to the place, when and where the money, for which he is engaged, is to be paid, and finding nobody ready to pay the money, he doth pay it himself to save the forfeiture of the obligation; hereby the condition to save harmless is broken, and the obligation forfeit. And therefore much more if the obligee be sued, arrested, outlawed, or taken in execution for the debt of the principal: so also if the obligee be put in fear of arrest for the debt of the principal, and therefore dare not go about his business; by this the condition is broken. But if the obligee be sued unjustly, either because he is sued before the money is due, or otherwise; or if the bond, in which he is bound, be against law and void; and he suffer himself to be unjustly vexed thereupon, and doth not take advantage of it; it seems this is no[t a] breach of the condition of the bond to save harmless.

2 H. 4. 9.

If a bailiff distrain beasts on a *withernam*, and afterwards redeliver them to the party of whom he had them, and take a bond from him with condition to save him harmless from him for whom the beasts were taken, and after he [the party] doth bring a detinue against the bailiff for the beasts; in this case, the condition is not broken; for this action will not lie in this case.

Kelw. 60. To pay money.

If the condition be to pay money to me at a day

and place certain, and the money is not tendered at the time and place; albeit there be nobody ready to receive it, if it be tendered, yet the condition is broken; [for the obligor has not performed his duty.]

If the condition be, to pay money to me at a day and place, and the obligor in his going to the place is robbed of the money, so as he cannot pay him, [*read*, me;] in this case, notwithstanding, the condition is broken, and the obligation forfeit, and this will not excuse it. Bro. Oblig. 9.

*P. 391. * If the condition be, to pay money to me at a day and place, and I, seeing him going to the place to pay the money, do wish him to forbear, and thereupon he doth so, and doth not pay it; in this case, the obligation is forfeit, and this will not excuse. But if I do violently and actually detain and hinder him, so that he cannot pay it, this will excuse him. [One fact may, the other cannot, be the ground of a plea. Keiw. 60.

To pay rent. If the condition be, to pay me the rent reserved on such a lease, at the times limited by the lease, and it be not accordingly; hereby the condition is broken, albeit I do never demand the rent; [for the bond makes it incumbent on the obligor to tender the rent to save his bond.] Hil. 4 Jac. Molineux's case.

If the condition be, to pay me the rent reserved on such a lease, and I enter upon all or part of the land demised, [thus evicting the lessee,] so as the rent is [by the rules of law] suspended so long as I keep the possession; in this case, the non-payment of the rent during the time of the suspension of the rent, is no[t any] breach of the condition. Bro. Obl.

For quiet enjoying. If the condition be, that I shall enjoy land without the interruption of any person whatsoever, and afterwards I do forfeit it myself by non-payment of rent, or the like; this is no[t any] breach of the condition, [for the condition does not protect against my folly or default.] Dyer, 30.

If the condition be, that the obligor shall suffer the obligee to enjoy lands, &c. and that without the let of him, &c. or any other person or persons, &c. and one that hath an elder title doth enter; this is no breach of the condition, [for he doth suffer, &c.] But if he procure this entry and disturbance, this is a breach of the condition. Dyer, 255. 17 Ed. 4. 3.

Kelw. 60. If the condition be, that *B.* and others shall quietly enjoy land, and *A.* the obligor, and *B.* the obligee, doth [*read*, do,] disturb the others; it seems by this disturbance, [in which the obligor takes a part,] the condition is broken.

Co. 9. 51. If the condition be, that the obligor shall not disturb me in the keeping of my courts, and he keep the courts and take the fees himself; this is a breach of the condition.

Co. super Lit. 384. If one make a feoffment of land to me, and make me an obligation with condition to defend the land for twelve years, &c. and I am entered on by a stranger, but never impleaded; in this case, the condition is broken.

Co. 4. 61. 8. 83. If the condition be, to stand to the award of *I. S.* and the obligor doth afterward countermand the submission made to *I. S.* [so that *I. S.* cannot make any valid award;] this is a breach of the condition. *Factum non dicitur quod non perseverat.* To stand to an award.

Co. 8. 82. 83. 18 Ed. 4. 20. If the condition be, that I shall have licence to carry wood seven years, and the obligor doth give me a licence for seven years, and then doth revoke it again; this [revocation, assuming such licence to be revocable, because it is a licence only, and not an interest,] is a breach of the condition. To give a licence.

18 Ed. 4. 23. If the condition be, that *I. S.* shall give me licence to go over his ground, and *I. S.* doth so, but another doth interrupt me; this is no[t a] breach of the condition. And yet, if the condition be, that I shall have licence to go over that ground, there perhaps such an interruption * may be, [it should seem not,] a breach of the condition. *P. 392.

Fitz. Barre, 60. If an obligation be made to me with condition, to appear in such a court such a day, and at the day he is kept in prison at my suit, so as he cannot appear; in this case, his non-appearance is no[t a] breach of the condition, for his imprisonment shall excuse him. But if his imprisonment be for felony, or any other such like cause of his own, [or at the suit of a stranger,] *contra.* To appear.

Dyer, 25. If the condition be, to appear in such a court such a day, and before the day a *supersedeas* doth come to the sheriff; yet, if the obligor do not appear, the obligation is forfeit.

Clerk Sect. If the condition be, that the obliger shall ride To ride to Dover.

with *I. S.* to Dover such a day, and *I. S.* doth not go thither that day; in this case, it seems, the condition is broken, and that he must procure *I. S.* to go thither and ride with him at his peril.

Not to alien. If I make a lease for years, and the lessee doth enter into an obligation with condition that he shall not alien the land demised without my licence, and I die, and then he doth alien it; it seems this is a breach of the condition. [*Sed quære.*] Per Just. Nichols, M. 13 Ja.

To serve. If the condition be, that *I. S.* shall serve me in all my honest and lawful commands; or that *I. S.* shall be a good and honest servant to me one year; in the first case, if I command him nothing, the condition is not broken, albeit he never tender his service; but in the last case, it seems he is to tender his service to me, or otherwise the condition will be broken. But if I refuse his service when it is tendered, or he die within the time, the obligation is discharged. And yet, if he depart away within the time, the condition is broken. Perk. Sect. 772. 6 Ed. 4. 2.

To marry a woman. If the condition be, that *A.* shall marry *B.* by a day, and before the day the obligor himself doth marry her, [by which he renders it impossible for *A.* to marry her;] in this case, the condition is broken. But if the obligee marry her before the day, the obligation is discharged, [for he shall not derive a benefit from having rendered the performance of the condition of the bond impossible.] 4 H. 7. 4. Perk. 799.

To perform covenants. If the condition be, to perform the covenants and payments of a deed, and the deed doth contain a feoffment, and this is on condition that if the feoffor pay such a sum of money he shall re-enter, and he doth not pay it; in this case, this non-payment is no breach of the condition. But if *A.* let land by indenture to *B.* for years, rendering rent, and *B.* doth bind himself in an obligation with condition to perform all the covenants contained in the indenture, and the rent is unpaid; this is a breach of the condition, and [a] cause of forfeiture of the obligation. Briscoe's case, Trin. 9 Ja. B. R. Adjudged Griffin and Scot's case, 5 Jac. B. R.

To keep prisoners. If the condition be for the safe keeping of prisoners, and one doth escape that is in execution, and in prison under colour of an execution, or the like, but in truth and in judgment of law is no prisoner; this escape is no[t a] breach of the condition. [*Sed quære.*] See more in *Conditian*, at *numb.* 10. Curia, Trin. 37 Eliz.

Co. super Lit. 207.

* If the condition of an obligation consist of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are possible at the time of the making of the obligation, and before the time of performance one of the things is become impossible to be done by the act of God, or by the act of the obligee himself; in this case, the obligation is discharged for ever, [because the obligor is deprived of the choice of the alternative.] And therefore if the condition be, that if the obligor shall sell away his wife's land, if then he shall either in his lifetime purchase to his wife and her heirs and assigns, land of as good right and value, as the money by him received or had by or upon the said sale shall amount unto, or else do and shall leave unto her by legacy, or otherwise, as much money as shall be by him received upon such sale, that then, &c. and the obligor doth sell his wife's land, and then his wife doth die before him, so that he cannot leave her the money; in this case, the obligation is discharged, and the husband is not bound to purchase land to her and her heirs. So if the condition be, that if *I. S.* do not prove the suggestion of a bill, depending in the court of requests, before the *utas* of Hilary, that [*omit*, that] then he shall pay 20*l.* &c. and *I. S.* die before the *utas*; hereby the obligation is discharged for ever, and he is not bound to pay the 20*l.* So if the condition be, that if the obligor appear in the King's Bench in Easter term, or pay 20*l.* to the obligee at Michaelmas, and the obligor die before Easter term; hereby the obligation is discharged: but if he do not appear in Easter term and outlive the term, and die after; then, it seems, [because his option no longer existed, and he must be deemed to have elected,] the 20*l.* must be paid at Michaelmas, or the obligation is forfeit. So if the condition be, that the obligor shall marry *A.* before Easter, or pay 20*l.* to the obligee at Michaelmas, and *A.* die, or become mad before Easter, or the obligee marry *A.* himself, and the marriage doth continue between them until Easter be past, [so that the option is taken away;] in all these cases, the obligation is discharged for ever. But when the thing is become impossible by the act or laches of the obligor, the law is otherwise. And therefore if

Co. 5. 22. 15 H. 7. 2.

Dyer, 262. 15 H. 7. 4. 4 H. 7. 4. Agree. 9 Jac. in Bathurst's case.

11. *By what means and when an obligation, good in its original creation, doth or may become void, be discharged or gone, by matter ex post facto; or not.*

*P. 393.

the condition be, that *A.* shall marry with *B.* before Easter, or that the obligor shall pay unto the obligee 20*l.* at Michaelmas, and the obligor himself marry with *B.* and the marriage doth continue until after Easter; hereby the obligation is not discharged. So if the condition be, to deliver up an obligation before Easter, or give a release at Michaelmas, and the obligor doth loose [*read*, lose] the obligation, or the obligation is burnt; hereby the obligation is not discharged, for if he doth not make the release at Michaelmas, he doth forfeit the obligation (22).

If the condition of an obligation consist of one part only, or be to do one thing at a time certain, and that thing at the time of the obligation made is possible to be done, but afterwards, and before *P. 394. the * time when it is to be performed it doth become impossible by the act of God, or the act of the obligee; in this case also, the obligation is gone and discharged for ever. And therefore, if the condition be, to appear in person such a day in such a court, and before the day the obligor die, or at the day the water doth arise so high that he cannot travel to the place without peril of life; in these cases the obligation is discharged. So if the condition be, that *A.* shall marry *B.* before Easter, and before the time *A.* or *B.* die, or become mad, or the obligee marry *B.* and the marriage doth continue until after the day; in all these cases the obligation is discharged. But if the thing become impossible by the act of the obligor, *contra.* And therefore if the condition be, that the obligor shall appear such a day, and before, and at the day, he is imprisoned through some default of his own, so that he cannot appear, this will not excuse him, no more than in case where he is so sick that he cannot appear without peril of his life. So if the condition be, that *B.* shall marry *C.* before Easter, and the obligor himself marry her, and the marriage doth continue until after the time; [is this circumstance essential, for all the cases *state* it;] in this case the obligation is forfeit. So if the condition give the obligor time all his lifetime to do the thing, the obligation is not discharged by his death,

8 Ed. 4. 21. Co. 5. 22. Perk. Sect. 769. 757. 6. 11. 7. 4. 24. Ed. 4. 27.

So held in the Exchequer, 3 Cur.

Curiæ, Co. B. Hil. 37 Eliz.

(22) See further how conditions in the disjunctive are to be performed, *Bac. Abr. Obligations* (F. 2.)

but in this case he must do it during his lifetime at his peril.

Adjudged, 37 Eliz. Co. B. Greeningham v. Ewre.

If the condition be, that the obligor shall deliver to the obligee an obligation or such a release, as the counsel of the obligee shall devise, before Michaelmas, [so that the advice is an essential term in the contract,] and the counsel of the obligee devise no release before Michaelmas; hereby the obligation is gone for ever.

Bro. Oblig. 6. 88. 29. 4 H. 7. 6.

If the obligation depend upon, or be necessary to, some other deed, and that deed become void, in this case the obligation is become void also; as if the condition of the obligation be, to perform the covenants of an indenture, and afterwards the covenants be discharged or become void; by this means the obligation is discharged and gone for ever. And if one make a lease for years, rendering rent, and the lessee enter into an obligation with condition to pay the rent to the lessor, and after it fall out so that the lessee is evicted out of the land by an elder title, whereby the rent in law is gone; in this case, and by this means, the obligation is discharged and gone also. But if the eviction be but of a part of the land, [under an elder title,] *contra*. [But an eviction by the lessor, suspending the rent, would afford a defence.]

Co. 5. 119.

If an obligation be made to me, and delivered to *I. S.* to my use, and, when it is tendered to me, I do refuse it and disagree to it; hereby it is become void, and cannot afterwards be made good again. So if an obligation be made to my wife, and I disagree to it; hereby it is become void.

Fitz. Barre, 37.

By a release made from the obligee to the obligor, or to one * of the obligors, if there be more than one, the obligation may be discharged. And therefore, if an obligation be made to me with condition to pay money, and I by my deed release it, or acknowledge myself satisfied for the debt; albeit I receive none of it, or that I receive but part of it in full satisfaction of the debt; by this [discharge of the debt] the obligation is discharged for ever.

*P. 395.

Bro. Oblig. 61. Co. 8. 136. 1 Ed. 4. 3. 11 Ed. 4. 2. 1 H. 7. 4.

If the obligee make the obligor, or one of the obligors, or all the obligors, his executor, or his executors; hereby the obligation is discharged for ever, [at law, but not in equity. 1 *Leon.* 320; 3 *Salk.* 163.] But the granting of letters of admi-

nistration to one or more of the obligors, is no discharge of the obligation. And if the obligor make the obligee his executor, this is no discharge of the obligation, [but he may retain and pay himself, as between creditors in equal degree with himself. The distinctions on this subject are collected by Mr. *Thomas*, in his *Co. Litt.* vol. 2, p. 453, n. C.]

If the obligee be a woman, and take the obligor to husband, [so that he is her husband at any time after the bond might be put in suit, and thus the action is once suspended,] hereby the obligation is discharged. Bro. Oblig. 61.

If the condition be to enfeoff *K. S.* (a woman) before such a time, and before the day the obligor doth marry the woman; this doth not discharge the obligation; [for this is his act, and at law he renders the performance of the condition impossible. In equity, the agreement may be performed by a conveyance to uses.] Fitz. Barre, 133

If the condition be to serve me seven years, and within the time I license him to depart, it seems that hereby the obligation is discharged: and yet if the condition be to stand to an award, and it is awarded that one of the parties shall pay 5*l.* a year for seven years, [being the substance,] towards the education of *I. S.* [being merely a direction of the application,] and *I. S.* die within the seven years, the obligation is not discharged by his death, but the money must be paid during the time notwithstanding. Dyer, 339.

If the condition be to do two things, or stand upon divers points; and the obligee, supposing the breach of one of them, doth sue the obligor, and the issue being joined upon that point, it is found against the plaintiff, and he is barred; hereby the whole obligation is discharged; and, so long as that judgment is in force, he can never sue the obligation upon any other point within the condition. Dyer, 371.

If the condition be to satisfy me for goods I have delivered to *I. S.* if they be lost; and afterwards they be lost, and I sue *I. S.* and have him in execution for them; by this the obligation is not discharged: but perhaps when I have satisfaction of *I. S.* being in execution for the goods, the obligation may be gone. Fitz. Barre, 64.

And in all cases, by which a deed in general may become void by matter *ex post facto*, as by rasure or the like, an obligation may become void.

CHAP. XXII.

Of a Defeasance.

1. *Defeasance. Quid.*

*P. 396.

*THIS in a large sense doth sometimes signify a condition annexed to an estate; and sometimes the condition of an obligation made with, and annexed to, the obligation at the time of making thereof: but it is more peculiarly and properly applied to such conditional [and distinct] instruments, as are made in defeasance and avoidance of statutes and recognizances, at the time of entering into the same statutes or recognizances; and to such conditional instruments as are made in defeasance of statutes, obligations, and the like, after the time of [at which] the same statutes [are] entered into, and obligations, &c. made; and it is therefore defined as follows.

A defeasance is a condition relating to a deed, [or executory contract,] as to an obligation, recognizance, statute or the like, which being performed, by the obligor or recognisor, the act is disabled and made void, as if it had never been done; which differeth from a condition only in this, that this [the condition] is always made at the same time, and annexed to, or inserted in, the same deed, [and is part thereof; for *quæ incontinenti fiunt inesse videntur*;] but that [the defeasance] is always made in a deed by itself, and for the most part made after the deed whereunto it hath relation (1).

2. *Where and in what cases a defeasance may be; and what things may be defeated and avoided thereby; and where, and what not.*

Co. super Lit. 236, 237. 1. 111. 113. Plow. 137. 193. 21 H. 7. 23. Bro. Defeasance in toto.

There is no inheritance [or other subject] executory, as rents, annuities, conditions, warranties, covenants, and such like, but may by a defeasance, made with the mutual consent of all those which were parties to the creation thereof at the same [time,] or at any time after, be annulled, discharged

(1) A defeasance is a collateral deed, made [and declared] at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. 2 *Bl. Com.* 327. A defeasance on bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it: it differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. *Ibid.* 342. See further as to the nature of defeasance, and what shall be said to amount to one, in *Com. Dig. Defeasance* (A.); *Wood's Inst.* 293; *Vin. Abr. Defeasance* (F.)

and defeated. And so is the law of statutes, recognizances, obligations, and the like; yet so, as in all these cases regularly, the defeasance must be made *eodem modo* [by the like solemnity] as the thing to be defeated was and is created, *viz.* if the one be by deed, the other must be so also: for it is a rule, that in all cases, where any executory thing is created by a deed, that the same thing, by the consent of all persons who were parties to the creation of it, [or at least all those persons who are interested in the subject to be defeasanced,] may be by their deed defeated and annulled; and therefore that warranties, recognizances, rents, charges, annuities, covenants, leases for years, [though not leases for lives, (see practical note on this point in application to mortgages, and the difference between mortgages in fee and for years,)] uses at common law, [consequently trusts at this day, and even uses to be executed by the statute 27 Hen. 8, c. 10, while these uses are executory,] and such like, may, by a defeasance made with mutual consent of all those that were parties to the creation of it, [or who are concerned in interest,] by deed, be discharged and avoided. [And a defeasance by the assignee of a lease for years, to the assignee of the reversion, will be good; and yet neither of these persons was a party to the contract. So the executor, &c. may defeasance a bond to the heirs, executors, &c. of the obligee.] *Nil est tam conveniens naturali æquitati quam quod unumquodque dissolvi potest eo ligamine quo ligatur.* And therefore by such a defeasance, not only the covenant which doth create a power of revocation, but the power itself created, may be utterly defeated and avoided: but estates of inheritance and other estates in tail or for life, [in things lying in livery, as distinguished from rents, &c.] executed by livery, &c. [or by grant or by use,] cannot be avoided by defeasance made after the time of their creation and first making [or rather vesting.] And yet by *P. 397. * another deed of defeasance made at the time, [and under these circumstances, there is a condition, and not a defeasance, properly so called,] a feoffment, release, lease for life, or other executed thing, may be avoided, as well as if it were by condition within the same deed: as if a disseisee release to the disseisor, this release cannot be defeated by an inden-

[2 Prest. Convey. 166. 199.]

ture of defeasance made afterwards; but it may be defeated by an indenture of defeasance made at the same time. *Quæ incontinenti fiunt inesse videntur* (2). [This proposition is not correctly expressed; at all events, a release of right cannot be made on a condition subsequent; that the condition may be good, it must be precedent. So a defeasance or condition may be annexed to a term of years after its creation. *Bul. Nisi Prius*, 158; *Co. Litt.* 237, a; *Yelv.* 177. On the subject of defeasances to declarations of uses and trusts, an ample discussion, with the more important distinctions, will be found in the 2 *Prest. Convey.* 166. 199. 203.]

Co. 1. 113.

To make a[n effectual] defeasance, these things are requisite: 1. That the defeasance be made *eodem modo*, [*i. e.* by equal solemnity,] as the thing to be defeated is created: for if the obligee by word only discharge the obligor, or grant not to sue him, this will not defeat the obligation; it must be by deed therefore, as the former was. [a] But whether the deed or defeasance be indented or poll is not material: 2.[b] That if it do recite the statute or the obligation, (as for the most part it doth,) that it be done truly: for if a defeasance be made of a statute or an obligation, which is recited to be made the 10th day of May, whereas in truth it beareth date the 1st day of May, this defeasance is void, [inasmuch as it refers to that which does not exist; and the date is so material a part of the description, that it cannot be corrected by averment; hence the utility of taking away the materiality of the date, by reciting deeds, as bearing date on or about, &c. This mode lets in an averment of the true date.] 3. [c] That it be made between the same persons that were parties to the first deed, &c. [or so many of them as are concerned in interest, or their representatives; for it is sufficient that they represent the person, and are privy in point of interest, as heirs, executors and administrators, whether they are by the defeasance to grant or accept the discharge;] and therefore if *A.* be bound in an obligation to *B.* in 20*l.* and *B.* make a defeasance to *C.* that if *C.* pay him 20*l.* the obligation made by

3. What shall be said a good defeasance; and what not.

[a] Bro. Defeas. 12. Fitz. Barre, 95.

For the manner of it.

[b] Plow. 393.

[c] 14 H. 8. 10 Bro. Estrang. tit. Fait, 10.

(2) See accordingly and further in 1 *Wood*, 786; *Com. Dig. Defeasance* (B.); *Vin. Abr. Defeasance* (C.)

A. shall be void; this is no good defeasance, because it is not made between the same parties. [d] And yet if a statute be made to the husband and wife, and the husband alone, [having acquired the right by marriage,] join in the making of a difeasance, this is a good defeasance. 4. [e] That it be made after, [or at the time of, *i. e.* cotemporaneous with,] the making of the recognizance, obligation, &c. and not before: for if *A.* grant to *B.* that if *B.* will be bound to him in 20*l.* by obligation, that the obligation shall be void; and after *B.* doth bind himself to *A.* in an obligation of 20*l.* that defeasance is not good, because it is before the obligation. [f] And yet if the date of the defeasance be before the date of the recognizance, &c. and it be delivered after, it is good enough; [because the defeasance (as is the case in regard to all the other deeds) takes effect by delivery, and the time of delivery may be shown; and it may be remarked, that the use of the date is to ascertain the time at which the transaction took place. The presumption of law is, that the time of the date is the time of delivery, but the presumption may be rebutted by proof of the fact; and such proof is admissible.] 5 That it be made of a thing defeasible: [g] for if a disseisee release his right to the terre-tenant, and after there is a defeasance made between them, that, if the releasor shall pay 20*l.* to the releasee, the release shall be void; this is a void defeasance. [The true reason seems to be, that a release of a right cannot be on a condition subsequent. See *supra*, p. 323, 397. The reason assigned by *Gawdy* in his argument, reported by *Plowden*, is, that the right was extinct before the release was executed.] [h] And yet a release may be avoided, by a condition or defeasance made at the time of making of a release as well as a feoffment; [provided it be a condition annexed to a release, operating in enlargement of an estate.]

[d] Bro. tit. Defeasance, 3.

[e] Bro. Defeasance, 5.

[f] Dyer, 315.

For the matter of it.

[g] Plow. 137. Bro. Defeasance, 1.

[h] Bro. Defeasance, 6. 9. Co. super Lit. 236.

If the defeasance of a recognizance, obligation, &c. be, that if the conusor or obligor, &c. pay a sum of money, or do not disturb the execution of the will of *I. S.* or do make a lease for years to *I. S.* or the like; these are good defeasances. As if the grantee of a rent-charge grant to his grantor, that if he shall pay him 20*l.* such a day, the grant of the rent shall be void. Albeit the condition of an obligation, that is repugnant to the obligation

See West. Symb. Bro. Defeasance in toto.

20 H. 7. 24. 21 H. 7. 32. Fitz. Barre, 71.

itself, is void, and the obligation single, yet it is otherwise in case of a defeasance * made after the obligation; for this is good, notwithstanding it be repugnant. [This paragraph must be thus understood: a defeasance, as a distinct and subsequent instrument, may be good, though the same stipulation, if in a condition to the deed, would be repugnant, and rejected on that account.] And therefore if the obligee, after the obligation made, grant by deed to the obligor, that the obligation shall be void; or that he will not sue the obligation at all; or that he will not sue the obligation until such a time; or that the obligation shall be discharged; these defeasances are good to avoid the obligation. [They are releases rather than defeasances. So a defeasance may be by one of two obligees. 48 *Edw.* 3, 12, b.] *P. 398.

Bro. Defea. 4. 7 H. 6. 43. 21 H. 7. 23. Perk. Sect. 69.

If the feoffee with warranty grant, that neither he nor his heirs shall take benefit of the warranty of the feoffor or his heirs, this is a good defeasance of the warranty, [or rather a release;] and if he grant, not to vouch, this [grant] will discharge the voucher; and if he grant not to bring a *warrantia chartæ*, this will bar him of that remedy, [merely giving a defence against these particular remedies.] In like manner it is, if the grantee of a rent-charge grant to the grantor, that he will not take any benefit by the grant, this is a total discharge, [*i. e.* a release;] and if he grant, that he will not bring an annuity, this is a discharge of the person, [*viz.* of that particular remedy;] and if he grant, that he will not distrain the land for the rent, this is a discharge of the land. [All these are, properly speaking, releases and not defeasances; and conditional releases should be distinguished from defeasances. So a covenant not to sue a sole obligor is a release. 2 *Roll. Abr.* 412, (G.) pl. 4, 5; 1 *Inst.* 232, a; *Dorchester* v. *Webb*, *Sir W. Jones*, 345; *Chatham* v. *Ward*, 1 *Bos. & Pull.* 630. But an agreement not to sue him within a particular time, or not to sue one of several persons who are joint and several obligors, is merely a defeasance. *Dean* v. *Newhall*, 8 *Term Rep.* 168; *Fitzgerald* v. *Trent*, 11 *Mod.* 253; *Lacy* v. *Kynaston*, 1 *Lord Raym.* 590; *Salk.* 573. But if the principal be discharged without the consent of a surety, the

surety will in equity, unless consenting to remain bound, be discharged.]

If one make a lease for life by deed, and after by another deed doth grant to his lessee, that he shall not be impeached for waste; this is a good discharge, [or rather, the grant of a privilege:] and if the lessee afterwards grant by deed to the lessor, that if he shall bring an action of waste against the lessee, that he will not make use nor take advantage of the deed of discharge; this is a good defeasance of the discharge, [*i. e.* it is a release of the privilege.] So that hereby it seems a defeasance may be of a defeasance, and one defeasance after another, and regularly the last shall stand. And therefore, if a lease for years be made on condition to pay 20*l.* at Easter, and the lease to be void, and before Easter the lessor and lessee agree, that, if the lessor pay it at Easter following, the lease shall be void, and before that time they make the like agreement for another year; it seems these be good defeasances, and that the last shall stand. [But here note, that if to a covenant a defeasance be added, to avoid the covenant and not the deed, on a certain event, all actions accrued in the meantime may be maintained, notwithstanding the defeasance.]

Bro. Defeasance, 11. Condition, 130

Agreed, Pasche, 8, & Ja. Co. B. Per Just. Bridgman.

If the defeasance after execution made upon a statute be thus, that if the conusor pay so much money the statute shall be void; it seems by this the statute and execution thereupon is void; howbeit it is best to add these words in the defeasance, " and the execution thereupon," (3).

Bro. Defeasance, 7.

And now, being coming towards an end, we come to the last assurance of a man's life, or that kind of assurance that men do commonly make when they are near and towards the end of their life, *viz.* a *Testament*.

(3) See further in *Vin. Abr. Defeasance* (D.)

CHAP. XXIII.

Of a Testament.

Terms of the Law. Lit. Bro. Sect. 300. Co. super Lit. 111. Swinb. of Wills, 24.

1. *Testament. Quid.*

*P. 399.

*A TESTAMENT is the full and complete declaration of a man's mind or last will of that [which] he would have to be done after his death, [by way of disposition of his property:] it is in Latin *testamentum*, i. e. *testatio mentis*, the witness of a man's mind; and to devise by testament, is to speak by a man's will what his mind is to have done after his death: and this is sometimes called a will or last will, for these words are *synonyma*, and are as it seems promiscuously used in our law: howsoever, by the civil law, it is then only said to be a testament, when there is an executor made and named in it; and when there is none, but a codicil only; for a codicil is the same that a testament is, but that it is without an executor; and a man can make but one testament that shall take effect, but he may make as many codicils as he will, [and he may have several testamentary papers.] And by the common law, where lands or tenements are devised in writing, albeit there be no executor named, yet there [in that instance,] it is properly called a last

Codicil. Quid.

(1) See further, as to what may be deemed a will or a testament, and the difference between them, in *Swinb.* 1, 6th edit.; *Bac. Abr.* tit. *Wills and Testaments* (A.); 4 *Burn's Eccl. Law*, 41, 3d edit. With respect to the introduction and progress of wills in England, it may not be improper to select a passage from *Wright's* excellent treatise on *Ten.* 173, where it is said, It was altogether as much against the nature of a feud, that the feudatory should dispose of it by *will*, as that he should otherwise alien it: upon this ground it was, that though lands were devisable until the Conquest, or rather until the establishment of *tenure*, yet then, or soon after, the power of disposing by *will* generally vanished, except of *socage* lands and tenements in some *cities* and *boroughs*, where it was retained, or rather indulged; it being of little consequence into what hands such *tenures* fell. And thus far it is true, that *nullum testamentum apud nos mansit pro lege*, until the statutes 32 & 34 Hen. 8, gave a testamentary power over lands, subject only to the restrictions and conditions of those statutes. But though lands were not, as is suggested, devisable from the time of the *Conquest* until the time of Henry 8, yet upon a distinction started, soon after the statute *quia emptores terrarum*, between the *land* and the *use* or profits of the lands, *feoffments* to *uses* were invented; by means whereof a man might, before the statute 27 Hen. 8, c. 10, by will dispose of the profits, though he could not dispose of the *land* itself. In note 1, to *Co. Lit.* 111, b. the historical progress of the testamentary power in England, over the different species of property in tenure, is clearly explained; from whence the learned annotator makes this conclusion: "That from his deduction (of the testamentary power) it appears, that the testamentary power is *now* exerciseable, either *directly* or *indirectly*, (as with respect to copyholds,) over land of every tenure now in use, and also over every sort of interest in land, which, not being fettered with entails, can be transferred by alienation, taking effect in the owner's lifetime."

will, and where it doth concern chattels only, a
Testator. testament (1). He that doth make the testament is called the testator: and when a man dieth without will, [or without having appointed an executor,] he
Intestate. is said to die intestate.

Quotuplex. Of testaments there be two sorts, namely, a Perk. Sect. 476. Co. super Lit. 111.
Written. testament in writing, or a written testament; which is, where the mind of the testator, in his lifetime, by himself, or some other by his appointment, is put in writing: and a testament by word, or without writing, which is, where a man is sick, and for fear lest death or want of memory or speech should surprise him, [and] that he should be prevented if he stayed the writing of his testament, desireth his neighbours and friends to bear witness of his last will, and then declareth the same presently by word before them: and this is called a
Nuncupative. *nuncupative*, or a *nuncupatory* testament: and this being after his death proved by witnesses, and put in writing by the ordinary, is of as great force for any other thing but land, as when at the first, in the life of the testator, it is put in writing. [Nuncupative wills are regulated by the statute law 29 Car. 2, c. 3, § 19.] A codicil also is in writing, or by word, as a testament is: the civilians have other divisions of wills and testaments, as solemn and unsolemn, privileged or unprivileged, whereof the common law maketh no mention.

2. *The parts of it.* The parts of every complete testament whereof it Terms of the Law, tit. Devise. Co. super Lit. 111. Swinb. Pt. 1. c. 7.
doth consist, are two: 1. The making of devises, or giving of legacies: 2. The making and ordination of an executor; for a testament, [so far as respects the appointment of a representative,] can be no more without, than a codicil can be with, an executor; [but executors are frequently appointed by an instrument purporting to be a codicil; such codicil would, however, be deemed in this respect a testament. These distinctions are verbal, rather than substantial.]

Devise or legacy. *Quid.* *P. 400. * A devise or legacy, [sometimes termed a bequest,] is where a man in his testament doth give any thing to another. The first of these terms is properly applied to the gift of lands [by will, when the lands are held for an estate of freehold or inheritance;] and the last to the gift of goods or chattels, [or a term in lands;] and therefore a devise strictly is said to be where a man in his testament doth

give his lands to another after his decease; and a legacy is said to be where a man in his testament doth give any chattel to another to have after the death of the testator; [and the word legacy may, by reference and construction, be descriptive of real
[1 Burr. 268.] estate;] but the word is promiscuously applied to the one and to the other. And he that gives by such a will is, [as to real estate,] called the devisor, [and as to chattels, is called the testator;] and he to whom the thing is given [is, as to real estate, termed] the devisee, or [as to personalty, the] legatee. Devisor, devisee, or legatee.

Dyer, 317. 74. Co. super Lit. 217. Swin. 132. 134. 136. And a devise is sometimes simple and without condition: as where I give my land to another and his heirs, or I give 20*l.* to another, without more words. And sometimes it is with a condition [precedent; or conditional limitation;] which is, when there is a quality added to the devise or legacy, whereby the effect of it is suspended or hindered, and it is thereby made to depend on some future event. And this condition, in this case, may be made almost by any words; as if I give to one my land, if he pay 20*l.* to my daughter; or so as he pay 20*l.* to my daughter; or paying 20*l.* to my daughter; or I give one 20*l.* if he marry my daughter; or when he shall marry my daughter; or I give my wife 20*l.* a year, whilst she shall live unmarried; [this is part of the limitation, measuring the duration; as distinguished from a condition precedent;] or I give to him, whosoever shall marry my daughter 20*l.* or the like; [this is a legacy which is contingent, because it is to a person not yet ascertained, but to be ascertained on an event;] in all these cases the devise is conditional. [So of a gift at, when, &c. See *infra.*] The first kind of devise is called by the civilians a simple assignation, and the latter a conditional assignation. Quotuplex. Conditional devise.

New Terms of the Law. Co. 8. 135. Plow. 288. Co. super Lit. 209. Co. 9. 40. An executor in a large sense is taken for any one that is appointed to have the disposition and ordering of the goods and chattels of a man that is dead, [or some of them.] And so there are three kinds of executors: the first is, *a lege constitutus*, who is therefore called *legitimus*; and such a one is the ordinary of the diocese, who hath ordinary jurisdiction in matters ecclesiastical: the second is, *à testatore constitutus*, who is therefore called *testamentarius*; and he is strictly and properly called Executor. Quid. Ordinary.

an executor; and is defined to be one appointed by a man's last will and testament to have the disposing and administration of all or [a] part of a man's goods and chattels, and to perform a man's last will and testament, according to the contents thereof: the third is, *ab episcopo constitutus*, who is therefore said to be *dativus*; and such a[n] one is an administrator, who is defined to be one that hath the goods and chattels of a man dying intestate, [or some of them,] committed to his charge by the ordinary for want of an executor; [or on account of his absence, or his renunciation, or *pendente lite* respecting the right to probate, &c. &c. *Toller's Executors*, 103;] and his power, benefit, and charge is in all things equal to the power, benefit, and charge of an executor.

Administrator.

Quotuplex.

The executor and administrator also is sometimes universal or total, *i. e.* one that hath the power and disposition of the whole, [*i. e.* all the] personal estate committed to him. And sometimes he is particular * or partial, *i. e.* one that hath the power and disposition of some part of the estate [only,] or of all the estate for a time only, committed to him. And sometimes he is absolute, *i. e.* such a[n] one that hath an absolute power of the estate, as executor or administrator: and sometimes he is conditional, *i. e.* one that hath a limited and conditional power of the estate only. And in both cases he shall be charged and chargeable for so much as is committed to him as the testator or intestate himself: for this cause the executor, [and also an administrator,] is said to represent the person of the testator [or intestate; and, as to personal estate, an administrator represents the intestate, in like manner as the heir does, as to real estate, represent his ancestor, and is privy to him;] for as to the estate committed to his trust, he [the executor or administrator] may charge others, and be charged himself, sue and be sued, as the testator himself might. And the estate he [the executor] hath by his executorship is said to be in him to the use of the testator and in his right: and that [which] he doth in the disposition of his estate is said to be in the right and to the use of the testator also. And the administrator hath the same power and property over and in the goods and chattels, the same remedy by suit, and so far forth shall be

Dyer, 4. Bro. Executor, 155. Co. 6. 19.

*P. 401.

Represent the person of the testator.

Co. super Lit. 209. St. 31 Ed. 3. c. 11. Co. 9. 40. 8. 135.

charged, as the executor; for they differ not in nature, but in name only. And yet the administrator is but the ordinary's deputy; and he may revoke the administration, or call the administrator to an account (2); [not generally and rightfully, *ad libitum*, but only where the grant of the letters thereof is obtained by surprise or a false suggestion, or contrary to the legal title to have administration.]

Swinb. 12. Dyer, 143. Co. super Lit. 112. Lit. Sect. 168. Co. 4. 61.

3. *The nature and effect of a testament, and of a codicil.*

A testament is of that nature, that it doth much differ from other acts and deeds, that men do and execute in their lifetimes: for albeit it be made, sealed, and published in ever so solemn a manner, yet it hath no life nor virtue in it until the testator's death; for it is a maxim in law, *omne testamentum morte consummatum est*; *et voluntas est ambulatoria usque ad extremum vitæ exitum:* it is therefore resembled until death to the interlocutory sentence, and after death to the definitive sentence, of a judge. And hence it is said, *sed legum servanda fides: suprema voluntas, quod mandat, fierique jubet, parere necesse est.* And for this cause a man may alter or make void his will at his pleasure; and he may make as many new wills and testaments as he will; and there are no[t any] means under the sun to bar a man of this liberty. [When a man covenants not to revoke or alter his will, this covenant will not control the will, or bar the party of his right to alter it. It will merely give a right to damages if the covenant be broken. So a man may covenant to give certain legacies, or make certain dispositions by his will. The only conclusion to be drawn from the text is, that under whatever obligation a man may be not to revoke his will, or if the paper expressing his will be conceived in absolute terms, and contain words expressly directed to preclude him of the liberty to annul his will, and declare what his mind may be in future, no regard shall be paid to such restriction; but a will of a later date shall supersede and repeal the effect of that will which bears a more early date. But should a man by bond, covenant, or agreement, stipulate not to revoke his will, the consequence after a revocation would be, that the bond would be forfeited, the covenant broken, or the agreement departed from, and an action might be maintained

Lit. Bro. Sect. 300.

[Revocation.]

(2) See more amply, as to the different kinds of executors, in *Swinb.* 379, 6th edit; and in *Godf. Orp. Leg.* 75.

against him, or his representatives, for the breach or non-observance of his agreement.] And the latter testament doth always revoke and overthrow the former; but otherwise it is of a codicil (3); [a] for a man may make as many of these [codicils] as he will, and make no testament at all; [b] or if he make a testament he may afterwards make as many codicils as he will, and one of them will not overthrow the other, [unless they be repugnant, or annulled by an express revocation;] for in the first case they must be all annexed to the letters of administration, and the administrator must perform them; and in the latter case they must be all annexed to the testament, and the executor must take care to perform them. A testament therefore is said to have three degrees: 1. An inception, which is the making of it. 2. A progression, which is the publication of it. 3. A consummation, which is the death of the testator. In grants, therefore, the first [grant] is *P. 402. of greatest force; but * in testaments the last [will] is of greatest force: [and, as between two repugnant clauses in a will, the latter will be effectual, while, as between two repugnant clauses in a deed, the latter will be rejected. See *chap. Expositions.*] But when a testament is perfect by the death of the party, it doth as effectually give and transfer estates, and alter the property of lands and goods, as acts executed by deeds in the lifetime of the parties; [except that goods will not pass to the legatee, till assent by the executor;] for hereby [*i. e.* by wills,] descents of lands [and escheats,] are prevented: and a man may make estates in fee simple, fee tail, for life, or years, of lands, tenements, rents, reversions or services, as effectually by testament, as by deed; and these estates also will be good without any livery of seisin or attornment. And hereby also rents, and power to distrain for them, may be transferred [or created;] conditions created and

Lit. Sect. 168. Perk. Sect. 478.

[a] Swin. 13, 14.

[b] Bro. Testament, 20.

Plow. 343, 344.

Co. super Lit. 112.

Lit. Sect. 167, 168.

(3) Which is either for the explanation or alteration of something in, or for addition of something to, or for substraction of something from, the testament: and a codicil hath this further use and force in law, that wherever it is added to a testament, wherein the testator declares that he will have the disposal of his estate to be in force, either by way of a testament, or codicil, or whatever other way the law allows; in that case, if the testament to which such codicil is annexed, afterwards proves to be invalid as a testament, that is, as to the appointing or constituting of an executor, yet it shall stand good as a codicil; and be observed as such by him who administers to the same. *God. Orp. Leg.* 4. See *Harwood* v. *Goodright*, *Cowp.* 87, mentioned afterwards in p. 395; and S. P. in 4 *Burr.* 2512, "that if the second is cancelled, the former revives."

annexed to estates [given by the will,] or to things
Perk. Sect. 505. devised. And therefore they that take by devises of lands, are said to take in the nature of purchasers, [*i.e.* by donation, as distinguised from heirship (4).]
Dyer, 221. And if therefore a tenant in tail make a feoffment, [thus effecting a discontinuance,] to the use of himself in fee, and after devise the same land to his wife in fee, and die; the son is not remitted, though the father die seised, [and although there would have been a remitter if the son had taken the fee by descent;] for the devise doth prevent the descent (5). [But if the father had devised to the son in fee, he would have taken by descent as his better title; and in that case he would have been remitted. It is on many accounts highly important, to ascertain whether the person who is heir and also a devisee, take by descent, or by donation, or purchase. Mr. *Watkin*'s excellent work on Descents should be consulted on this subject.]

Co. 6. 23. To the making of every good testament, these things are requisite:—

4. What shall be said a good and a sufficient testament; or not.

1. That the testator be a person able to make a testament, and not disabled for any special cause, either in respect of his person, mind, or condition, or in respect of the thing whereof the testament is to be made. And for this it must be known, that a woman that hath a husband cannot make a testament of her lands or goods, except it be in some special cases (6); for of her lands she can make no testament, either with or without her husband's consent, [except through the medium of a power or trust:] of the goods and chattels she hath as executrix to any other, she may make an executor without her husband's consent; for if she do not so, the administration of them must be granted to the next of kin to the deceased testator, and shall not go to the husband; but of them [her lands] she can make no devise, either with or without her

First, in respect of the person that doth make it, and the thing whereof it is made; and what persons may make a testament; and of what things; or not; and how.

Stat. 32 & 34 H. 8. 5. Co. 4. 51. Bro. Testament, 13. 12 H. 7. 14. Perk. Sect. 502. Fitz. Execut. 40.

A feme covert.

Plow. 526. Fitz. Executor, 109.

(4) See the difference between *purchase* and *descent* in the books. In *Harg. Co. Lit.* 18, b. note 2, it is said, That instead of distributing all the several titles to land under *purchase* and *descent*, it would be more accurate to say, that the title to land is either *by purchase*, to which the act or agreement of the party is essential, or by *mere act in law*, and under the latter to consider, first *descent*, and then *escheat*, and such other titles not by descent, as yet, like them, accrue by mere act of law. See further, 2 *Bl. Com.* 201. 241.

(5) See further, as to the nature and effect of a will and codicil, in *Bac. Abr. Wills* (E.); *Swinb.* 51.

(6) A wife, whose husband is banished by act of parliament for life, may make a will, and act in every other respect as a feme sole. *Countess of Portland* v. *Prodgers*, 2 *Vern.* 104.

husband's leave, for they are not devisable, [except under a power or trust;] and if she do devise them, the devise is void (7). And of the things due to the wife, whereof she was not possessed during the marriage, as things in action (8), and the like, it seems she may make her testament, [with her husband's licence or consent;] at least she may make her husband executor of her paraphernalia, *viz.* her necessary wearing apparel, being that which is fit for one of her rank. Some say she may make a testament without her husband's leave; others doubt of this; howbeit all agree, that she and not his executor, shall have this [the paraphernalia] after her husband's death, and that the husband cannot give it away from her. [But creditors of the husband may claim even the paraphernalia of the wife, except necessary apparel. *Query*; and *vide* 2 *Pr. Wms.* 80] (9). And of the goods and chattels her husband hath, either by her or otherwise, she may not make a testament, without the licence and consent of her husband first had so to do; [and even if he does consent, the gift does not pass the property as from the wife, but from the husband.] But with his leave and consent she may make a testament of his goods, and make him her executor, if she will. And it is said also, that if she do make a testament of his goods, (in truth, without his leave and consent,) and he, after her death, * suffer the will to be proved, and deliver the goods accordingly; in this case the testament is good, [or rather the gift by the husband is efficient.] And yet if the husband give his wife leave to make a testament of his goods, and she do so, he may revoke the same at any time in her lifetime, or after her death before the will be

12 H. 7. 24. 18 Ed. 4. 11. Perk. Sect. 501. Fitz. Executor, 5. 28. 109. Bro. Testament, 11.

*P. 403.

(7) But although the wife, being executrix, may without her husband's licence make her testament of such goods whereof she is possessed as executrix, yet the profits arising therefrom during the marriage shall accrue to her husband, and not unto herself as executrix; so that without her husband's approbation she can make no testament of such profits. *God. Orp. Leg.* 31.

(8) In the case of *Adams* v. *Cole*, *Ca. temp. Talb.* 168, Lord *Talbot* decreed a bond which the husband had in right of his wife, but whereon he had never recovered, to go to the husband's representative; the husband being a purchaser of his wife's fortune by the settlement he had made upon her.

(9) If a woman saves money out of her pin-money or separate maintenance, she may dispose of such money, or of any jewels, &c. bought with it, by writing in nature of a will, if she dies before her husband; and shall have it herself if she survives him; and such jewels, &c. shall not be liable to her husband's debts. See *Herbert* v. *Herbert*, Prec. 14.

proved. But a woman, after contract with any man, may, before the marriage, make a testament as well as any other, and is not at all disabled hereby (10). [This is an allusion to those cases, it is apprehended, in which a marriage was deemed inchoate by the contract. But if there was a contract *per verba de præsenti*, *query*, if this marriage was not so far complete, that the woman was under the control of the man. But a subsequent marriage would be a revocation of the will; and though her husband died in her lifetime, the effect of the testamentary disposition would not be revived. A republication is required to give this paper the effect of a new will. And if the husband be bound to permit his wife to make a will, the bond will be forfeited if he resist the claims of those who are legatees under the will.]

An infant.

Stat. 32 Ed. 34 H. 8. c. 5. Perk. Sect. 503, 504. Br. Custom, 50. Swin. 37, 38.

An infant, until he be of the age of one-and-twenty years, can make no testament of his lands by statutes of 32 & 34 Hen. 8. But by special custom in some places, where land is devisable by custom, he may devise it sooner (11). And of his goods and chattels, if he be a boy, he may make a testament at fourteen years of age, and not before; and if a maid, at twelve years of age, and not before; and then they may do it without and against the consent of their tutor, father, or guardian. [These are now the acknowledged ages for this purpose] (12). And yet some say, an infant cannot make a testament of his goods and chattels until he be eighteen years of age (13). A mad

Co. super Lit. 89.

(10) But the marriage being afterwards had renders the will a nullity. See accordingly and further, as to a testament made by a feme-covert, of what things it may be made, and in what cases it shall operate, in *Swinb.* 88; 1 *Wood*, 790; *God. Orp. Leg.* 29; *Com. Dig. Devise* (H. 3.); 4 *Burn's Ecc. Law*, 45.

(11) An infant may *alien gavelkind* lands at fifteen years of age, *Rob. on Gav.* 193; but it must be by *feoffment*. *Ibid.* 194. But the custom must be taken strictly, and does not extend to any other conveyance or assurance, *Noy's Max.* 40; and therefore does not enable him to make a will of these lands at fifteen. *Co. Cop.* § 33.

(12) The general excellence of the *Touchstone* is peculiarly conspicuous in this point of doctrine; for this *dictum* appears, by the following elaborate note, to be well founded. "There is," says Mr. *Hargrave*, in note 6, to *Co. Litt.* 89, b. "a great abundance of irreconcileable opinions in our books, about the earliest age at which a will may be made of *personal* estate." [And then the observations of Mr. *Hargrave* are copied in the MSS., but at too great length to be inserted.]

(13) See fully, with respect to the earliest age at which a will may be made of personal estate, in note 6, to *Co. Litt.* 89, b. 13th edit.; where the various authorities, relating to that disputed point of doctrine, are collected and judiciously considered. And further in *Com. Dig. Devise* (H. 2.)

A lunatic person. or lunatic person, during the time of his insanity of mind, cannot make a testament of lands or goods; but such a one as hath his *lucida intervalla*, clear or calm intermissions, may, during the time of such quietness and freedom of mind, make his testament, and it will be good. [But whoever would claim under the will must clearly establish the fact of sanity.] So also an idiot, *i. e.* such a one as cannot number twenty, or tell what age he is, or the like, cannot make a testament, or dispose of his lands or goods; and albeit he do make a wise, reasonable, and sensible testament, yet is the testament void. [By this proposition it is to be understood, that the mere circumstance that a testamentary paper is wise, is not any proof against the idiocy; but if it should be shown that these proofs of sanity proceeded from, and were dictated by, the testator, it would be strong evidence to prove that he was not an idiot.] But such a[n] one as is of a mean [poor or weak] understanding only, that hath *grossum caput*, and is of the middle sort, between a wise man and a fool, is not prohibited to make a testament. So also an old man, that by reason of his great age, is childish again, or so forgetful, that he doth forget his own name, cannot make a testament; for a testament made by such a one is void. So also it seems a drunken man, that is so excessively drunk, that he is deprived of the use of reason and understanding, during that time, may not make a testament (14); for it is requisite, when the testator doth make his will, that he be of sound and perfect memory, [a] *i. e.* that he have a reasonable memory and understanding to dispose of his estate with reason. [b] A man that is both deaf and dumb, and that is so by nature, cannot make a testament. [It should seem, that no one is under an impediment to make a will, unless he be deprived of all his senses; so that he must be born deaf, dumb, and blind. 1 *Inst.* 42, b.] But a man that is so by accident, may, by writing or signs, make a testament. And

Perk. Sect. 503, 504. 24. Swin. 37. 40.

An idiot.

Swinb. 39. 40.

An old man. [Dotard.]

Swinb. 41.

[a] Co. 6. 23. Hil. 3 Car. Per the Ld. Keeper, in Chancery.

A deaf and dumb man.

[b] Swin. 53.

(14) Mr. J. *Blackstone*, in enumerating persons disabled from making testaments, mentions such as have their senses *bigotted* with drunkenness. In the case of *Gurthsaik* v. *Isherwood*, heard in *Canc.* in Lincoln's-Inn Hall, in 1778, to set aside leases, part of the evidence tended to show the *weakness* of the grantor's understanding from his frequenting alehouse.

so may a man that is deaf or dumb by nature or accident. And so also may a man that is blind. [In short, the fact to be ascertained is, whether he be of a disposing mind, and has expressed that mind by a testamentary act.] An alien born cannot make a testament of lands, [for the title will at his death be in the king,] or goods. [See *Com. Dig. Alien* (C. 7), that an alien may dispose of his goods. And it is not the fact of an alien's birth, but the want of title, which deprives the will of effect, even as to lands; and therefore a denizen, or a naturalized alien, may devise lands which might descend from him.] [c] A man that is entered into religion, [*i. e. civiliter mortuus*,] cannot make a testament. [d] A traitor attainted, from the time of the treason committed, can make no testament of his lands or goods; for they are all forfeit to the king; but after the time he hath a pardon from the king for his offence, * he may make a testament of his lands or goods as another man; [and although the will be prior in time, yet the forfeiture will defeat the operation of the will.] A man that is attainted or convict of felony cannot make a testament of his lands or goods, for they are forfeit. [As to lands, there is not any forfeiture of the inheritance. The title, if any, of the lord, is by escheat. The observations in *Plowden* are confined to goods, or must be so understood.] But if a man be only indicted, and die before attainder, his testament is good for his lands and goods both. And if he be indicted, and will not answer upon his arraignment, but standeth mute, &c.; in this case, his lands are not forfeit, [because at the common law there was not any attainder;] and therefore, it seems, he may make a testament of them (15). And if a man kill himself, his testament, as to his goods and chattels, is void (16), but as to his lands is good; [for there is not any corruption of blood or consequent escheat. *Plow.* 261.]

An alien.

[c] Caria, B. R. 7 Jac.

[d] Stat. 5 & 6 Ed. 6. c. 11. Swinb. 54.

A traitor.

*P. 404.

Prerogat. Reg. Plow. 258, 259.

A felon.

A felo de se.

Plow. 261.

(15) By statute 12 Geo. 3, c. 20, every person arraigned for felony or piracy, who shall stand mute, or not answer directly to the offence, shall be convicted thereof, and the court shall thereupon award judgment and execution against the person so standing mute, in the same manner as if he had been convicted by verdict or confession; and such judgment shall have all the same consequences, in every respect, as if such person had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.

(16) In case he shall be found *felo de se* by the verdict of a jury summoned by the coroner, upon his inspection of the body; *sed aliter*, if the verdict be lunacy.

An outlawed person.

A man that is outlawed in a personal action cannot make a testament of his goods and chattels so long as the outlawry doth continue in force, [because his goods and chattels are forfeited;] but of his lands he may make a testament. [Even in real actions the outlawry is only a personal disability, and the disability is confined to testamentary gifts of the personal estate.] The head or any of the members of a corporation may not make a testament of the lands or goods they have in common; for they shall go in succession. And no will can be made by a corporation sole of goods belonging to the corporation. The title of the successor will prevail.] A villain cannot make a testament of his lands or goods, after the lord hath seized them. But here note, that howsoever the testaments of traitors, aliens, felons, outlawed persons, and villains be void, as to the king or lord that hath right to the lands or goods by forfeiture or otherwise; yet it seems the testament is good against the testator himself, and all others, but such persons only. And here note further also, by the civil law also the testament of divers others, as excommunicate persons, heretics, usurers, incestuous persons, sodomites, libellers, and the like, are void. But, by our law, the testaments of such persons, at least as to their lands, [real estate,] are good by the statutes that do enable men to devise their lands. But all other persons whatsoever, male or female, old or young, lay or spiritual, rich or poor, at any time before their death, whilst they are able to speak so distinctly, or write so plainly, as another may understand them, and understand that they understand themselves, [*i. e.* have a disposing mind,] may make testaments of their lands, goods, and chattels; and that, albeit they have sworn to the contrary; and none are restrained of this liberty, but such as are before named. See more, *infra*, [as] to this matter (17); [and *Powell's Swinb.* 112. 157.]

Fitz. Dec. 16.

A corporation.

Fitz. Test. 1.

A villain.

Swin. 155. &c. See the stat. 31 & 34 H. 8. Perk. Sect. 496.

Secondly, in respect of the mind of him that doth make it.

The second thing, required to the making of a good testament, is, that he that doth make it have, at the time of the making of it, *animum testandi*, a mind to dispose; a firm resolution and advised mination to make a testament; otherwise the

See more infra at numb. 7. Swin. 9. 131. 324. 125.

as to what persons are capable of making testaments, in 2 *Bl. Com.* (B.); *Vin. Abr. Devise* (A.)

testament will be void: for it is the mind, not the words, of the testator, that doth give life to the testament: for if a man, rashly, unadvisedly, incidently, jestingly, or boastingly, and not seriously, write or say that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no testament, nor to be regarded. And the mind of the testator herein is to be discovered by circumstances: for if at the time he be sick, or set himself seriously to make his testament, or require witnesses to bear * witness of it, it shall be deemed in earnest; but if it be by way of discourse only, or of somewhat he will do hereafter, or the like, it shall be taken for nothing. [The statute of Frauds and Perjuries, 29 Car. 2, c. 3, has in a great degree removed the inconvenience, and even the existence of these nuncupative wills. The enactment is stated in a note to p. 407.] *P. 405.

Swinb. 283, 284, 285, 286.

The third thing, required in a good testament, is, that the mind of the testator, in the making of it, be free, and not moved by fear, fraud, or flattery: for when a testator is moved to make his testament by fear, or circumvented by fraud, or overcome by some immoderate flattery, [it would be very difficult to attack a will on the latter ground;] the same [will] is void, or at least voidable by exception. And therefore if a man, by occasion of some present fear, or violence, or threatening of future evils, do at the same time, or afterwards by the same motive, [*i. e.* when acting under that influence,] make a testament, this testament is void, not only as to him that put him so in fear, but as to all others, albeit the testator confirm it with an oath. But if the cause of fear be some vain matter, or being weighty is removed, and the testator doth afterwards, when the fear is passed, confirm the testament; in this case, perhaps, the testament may be good. And if a man, by occasion of some fraud or deceit, be moved to make a testament, if the deceit be such as may move a prudent man or woman, and if it be evil also, the testament is void, or voidable at the least; but if the deceit be light and small, or if it be to a good end, as where a man is about to give all his estate to some lewd person from his wife and children, and they persuade the testator that the lewd fellow

Thirdly, in respect of the occasion or motive of it.

is dead, or the like, and thereby procure him to give his estate to them; this is a good testament, [or rather, it should be decided, there is an intestacy.] And one may, by honest intercessions, and modest persuasions, procure another to make himself, or a stranger, executor to him, or the like, and this [persuasion] will not hurt the testament. Also a man may use fair and flattering speeches to move the testator to make his testament, and to give his estate unto himself or some friend of his; except it be in case where the flatterer doth first beat or threaten him, or put him in fear, or to his flattery joineth fraud and deceit, or the testator is a person of weak judgment, or under the danger of government of the flatterer, as when the physician shall persuade his patient, under his hands, to make his testament, and give his estate to himself; or the wife, attending on her husband in his sickness, shall neglect him, [in order to induce him to make a will in her favour,] or continually [against his will, *i. e.* fraudulently] provoke him to give her all; or where the pursuader is importunate and will have no denial; or when there is another testament made before; for, in all these cases, the testament will be in danger to be avoided (18). And if I be much privy to another man's mind, and he tell me often in his health how he doth intend to settle his estate, and he being sick, I do of mine own head draw a will according to his mind before declared to me, and bring it to him, and ask him whether this shall be his will or no, and he doth consider of it, and then deliver it back to me, and say, yea; this is a good testament. But if otherwise some friends of a sick man, of their own heads, shall
*P. 406. make a will, * and bring it to a man in extremity of sickness, and read it to him, and ask him, whether this shall be his will, and he say, yea, yea; or if a man be in great extremity, and his friends press him much, and so wrest words from him, especially if it be in advantage of them, or some friends of theirs; in these cases, the testaments are very suspicious; [and the will shall not prevail, unless it be proved that the mind of the deceased

(18) How wills made through fear, fraud or flattery are remediable, whether as to personal or real estate, in equity, courts of law, or spiritual courts; in what cases courts of equity will set aside a will for fraud, and in what court fraud in obtaining a will is examinable, see *Bac. Abr. Wills* (G. 2 and 3.)

was active, and willing to adopt this testamentary paper.]

But as touching these two last things, *query* how they shall avail in the wills of lands, which are not regulated so much by the civil law (19). [See *Pow. Devises*, 26. A will of real estate may be set aside for fraud in obtaining it. *Pow. Devises*, 691. And particular clauses or expressions in a will may be excluded from the will, as inserted by fraud; as never directed; or as misrepresented; but no clause can be introduced into a will, or any omission supplied by means of parol evidence. *Newburgh* v. *Newburgh*, before the Vice Chancellor, in 1821.]

Swinb. 112. Bro. Test. 201.

The fourth thing, required in the making of a good testament, is, that the form and order, that the law prescribeth, be observed in the disposition; and therefore, 1. That there be an executor named in all testaments of goods and chattels, and that that executor named be capable of the executorship; for this is said to be the head and foundation of the testament: for if there be never so many legacies given, and no executor made, this disposition is but a codicil, and cannot properly be called a testament; for, in this case, the party dead is said to die intestate, and the administration of his goods must be granted to the widow, or next of kin, [or to the legatee, if any, entitled to the residue;] whereas, on the other side, if an executor be appointed, albeit there be no legacy given, yet this disposition is, and is properly said to be, a testament (20) [to make a representative; and yet the executor may, under circumstances, be a trustee, so that in equity there will be, in effect, and as to all beneficial purposes, an intestacy.] 2. If the testament be of lands or tenements, it must be in writing, and it must be committed to writing at the time of the

Fourthly, in respect of the manner and form of the disposition.

1. Naming of an executor.

Stat. 32 & 34 H. 8. Perk. Sect. 476, 477.

2. If it be of lands it must be in writing.

(19) A will of lands, made by the permission and under the control of the statutes respecting wills, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject. See 2 *Bl. Com.* 378. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such *devises* and *testaments of personal chattels*, that the latter includes all the personalty testator has at his death, the *former* only the lands he had at the time of making the will, and not those *purchased* afterwards, unless the will is republished. *Ibid. Query*, when estates come afterwards by descent, for Mr. J. *B.* takes no notice of them.

(20) Mr. *John Brown* (the Chancery counsel) is said to have made his will accordingly: 'This is my last will and testament, and I do appoint executor thereof."

making thereof (21); and it is not sufficient that it be put in writing after the death of the testator, being first made by word of mouth only; for then it is but [*i. e.* only a] nuncupative still. [The following paragraphs, as they apply to real estate, and nuncupative wills, were law prior to the statute of 29 Car. 2, c. 3; and the alterations made by that statute must be kept in mind, as correctives of the law, as stated in the text. Gifts of copyhold lands are governed by the common law, and not the statute of 29 Car. 2, c. 3. *Carey* v. *Askew*, 2 *Ves.* jun. 228.] But if the testament be first made by word of mouth, and be afterwards written, and then brought to the testator, and he approve it for his testament; or if the testator, when he doth declare his mind, doth appoint that the same shall be written, and thereupon the same is written accordingly in the lifetime of the testator, [even though he was then senseless. *Aleyn*, 54. 407;] these are good testaments of land, and as good as if they were written at the first. If therefore one be very sick, and another come to him, and ask him whether his wife shall have his land, and he say, yea, and a clerk being present doth put this in writing, without any precedent commandment, or subsequent allowance of the sick man; this is no good testament of the

Dyer, 72. Plow. 345. Co. 4. 60. Dyer, 53.

(21) By the 5th section of the statute 29 Car. 2, c. 3, it is enacted that all devises and bequests of any *lands* or *tenements*, devisable either by force of the statute of wills, or by that statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be *in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses,* (but this must be understood of freehold estate, for copyholds will pass by will not *duly attested* to pass lands. See *Carey* v. *Askew*, *Bro. Rep.* Michaelmas, 26 Geo. 3; see fully in *Vin. Abr. Copyhold* (W. e.);) or else they shall be utterly void and of none effect. See 3 *Lev.* 86; *Carthew*, 35. 514; 3 *Mod.* 218. 262. But if it be a testament of *chattels* only, and be written in the testator's own hand, although it has neither his name nor seal to it, nor any witnesses present at its publication, yet it is a good will, if there is sufficient proof of its being his hand-writing. 2 *Bl. Com.* 501; *Gilb. Rep.* 260; *God. Orp. Leg.* 66. This principle is taken from the civil law; *cæterum ex constitutione Justiniani, si testator propria manu totum testamentum conscripserit, idque sifecisse in tabulis specialiter expresserit, nihil opus est vel ipsum, vel alium ejus nomine subscribere. Vinius ad Just.* 278. The stat. of 29 Car. 2, was not meant to check the power of devising, but only to guard against fraud; but Lord *Mansfield*, in *Bl. Rep.* 100, believes more fair wills have been destroyed for want of observing its restrictions, than fraudulent wills obstructed by its caution. Mr. J. *Blackstone* makes a similar remark on the operation of the registering acts. Such observations may be made with great propriety on all acts which impose restrictions in the forms of conveyances; but are they consistent with truth or sound reason? We see the few instances which happen in consequence of not complying with the forms prescribed by those acts; but who can venture to assert what number of inconveniences might have arisen if those statutes had not been made?

land. So if one declare his whole mind before witnesses, and send for a notary to write it, and die before he come, and he write it after his death; this is no good testament for his lands, but a good nuncupative will for his goods and chattels; except he declare his mind to be, that it shall not be his will, unless it be put in writing, for then perhaps it may not be a good will for his goods and chattels. So if he that doth write the will cannot hear the party speak, and another that stands by the sick man doth tell him what he doth say; in this case, if there be none others present * to prove that he reported the very words of the sick man, this will be no good testament of the land. But if a notary take direction from the sick man for his will, and after go away and write it, and then doth bring it again and read it to the testator, and he approve it; or if it be written from his mouth by the notary according to his mind, and his mind were to have it written, albeit it be not showed or read to him afterwards; these are good testaments. So if the notary do only take certain rude notes or directions from the sick man which he doth agree unto, and they be afterwards written fair in his lifetime, and not showed to him again, or not written fair until after his death; these are good testaments of lands. [*Aleyn*, 54.] If a sick man bid the notary make a testament of his lands, but doth not tell him how, and the notary make a devise of it after his own mind; this is no good testament: and yet if it be after read unto, and approved by, the testator, it may be good (22). And so if a testament be found written in the testator's house, and not known by whom, and it be read unto, and approved by, the testator; this is not a good testament in

Adjudged Trin. 10. 12.

*P. 407.

(22) By the 19 and 20 section of the statute of 29 Car. 2, c. 3, it is enacted that no *nuncupative* will shall be good, where the estate thereby bequeathed shall exceed the value of 30 *l.* that is not proved by the oaths of three witnesses at the least that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in his or her habitation, or where he or she hath been resident for ten days or more next before the making of such will, except where such person was taken sick, being from home, and died before he or she returned home. And that after six months passed after the speaking of the testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will. See more amply in what cases a nuncupative will shall be good, and as to the time and manner of making and proving it, in *God. Orp. Leg.* 13; 2 *Bl. Com.* 501; *Com Dig. Devise* (C.); *Bac. Abr. Wills* (D. 2.); *Vin. Abr. Devise* (Y. e.)

writing for lands and goods. [*Query* as to goods, since the testator had avowed and adopted it.]

3. Uses and lands by custom, and chattles devisable without writing.

3. Uses of lands, before the statute of uses, might, and lands and tenements devisable by custom, and goods and chattels may be disposed by word without writing; and such testaments of such things so made are good. [See alterations by the 29 Car. 2, c. 3.] (23).

4. The matter or hand wherein and whereby it is written.

4. It is not material in what matter or stuff, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand or letters, whether in secretary hand, roman hand, or court hand, or in any other hand, a testament be written, so it be fair and legible, that it may be read and understood; neither is it material whether the same be written at large, or by notes, or characters usual or unusual, as xx^{s} for 20*s.* or when the figure "2" is used instead of the letter *A.* if it be usual in the testator's writing, or the like; for the testament is good notwithstanding. So also if some words be omitted, or sentences improper used, when the intent and meaning is apparent; as where a man saith, "I make my wife of this my last will and testament," leaving out the word "executrix;" yet the testament is good, and this [word] shall be understood, [*i. e.* implied;] but if it be so done as it cannot be read, or, by reading, the mind of the testator cannot be known; then is the testament void and of no force, [as far as it is insensible or uncertain.] In the like manner as a *nuncupative* will is, when the words spoken are so ambiguous, obscure, and uncertain, that thereby the meaning of the testator cannot be known nor understood. Swinb. pt. 4. sect. 25, 26.

[Executrix word supplied.]

[Insensible.]

[Ambiguous.]

5. [Sealing and subscribing the testator's name not needful.

5. Where writing is needful, (as in the case of disposition of land [real or freehold estate] it is,) there, sealing of the testament, or subscribing of the testator's name, is not necessary. [Signature by the testator, either with his name or a mark, (and a mark is sufficient,) or by some other person in his presence, and by his express directions, is now necessary] (24). And therefore if a Perk. Sect. 476 477.

(23) See the note before, as to the 5th section of the statute 29 Car. 2, c. 3, [n. 21, p. 406.]

(24) But it is now under the statute 29 Car. 2, as hath been observed before. Sealing a will is not a sufficient signing within the statute of Frauds and Perjuries, *per Parker*, C. B. and Barons *Clive* and *Smythe*, in *Smith* v. *Evans*, 1 *Wils.* pt. 1, p. 313, contrary to the opinion of *North*, *Windham*, and *Charlton*, in *Lemayne* v. *Stanley*, 3 *Lev.* 1. [But the name of the testator, written by himself at the head of his will, is a sufficient signing. 3 *Lev.* 1.]

man, by himself or another, do make a testament of his land, and do not put his seal or name to it, [even at this day a seal is not necessary, unless requisite by the terms of a power;] if he agree to it, this is a sufficient testament. [But sealing is not an equivalent for signing.]

Swinb. 6. Lit. Bro. sect. 300. Swinb. pt. 7. sect. 10. Co. 3. 31.

*6. If, whilst the testator is making his will, and whilst he intendeth to proceed further at that time, either by adding, diminishing, or altering, he be suddenly stricken with sickness, or insanity of mind, whereby he cannot proceed, but gives it over in the midst, and so he die; it seems, in this case, the whole will is void. [This rule still prevails, except so far as it is excluded by the statute law.] And yet if a man begin his will, and make perfect devises to one, and then of himself he give over until another time; or if a man make a perfect devise to one, and then die before he can make any devise to any others; it seems these are good testaments for as much as is done. [When the rule is applicable, the exceptions are admissible.] And therefore, it is said, if one command another to make his will, and by it to devise white acre to *I. S.* and his heirs, and black acre to *I. N.* and his heirs, and he write the devise to *I. S.* and his heirs, and the testator die before he can write the devise to *I. N.* and his heirs; this is a good devise to *I. S.* but a void devise to *I. N.* and his heirs. [Gifts, by will, of copyhold lands, and leasehold lands held for years, would still be governed by this distinction.] But if a man bid the notary write a devise of his land to *I. S.* upon condition, and the notary write a devise to *I. S.* but the testator dieth before he can write the condition; in this case the whole devise is void. [So if the condition be omitted fraudulently, *i. e.* the testator is deceived, it is apprehended that even at this day, and notwithstanding the statute, the devise would be void.]

6. Interruption in the making of the will. *P. 408.

Swin. 188.

But a man may if he please make a testament of part of his goods, and die intestate for the rest, and that disposition he doth make is good for so much.

7. The last thing required to the perfection of a testament, [*i. e.* of goods and chattels, or personal assets, including terms of years and chattels real,] is, that it be proved; for if it be never so well made, and be in truth the testament of the testator,

7. In respect of the proof of it; and what shall be said a sufficient proof of a testament, or not.

yet if it cannot be by proof, [*i. e.* by letters of probate, or letters of administration, being the authentication by the ecclesiastical judge having jurisdiction over the assets; so that the letters of probate or of administration may be valid; *i. e.* either good, or at least voidable only, and not void;] made to appear so, it is but a void testament, and of no force at all. And therefore herein these things are to be known: 1. That a *nuncupative* testament must be proved by two witnesses at the least, and those must be such as are without exception (25). Swin. pt. 7. sect. 13, pt. 4. sect. 15.

2. A written testament, when it is written with the testator's own hand, doth prove and approve itself, and therefore need not the help of [subscribing] witnesses to prove it (26). [But to prove the hand-writing there must be two witnesses; and if there be only one subscribing witness, another must be produced to identify the hand-writing of the testator. *Toller's Executor*, 33.] And for this cause if a man's testament be found written fair and perfect with his own hand after his death, albeit it be not subscribed with his name, sealed with his seal, or have any witnesses to it, if it be known or can be proved to be his hand, it is held to be a good testament, and a sufficient proof of itself; but if it be sealed with his seal, and subscribed with the name of the testator, and can be proved by witnesses, it is the more authentic. And when it is found amongst the choice evidences of the testator, or fast locked up in a safe place, it is the more esteemed: but if it be written in another hand, and the testator's hand and seal, or one of them not to it, albeit it be found in such a place as before, yet some proof will be expected of it further by witnesses in that case. And if a writing be found under the testator's own hand, yet if it be but a scribling writing written copy-wise, with a great distance between every line, without any date, in strange characters, with many interlinings, and lying amongst his void papers, or the like; this will not be * esteemed a sufficient testament, nor

*P. 409.

(25) See the note before, as to the 19 and 20 section of the statute of Frauds; see also the 21st section of that statute. By stat. 4 Anne, c. 16, s. 14, it is declared that all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto.

(26) See note 21, to page 406.

a good proof of it; but it shall be accounted rather a draught or image of the testator's will for a direction to him after to make his will by: and yet if it can be proved that the testator did declare himself that this should be his will; this will be a good testament, and a good proof of it. [It is often a question whether a paper be or be not testamentary, 3 *Ves.* jun. 155; *Cox* v. *Bassett*, 4 *Ves.* jun. 186; *Matthews* v. *Warner*, 9 *Ves.* 249; and circumstances must determine the court in its decision.] 3. If it be proved the testator said his testament was in such a schedule in the hands of *I. S.*, and *I. S.* produce a writing deposing it to be the same, it seems this is a sufficient proof; but if he say withal it is written with his own hand, then it seems some other proof, as by comparing hands, or the like, that it is his hand wherein it is written, will be expected, [as the means of identity, so as to connect the writing with the testamentary declaration by which it is to be proved.] 4. If the witnesses will prove the writing produced to be the last will of the testator, or that he said, it was, or it should be his last will, or that it is the same writing that was showed unto them, and whereunto they are witnesses, albeit they never heard it read, or set their hands to it, it is a sufficient proof. [Letters of probate, while they remain in force, and unless they be void for want of jurisdiction, are conclusive evidence of the will as to personal estate, and of the character of executor, &c. But evidence may be given that the letters of probate are forged, or that they are vacated, repealed, &c. And in the absence of letters of probate, the will may be proved by evidence of the acts of the ecclesiastical court on granting letters of probate. As to real estate, the statute of Frauds and Perjuries has guarded against the admissibility of parol evidence to prove these facts (27).] 5. All persons male and female, rich and poor, are esteemed competent witnesses to prove a will; save only such as are infamous, as perjured persons, and the like; and such as want understanding and judgment, as children, infants, and the like;

winb. pt. 4 ct. 21.

Witness competent to prove a testament.

(27) Whether the three witnesses, required by the statute of Frauds, need be all in the stator's presence at the same time, see *Gryle* v. *Gryle*, 2 *Atk.* 176; and *Jones* v. *Lake*, in e note thereto. If a testator sees the witnesses attest through a window, it is sufficient. *sson* v. *Dade*, *Bro. Rep.* 99. See also *Eq. Ca. Abr.* 1. 402.

and such as are presumed to bear affection, as kindred, tenants, servants and the like. [This latter branch should be omitted (28).] A legatee is reputed a competent witness to prove any other part of the will but his own legacy, or to prove any thing against himself touching his own legacy, but not otherwise. And therefore where there be two witnesses of a will, wherein each of them hath somewhat bequeathed unto himself; this will cannot be sufficiently proved for those legacies; but for the rest of the will it may be sufficiently proved (29). 6. Where there is no question nor opposition moved or had about or against a testament, there the oath of the executor alone is esteemed a sufficient proof of it; and in that case regularly no other proof is required; and where more proof is necessary, as in the cases before, it is in the discretion of the ordinary what proof to admit and allow; and those witnesses for number, nature and quality; or that other proof, that [which] he doth deem and accept for sufficient, is sufficient; and the testament so proved by such witnesses, or other proof, is sufficiently proved (30). And of this question

(28) All witnesses that have the use of their reason are to be received, except such as are *infamous*, or such as are *interested* in the event of the cause; all others are *competent* witnesses; though the jury, from other circumstances, will judge of their credibility. 3 *Bl. Com.* 377. See further what persons are capable of being witnesses, *Bac. Abr. Evidence* (A.) and next note. The distinction between *competent* and *credible* witnesses explained by Lord *Mansfield*, in *Wyndham* v. *Chetwynde*, 1 *Bl. Rep.* 98.

(29) See the stat. 25 Geo. 2, c. 6, "for putting an end to doubts and questions relating "to the attestation of wills and codicils concerning real estates." It enacts, that beneficial devises, legacies, estates, &c. given to any person who shall attest the execution of a will or codicil after the 24th of June 1752, shall be void as to the person attesting, and such person shall not [the word *not* must be omitted; *Pow. Dev.* 122;] be admitted a witness to the execution of such will or codicil. That where lands are charged by will or codicil with debts, any creditor whose debt is so charged, who shall attest the execution, shall be a good witness. That a legatee who attested the execution, and who has been paid, or has accepted or released, or has refused to accept his legacy, upon tender thereof; such legatee shall be a witness. [The statute should be read, and its distinctions should receive attention.] See fully as to the occasion and operation of this statute in 2 *Bl. Com.* 377. *Windham* v. *Chetwynd*, 1 *Burr.* 414. See the case of *Holdfast* on demise of *Anstey* v. *Dawson*, 1 *Bl. Rep.* 8, (which gave occasion to the stat. 25 Geo. 2, c. 6,) as to the competency of a witness to a will who had released his own legacy, but whose wife had an annuity given her for her separate use.

(30) As to real estate a will shall not be read on proof of a witness's hand, unless there be positive proof that he is dead. *Bishop* v. *Burton*, *Com. Rep.* 614. And in *Townsend* v. *Ives*, 1 *Wils. Rep.* 216, it is said to be a rule, that *all* the witnesses, if living, must be examined to prove the will. This is the rule only when the will is to be established *per testes* against the heir, under the jurisdiction of a court of equity. *Pow. Devises*, 714. See more amply as to what shall be a sufficient proof of a will, in *Bac. Abr. Wills* (D. 3.); *Eq. Ca. Abr. Wills* (A.); *Vin. Abr. Devise* (N. 13.)

see more *infra*, at *numb.* 7. [For the attestation of wills of real estate, see Appendix.]

Co. 4. 61. Lit. Sect. 168. Plow. 344-341. Swinb. pt. 7. sect. 14, 15. Perk. Sect. 478. Co. 3. 36. 8. 82, 83.

5. *Where and how a testament good in its beginning may become void by matter ex post facto, or not.*

1. By countermand or revocation.

A testament, sufficient and good in its creation and beginning, may afterwards become void by divers means, as first by countermand or revocation; and this is sometimes by the party himself that made it, and sometimes it is by another; and sometimes it is expressed, and sometimes it is implied [by cancellation;] for it is a rule, that any act or thing done, or words spoken, by the testator after the testament made, [mere declaration will not, as to real estate, be sufficient, see 29 Car. 2, c. 3,] or that doth alter or cross all or part of his testament made before, is a revocation of it, or of that part thereof that is so crossed and altered. And therefore if a feme sole make a testament, * and after take a husband; by this [marriage] the testament is revoked, [even though she survive her husband.] And if a man make a testament of land, and after make a feoffment of the same land, which feoffment is not good for some defect in the livery of seisin, or otherwise, so that the feoffor dieth seised of the land notwithstanding; hereby the testament as to this land, is revoked (31). So if a man make a latter testament, and therein by express words doth revoke the former testament. [*Infra*, 413.] Or if a man by any writing, or by word of mouth, (for one may by word of mouth revoke a will in writing, albeit it be of land,) [altered by the statute of 29 Car. 2, c. 3, as is shown in the note,] (32), do expressly revoke a former testament that

*P. 410.

(31) An alteration of circumstances, [as marriage and birth of a child, but this is merely a revocation by implication, and that implication may be rebutted by evidence, *Brady* v. *Cubit*, *Doug. Rep.* 30,] may be a revocation of a will of lands, as well as of a personal estate, and that notwithstanding the statute of Frauds and Perjuries, which does not extend to an implied revocation. *Per Lord Keeper*, in *Brown* v. *Thompson*, 1 *Eq. Ca. Abr.* 413. The numerous cases respecting implied revocations will be found, interspersed amongst the cases respecting express revocations, in the books referred to on a subsequent note. So if one seised in fee devised, and then enfeoffs another to the use of himself in fee, though it is the old use that remained, yet it is a revocation, though it lies on the feoffment. So of a bargain and sale without enrolment. *Per Lord Hardwicke*, *Sparrow* v. *Hardcastle*. See 5 *Bac. Abr.* 527.

(32) But now, by the 6th section of the 29 Car. 2, c. 3, no devise in writing of lands, &c. or any clause thereof, shall [not] be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his direction and consent, but shall continue, &c. unless altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more credible witnesses, declaring the same.

he hath made, and make no new testament, (for so a man may do, and die intestate, if he will;) or if a man make a latter testament, [inconsistent with the former testament, *Cowp.* 87,] and make no mention of the former testament; all these are countermands of the former testament. [But a jury, by finding that there was another will, *Hungerford* v. *Nosworthy*, *Hard.* 374; *Show. Parl. Cas.* 146; or, though they find the second will was different, if they do not find the difference, *Goodright* v. *Harwood*, 3 *Wils.* 197; *Cowp.* 87. do not, in effect and law, find a revocation of the will produced in evidence.] And the latter testament [being inconsistent] doth always revoke the former; and that, [*viz.* it does so,] albeit the executor of the latter do refuse the executorship, or die during the life of the testator, or after his death; and albeit the king be made executor of the former; and albeit the former be a written, and the latter but a nuncupative testament. And this holdeth true in a testament of lands, as well as in a testament of goods and chattels. [If there be two inconsistent wills of the same date, and no evidence can be given to establish which of them is the latter will, the devise will be void for uncertainty, since neither party can make a title against the heir. *Phipps* v. *Anglesea*, 7 *Bro. Parl. Cas.* 443; 6 *Cruise's Dig.* 101.] But otherwise it is *è converso*; for however a man may by word avoid a will made in writing that is good, yet a man cannot by word make good and affirm a will made in writing that is void. And therefore if a man devise his land in writing to *I. S.* and his heirs, and *I. S.* die before the devisor, and after the devisor say by word, that the heirs of *I. S.* shall have the land, as *I. S.* should have had it if he had lived; this verbal declaration will not affirm the disposition. [And where there was a devise to *A.* for life, remainder to the heirs of his body, and *A.* died in the lifetime of the testator, it was held that the will was void; and that, as the words

Dyer, 310. 34 Eliz. B. R. Burton's case.

See the cases of *Eggleston* v. *Speke*, 3 *Mod.* 258; and *Onions* v. *Tyrer*, 1 *Pr. Wms.* 343. And by the 22d section of the same statute, no will in writing, concerning personal estate, shall be repealed, nor any clause or bequest therein altered by words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and read to and allowed by him, and proved to be done by three witnesses.

heirs, &c. were originally words of limitation, and not of purchase, and the heirs were to take in succession by way of descent, they could not, by this change of circumstances, become purchasers to take in their own right. *Ambrose* v. *Hodgson, Dougl.* 337; *Wright* v. *Warner*, 6 *Term Rep.* 517.] Also the latter testament doth infringe the former, albeit there be no mention made in the latter of revoking the former; and albeit there be twenty witnesses of the former, and but two or none of the latter; [altered as to real estate by the stat. of 29 Car. 2;] and albeit in the former the executor be appointed simply and without condition, and in the latter he be appointed conditionally, and the same condition be also broken, so that the condition be of something then to come, at the time when the condition was made; but if the executor of the latter testament be made upon some condition then present or past, the condition not existing, the former testament is not revoked; and albeit the former testament be made irrevocable, *i. e.* that the testator say, I make this my last will and testament irrevocable; and albeit the testator hath sworn not to revoke the former, the oath being also revoked, together with the testament; [or rather, for this purpose an oath is not of any legal obligation;] and albeit the testator enter into an obligation with condition not to revoke it; but then in this case he doth forfeit his obligation (33). But the latter testament doth not revoke the former in these cases following: 1. When the latter is imperfect in respect of will; *i. e.* when the testator dieth whilst he is making of * it, and before he can finish it; or when it is vehemently suspected that the testator was compelled to make the latter by fear or violence [so that it is void]; or induced to make it by fraud and deceit; or when the former was made by the testator whilst he was in his good

Condition.

*P. 411.

(33) A subsequent will, though it be found to contain *a different disposition from* a former, if the particulars of that difference be unknown, is no revocation of such former will. *Harwood* v. *Goodright* on demise of *Rolfe*, *Cowp. Rep.* 87. In that case it is said, *per* Lord *M.* [the quotation is not accurate,] "The mere circumstance of making a second will is not in itself a revocation of a former: for the testator may cancel such latter will; and it has been settled, that if a man, by a second will, even revoke a former, [too general,] yet if he keep the first will undestroyed, and afterwards destroy the second, the first is revived." Clearly, because a will being ambulatory during the testator's life, and not taking effect or becoming a valid instrument till his death; for whilst ambulatory it is *inchoatum sed non perfectum*; therefore that will which, with the proper requisites, is in existence at the time of the testator's death, is alone a good will.

and perfect mind and memory, and the latter is made by him when he is *inops mentis* [so that the act is not testamentary]; or when the latter is made by the persuasion and for the benefit of certain persons, when the testator is in extremity or sickness; unless it appear plainly to be the express will of the testator to revoke the former; or unless the testator himself did dictate the latter; or in case the latter be in favour of the children of the testator or others, who are to have the administration of his goods if he die intestate. 2. When the testator doth make two testaments, a former and a latter, both being written, and afterwards lying sick upon his death-bed, they are both presented unto him, and he is desired to deliver, to one of the standers-by, which of them he will have to stand for his last will, and he deliver the former, [with full knowledge and meaning that the former will is to have effect. This rule may still apply to personal estate; but, in reference to real estate, it is excluded by the 29 Car. 2, c. 3. *Walpole* v. *Cholmondeley*, 7 *Term Rep.* 138. Lord *Orford* made a codicil, and the codicil referred to the former of two wills, by describing its date; and this was held a republication of that will; and the court would not admit evidence to show that the reference was by mistake, for such evidence would be in opposition to the statute of Frauds and Perjuries.] 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings; [and there may be distinct wills for distinct subjects, or different gifts; thus, one will may give one farm, and another will may give another farm; or one will may give the fee, and another will, or codicil, may give a prior life estate, or in tail; or may add a limitation by executory devise, or a condition, &c. So if there be two wills, and in some points they agree, and in others they differ, both will stand, as far as they agree; and the latter will may be valid, as far as it respects the former.] 4. When in the latter testament there is no executor named; for then it is but a codicil, or addition to the former. 5. When the latter is made upon some sudden discontent against the executor of the former testament, and afterwards he and the executor are reconciled again: in these, and such like cases, the latter tes-

Lit. Bro. 55. tament is no revocation of the former. If the husband license the wife to make a testament, and after her death he forbid the probate, this is a countermand of the testament. But note here, that revocations in general are not favoured in law; and therefore he that will avoid a former will by revocation, must see he prove it [the revocation] well; [and the statute of Frauds and Perjuries has protected wills of real estate from revocation, on mere evidence of declaration] (34).

Swinb. fib. 7. pt. sect. 16. 2. A good testament may become void by cancelling, or other destruction of it (35); as where the testator himself, or some other by his commandment, doth cut or tear it in pieces, deface it, or cast it into the fire; by this means the testament is made void; except it be in case where the testator doth it unadvisedly, or it be done by some other without his consent, or by some casualty, or when he doth willingly pull away the seals (36), and then he doth afterwards seal it again, [for this was a republication. Now, by the statute of Frauds and Perjuries, there must be a new attestation;] or where the whole testament is not can-

2. By cancelling of it.

[Cowp. 54.]

---

(34) See fully as to the doctrine of revocation of wills, either express or implied, which is no less material than extensive, *Com. Dig. Devise* (F.); *Bac. Abr. Wills* (G.); *Swinb.* 523; *Eq. Cas. Abr. Wills* (E.); *Vin. Abr. Devise* (O.) to (Z.); *God. Orph. Leg.* 51; *Went. Off. Ex.* 20; and the following cases, which do not appear to be inserted in the 4th edition of *Bac. Abr.* lately published. *Beard* v. *Beard*, 3 *Atk.* 72; deed-poll to wife revoked a will dated prior, though the deed-poll, being to a feme covert from her husband, could not take effect. *Carte* v. *Carte*, 3 *Atk.* 176; benefit in leases, renewed after will, held in trust for testator, will pass, though legal estate would not. *Darley* v. *Darley*, 3 *Wils.* 6; recovery by tenant for life, with reversion in fee, is a revocation of his will. *Parsons* v. *Freeman*, 1 *Wils.* 308; similar point as to recovery. *Goodright* v. *Glazier*, 4 *Burr.* 2512; testator makes a second will, without cancelling the first; then cancels the second: the first revives. S. P. *Cowp.* 87; and *Goodright* v. *Harwood*, fully reported in 3 *Wils.* 497. In that case a writ of error being brought, the judgment of the court of Common Pleas was reversed by the court of King's Bench, and on an appeal to the House of Lords in April 1775, the decision of the King's Bench was affirmed. All the cases in the *latter part* of this note go to the revocation of *real* estate; but there are cases which relate to *personal* estate, where *alteration of circumstances* operate as a revocation; as in the case of *Shaftesbury* v. *Shaftesbury*, 2 *Vern.* 747, where testator devised his goods in his house at *R.* at his decease, to his wife. Whilst testator was abroad, his steward gave up the house, and removed the goods to another house, and wrote testator word what he had done, who approved of it. Held, the devise revoked, and that the goods did not pass; *aliter*, if removed by fraud to defeat the legacy. In the case of *Moore* v. *Moore*, *Bro. Rep.* 129, Lord *Thurlow* says, "Removal of goods for a necessary purpose, is not an ademption of a specific legacy."

(35) A will revoked by a subsequent will, *but not cancelled*, is re-established by cancelling the subsequent will. 4 *Burr.* 2512; *Dougl.* 40. Or if testator in anywise destroys the subsequent will, the former, if existing, is revived. *Per* Lord *M. Harwood v. Goodright*, *Cowp.* 92.

(36) Revocation by obliterating, tearing, &c. See *Vin. Abr. Devise* (R. 4.)

celled or defaced (37), but some or the chief part thereof, as the naming the executor, or the like, for it is still good for the residue; [and where a testator began to cancel his will, in a fit of anger, and stopped in the progress of the act, though he had mutilated the will, the will was established, 3 *Barn. & Ald.* 489;] or where there be several papers or writings, of one, ten, or each of them, containing the whole testament, the cancelling or defacing some of them doth not hurt the testament, unless it can be proved that the testator's mind were to avoid it all. *Pow. Dev.* 654.] But where there are several parts of a will, the cancellation of one part is an effectual cancellation of all the other parts. See *Edward Seymour's case*, 1 *P. Wms.* 346; but if one of two parts of a will be thrown on the fire by mistake, it should seem that parol evidence may be given to show the mistake. 1 *P. Wms.* 346; and where a testator threw his will on the fire, intending to destroy it, and a by-stander took it out of the fire and preserved it, without the knowledge of the testator, it was held that the will was revoked. *Bibb* v. *Thomas*, 2 *J. Black.* 1043;] or where the testament is lost in the lifetime of the testator, or after; for in this case, so much as can be proved by witnesses is still in force. [Is this evidence admissible against an heir, except in equity? See *St. Legar* v. *Adams*, 1 *Lord Raym.* 731; *Phillip's Evid.* 174. 433; that the evidence is admissible] (38).

[2 Vern. 741. Cowp. 54. 4 Burr. 2512.]

3. By alteration of the estate of the testator.

*P. 412.

3. A good testament may become void by alteration of the estate of the testator; as when a man, after the time of * making the testament, and before his death, is convicted or condemned of some great crime, for the which the law depriveth him of the making of a testament, as treason, felony, or the like. And yet if the crime be pardoned and purged before his death, the testament may be good enough. [These

Swinb. fib. 7. sect. 17.

(37) Therefore, where one by will duly attested devised all *his lands* to trustees, in trust to sell, &c. and out of the money arising by sale to pay an annuity to his wife, legacies to his children, &c.; testator afterwards obliterates, interlines, and alters all the bequests directed to be paid out of the money arising by sale, without attesting such alteration, &c. and without re-publishing his will; held, that the devise to the trustees *to sell*, was not revoked. *Sutton* v. *Sutton*, *Cowp. Rep.* 812; [4 *East*, 419; 3 *Bos. & Pull.* 16; 18 *Ves.* 352.]

(38) The mere act of *cancelling* a will is no revocation, unless it be done *animo revocandi*. *Burtinshaw* v. *Gilbert*, B. R. *Cowp. Rep.* 52. And parol evidence must be let in to show the intent of a testator in cancelling a will. *Ibid.* 53. [*Cowp.* 54.]

points are more immediately applicable to personalty; but they are not properly considered as revocations by alteration of the estate, but revocations by crime, or rather by reason of crime. In the case of treason, the lands of the party are forfeited, and the devisee cannot claim as against the crown; but, in case of felony, there is not any forfeiture of the inheritance. The title of the lord is by escheat, for want of heirs, and as a consequence of the extinction of inheritable blood. *Query*, therefore, if there be any decision, that the will of a felon is revoked by his attainder; and if it be revoked, whether such revocation is not by reason that he is *civiliter mortuus?* As to conveyances by a felon, after the felony committed, and before attainder, see 3 *Prest. Abstr.* 392. Revocation, by alteration of estate, is become, by numerous decisions, a very important head of the law. It would require a long and very accurate note to explain the rules on this subject, with all the distinctions, as they apply to, first, copyhold lands held in fee; secondly, freehold lands held in fee: freehold lands held for lives: interests under tenants right in freehold and copyhold lands held for lives: leasehold lands held for years: revocations *in toto*, as distinguished from revocation *pro tanto*; and the rules of equity, as distinguished from the rules of law, by affecting the heir with a trust. The cases are collected by *Powell* on *Devises*, 605; and *Cruise*, in his *Digest*, vol. 6. So a will may be revoked by an alteration in the circumstances of the testator, as by marriage and the birth of a child; but this is merely a presumptive revocation, and therefore parol evidence may be admitted to show there was not an intention to revoke. *Brady* v. *Cubit, Dougl.* 31. But see *Doe* v. *Lancashire, per* Lord *Kenyon*, 5 *Term Rep.* 49. But in the case of revocation by alteration of estate, parol evidence is not admissible, to show there was the absence of an intention to revoke. And according to a late case of revocation, by alteration of the circumstances of the testator, there must be, first, a marriage; secondly, the birth of a child, or a child *en ventre sa mere*; and, thirdly, the will must raise the presumption that the testator would have altered his will, if he had

considered such alteration necessary; therefore there is not any revocation, when a man makes a settlement, prior to the second marriage, for the wife and children, or perhaps the wife only, (*ex parte Ilchester*, 7 *Ves.* 348); or by a will, prior to the second marriage, gives the bulk of his property to the woman he intends to marry, and whom he afterwards marries, and provides for his children by her. *Kennell* v. *Icraston*, 2 *East*, 530. Or where a man having a son and two daughters, devised his real and personal estate between them, and afterwards married, and had other children of the second marriage, since the effect of a constructive revocation would be, to give all the real estate to the eldest son, in exclusion of the two daughters of the second marriage. *Sheath* v. *York*, 1 *Ves. & Beam.* 290.] And if a man of sane and perfect memory make his testament, and after become *inops mentis*, as every man for the most part is before his death, this does not hurt the testament. 4. A good testament may become void by an intention only to alter it, when the testator is hindered in his intention, that it cannot take effect; and therefore if when the testator intendeth to alter his testament, or to make a new one, he be by fear or fraud forbidden or letten, that he dare not or cannot alter it, or the notary or the witnesses dare not or may not be suffered to come to him; as when a wife or some other that is to have benefit by the former will, under pretence that she hath a charge from the physician that none shall come at him, or under pretence that he is asleep, or the like, will not suffer any body to come at him; or when the notary and witnesses are all present, and they make such a noise or quarrelling that they hinder the effect of his intent; or when the testator is kept from doing it by importunate requests and flattering persuasions; in all these cases, and by these means, the former testament may become void. But if it appear, that the testator hath no purpose to alter the testament when he is let as aforesaid; the fear is a vain fear. If the testator is prohibited at another time, and not the time when he doth intend to alter the testament, but he hath sundry opportunities after that time to do it, and doth it not;

Co. 4. 6a.

Fourthly, by intention to alter it.

Swinb. pt. 4. sect. 18.

or if he is drawn only by the fair speeches of a wife or friend; or if by the weeping or other trouble, arising from the grief of the legatory or executor for the testator's sickness only, he is disturbed; in these cases, perhaps it may not be void. And where it is void by the prohibition of a legatory only, it is void for so much as doth concern him only, and not for the rest of the testament. [And if a testator be prevented from altering his will, by a promise on the part of a devisee or legatee to perform certain trusts, or do certain acts, equity will, on the ground of fraud rather than trust, relieve the persons or the objects, disappointed by the omission of the testator to alter his will.] 5. A good testament may become void by making another of the same date; for if two testaments be found after the death of the testator, and it cannot be discerned, or proved, which was made former or latter; the one of them doth overthrow the other, and both of them are become void [for uncertainty,] except they be both to the same purpose, or one of them be made in favour to [of the] wife and children, &c. and the other to [*read*, of] strangers (39). And yet in the first case also the testator by declaration of his mind, which of them he will have to take effect, may make either of them good. [The rule is, the last will and the first deed shall prevail. In all these instances the will is void for uncertainty, since it cannot be ascertained which of the testamentary papers is to have effect; and no one claiming under a will can succeed against an heir without showing that the will, under which he claims, is the last will; and for want of establishing this fact, he must fail: but the rule does not apply when it can be shown by evidence which of the wills was the last; nor, it is apprehended, will it apply when the same person is a devisee of the same subject, and for the same estate, under each will. Does the rule apply when there are several wills of the same date, each disposing of a different farm to different persons, or one will giving a life estate or estate tail, and the other will giving the fee? It is apprehended it does not;

Fifthly, by making another of the same date.

Swinb. pt. 7. sect. 11. Perk. Sect. 479.

(39) If two wills are consistent, or may stand together, they ought to stand together; as in the case of *Coward* v. *Marshall*, *Cro. Eliz.* 721, where the latter *will* did not revoke the former, but might well stand with it. *Per De Grey*, C. J. 3 *Wils.* 514. But *query*, if any case of two wills of same date? and yet, if consistent, why not?

since, as between these persons and the heir, there is not any uncertainty of title. See note 39. So the context of the two wills may establish one will to be an explanation or alteration of the other will.] 6. A good testament may be made void by the declaration of the testator's mind; as if a man have two testaments lying by him, the one made after the other, and they are both showed or delivered to the testator when he lieth sick, and he by word or sign declare * that he will have the former to stand; this declaration doth revoke the latter, and affirm the former. [Since the statute of Frauds and Perjuries, 29 Car. 2, c. 3, there must, as to real estate, be an express republication; and as to personal estate the former will must be read to and allowed by the testator, and proved to be so done by three witnesses. See p. 411.] And where a man would revoke a will for any of these causes, he must presently after the death of the testator put in a *caveat*, or exception, in that court where the will is to be proved, and thereupon proceed to question it; or by a prohibition, in some cases, he may stay the probate in the spiritual court (40). See more *infra*, at *numb.* 12.

Sixthly, by the declaration of the testator.

*P. 413.

6. *Where a testament void or voidable in its inception, may become good by some matter or accident* ex post facto; *and where not.*

If a woman covert, without the leave of her husband, make a testament of her husband's goods, and the husband doth after her death connive at the probate, and deliver the goods accordingly, hereby the testament of the wife is become good; [or rather, the person to whom the goods are delivered is entitled to them by the gift of the husband, and not by force of the will.] But if an infant, or madman, make a testament in the time of his infancy, or madness, and after the infant or madman become of full age, or sober, before his death; it seems these testaments are void. And yet if the infant at his full age, or the madman when he is sober, make a publication of this testament, it may perhaps be good. [No doubt it will be good. 1 *Sid.* 162.]

Perk. Sect. 501. Co. 1. 99. 2. 55.

If a man make a former and a latter will, and by the latter the former is revoked, and after the testator declare himself that the former shall stand;

Perk. Sect. 479. Co. 4. 61. Plow. 344.

(40) Seventhly, marriage, and the birth of a child, amount to a revocation of a will, if it is of all the testator's land. *Dougl.* 38, 9. Marriage alone is a revocation of a will of land by a woman. *Dougl.* 34.

by this the former, that was void before, is now become good again (41). [When there are two wills, the cancellation of the latter instrument will restore the former, unless the former will was expressly revoked. After express revocation, or actual cancellation, there must be an express republication. *Cowp.* 52; but see *Cowp.* 92.] And yet if a man make a will that is void, and it be proved after his death; this probate will not make it good, but it doth remain void, as it was before. [But as to personal estate, the only mode of trying the validity of the will is to institute a suit to repeal the probate. No objection can be taken to the right of the executor, or the validity of the will, while the probate remains in force.]

If a feme sole make a will, and then take a husband, whereby the will is countermanded, and so become void; if her husband die, so that she become sole again; this accident will not make the will good again, but it doth remain void still. *Forse* v. *Hembling*, 4 *Co.* 61.] But perhaps, by a new publication after she doth become sole, it may, [indeed, certainly would,] become good again. See more *infra*, at *numb.* 11. [A note on republication will be added in the Appendix.]

7. What shall be said a good and sufficient devise or legacy, or not.

See before at numb. 4.

To the making of a good and sufficient devise, these things are requisite: 1. That there be a devisor, and that he be a person able to devise; and that, both in respect of the condition of his own person, and of the thing whereof the devise is made. 2. That there be a devisee, and that he be a person capable and able to receive the thing devised, either at the time when the devise is made, or at least when the devise is to take effect. 3. That the devisor have at the time of the devise made, *animum testandi*, *i. e.* a mind to make a devise. 4. That the will of the devisor be free, and not drawn or coacted by fraud, flattery, fear, or the like. 5. That the devise be made in due manner and form. 6. That the thing devised be a thing devisable. 7. That it be devised upon lawful terms and conditions. 8. That there be words sufficient to make his mind known. 9. That it be proved after the death of the devisor; [this is

Perk. Sect. 406. See before at numb. 4, and after at numb. 17.

(41) The student will necessarily consider the operation of the statute of 29 Car. 2, c. 3, throughout the whole of this chapter, with respect to the requisites thereby made necessary, either to the making or to the revocation of testaments, which have been mentioned before in the particular sections of that statute.

necessary only as to personal estate. The probate in the ecclesiastical court has not any effect as to real estate. To prove a will against an heir at law, a suit must be instituted in the court of Chancery, to establish the will *per testes*. Formerly, purchasers from a devisee uniformly required that the will should be established against the heir before they accepted the title; but this practice is justly exploded, except in those instances in which the heir sets up a claim in opposition to the will; or there is reason to suspect that the will was improperly obtained.] 10. And if it be a devise of land, it is further required that the devisor be
*P. 414. solely seised of the land, and not jointly * seised with another. [A joint-tenant has not any devisable interest. Before he can devise he must sever the joint-tenancy, and convert it into a sole tenancy. A will made by a joint-tenant has not any operation, although he afterwards survive his companion, and die solely seised.] And that he be seised of an estate in fee simple; [now, by the statute of Frauds and Perjuries, estates *pur auter vie*, confer a devisable interest.] And that the devise be in writing, [and the will duly attested.] And for the first of these it is to be known, that whosoever may make a testament, may make a devise of the same thing of which he may make a testament. *Et sic è converso*. And whosoever is disabled to make a testament, is disabled to devise by such a testament. And therefore infants may not devise their lands until they be one-and-twenty years of age, nor their goods and chattels until they be fourteen years of age (42), (or, as some say, until they be eighteen years of age) (43). [The better opinion now is, that as to personal estate, a male may make a testament at the age of fourteen years, and a female at the age of twelve years.] Women, that have husbands, cannot devise their lands to their own husbands or others, either by or without their husband's consent, albeit there be a custom to enable them thereunto; but all such devises are void (44). [By custom, a feme covert may sur-

First, in respect of matter touching the devisor, and who may be the devisor.

Co. super Lit. 112. 4. 61. Bro. Devise, 32.

(42) Though an infant may make a *feoffment* of gavelkind lands at fifteen, he cannot make a will of them. *Co. Cop.* 65.

(43) See before in note 13, page 403. So if a will be revoked by a subsequent will, but not cancelled, it will be re-established by cancelling the subsequent will, without any declaration of the testator. *Dougl.* 40; 4 *Burr.* 2512.

(44) But under a power reserved, a feme covert may *devise* (by way of appointment) to or any other person.

render copyhold lands, and devise them by her will. *Dyer*, 363, b.; *Moore*, 123; *Cro. Eliz.* 717; *Litt. Rep.* 274; 2 *Wils. Rep.* 1.] And spiritual persons, as archbishops, bishops, deans, archdeacons, prebends, parsons, vicars, or any member of a corporation, may not devise the lands or goods they have in the right of their churches or corporations. And, for the second thing, this is to be known: 1. That regularly, whosoever may be a grantee, may be a devisee or legatee. And therefore a devise made to any person or persons, male or female, children or strangers, bondmen or freemen, laymen or clerks, debtors or creditors, infants or men of full age, women sole or covert, colleges, universities, corporations, or the like, [as to colleges see the statutes of Mortmain,] are good. But it is said, that if any legacy be given to an heretic, apostate, traitor, felon, excommunicate person, outlawed person, bastard, unlawful college, libeller, sodomite, usurer, recusant convict, it is void by the civil law, except it be in some special cases. And yet it seems a devise of lands to any such person, is good within the statute of Wills. A devise to an infant in the womb of its mother, at the time of the death of the testator, is void (45). [The rule is, that a bequest or devise to a person *tanquam in esse*, is void, if there be not any such person; because the description fails. But it is now settled, contrary to the earlier authorities, that a devise to an intant *en ventre sa mere*; or to a child to be begotten; and even to a child unborn, when it shall attain twenty-one years of age; is good. So is a gift to a child, to be born and called by a particular name. But in all cases of devises and bequests to unborn children, they must be children of a person *in esse*, or of a child of the testator; or there must be some special limitation to bring the gift within the rule against perpetuities, or the common law learning, which will protect the gift as a remainder. 2 *Prest. Abstr.* 114. 148.] [b] And yet if a man devise to such an

Perk. Sect. 498.

Perk. Sect. 505. 510. Swinb. 222. See infra at numb. 18.

Secondly, in respect of the matter touching the devisee; and who may be a devisee; and by what name.

[a] Dyer, 303, 304. B. R. Curia, Mic. 13 Jac.

[b] New Terms of the Law, tit. Devise.

(45) But by law such a child may now take a legacy or be executor; and if there happens to be two or more at a birth, they shall be joint legatees or joint executors; for the civil law, for the benefit of the infant, respects a child in his mother's womb in the same condition as if he were born. *God. Orp. Leg.* 102; *post*, 441. See 1 *Salk.* 230; *Gilb. Ten.* 264; who queries whether it is fully settled, that a devise of *copyhold* is good to an infant *en ventre sa mere*, because there is nobody to do the services till the birth; *aliter*, of a surrender to infant *en vente*.

good; for it is a rule, [c] that the devisee must be capable of the thing devised at the time of the death of the devisor, if it be then to take effect in possession; or if it be a remainder, he must be capable of it at the time when the remainder shall happen, or otherwise the devise is void (46). On this subject, see *Fearne on Cont. Rem. &c.* 307.] And a man may devise his lands, goods, or chattels, to his own wife, as well as to any other. [So he may make a gift or conveyance to her use, or in trust for her; but he cannot grant to his wife, under the rules of the common law.] 2. But he that may be thus a devisee, and is capable of a thing devised, must be certainly, [*i. e.* with reasonable certainty,] named and described; for if a devise be to a person altogether incertain, [*i. e.* to a person who cannot be ascertained; or by a vague and indeterminate description,] the devise is altogether void. And therefore if I give my land to my best friend, or to my best friends; these are void devises. So if I give my land to a vicar, and say not to what vicar; this devise is void, and no averment will help in this case. If one have two sons of one name called *I. S.* and he devise to his son *I. S.* without any distinction; it seems this devise is void for incertainty: but in * this case perhaps an averment, which son is meant, may help. [This is now clearly understood to be the law: there is merely a latent ambiguity, and parol evidence may supply the certainty of the person. But if no such evidence can be given, or if the evidence leave the intention in uncertainty, the devise will be void. *Thomas* v. *Thomas*, 6 *Durnf. & East*, 671.] So if one give to *I. S.* 20*l.* and there be two or more of that name, this devise is void; except it may be proved by some thing, [or rather circumstance, or by extrinsic evidence,] which of them he meant. So if one say in his testament, I give to one of the world 10*l.*; this

[c] 9 Ja. B. R.

Lit. Sect. 168. Lit. Bro. Sect. 55.

Incertainty.

M. 19 Jac. Curia, B. R. Crumpe v. Bodie.

Averment.

Co. 6. 68. Swinb. 293, 294, 295, 296.

*P. 415.

(46) The law is said to be now clear, that a devise to an infant *en ventre sa mere* is good enough, though he be born after the death of the testator, and *he shall take by way of executory devise when he is born.* *Per North*, C. J.; *Freem.* 293. See more amply as to a devise to an infant *en ventre sa mere*, in *Vin. Abr. Devise* (I. 9.); *God. Orp. Leg.* 102; *Bac. Abr. Infancy* (C.); *Swinb.* 251; *Fearne on Cont. Rem.* 324. 401. 425, 3d edit.; *Gilb. Law of Devises*, 15. For the various *benefits* to which an infant *en ventre sa mere* is entitled by law, see 2 *Vern.* 270.

custody of such a man; and in truth there is no such schedule in the custody of such a man to be found; or if there be no name written therein; it seems these legacies are void for incertainty; [or rather, because the description fails.] So if a man give a legacy to a man incertain, and no such man is to be found, and the meaning of the testator cannot be known; [*i. e.* if the gift be by such terms as do not admit of any legal interpretation;] this devise is void. And yet if a man by his will say thus, I devise to him that shall marry my daughter; this, [whether by way of remainder or executory devise,] is a good devise; and he that doth marry my daughter in my lifetime, or after my death, [for *certum est quod certum reddi potest*,] shall have it. And if a man devise any thing *ad pias causas*, as to the church or to the poor, not expressing what church or poor; this perhaps may be a good devise. [This is so settled; and in general a charity never fails for want of an object. The king, by his chancellor, will decree an execution of the trust as near as may be; and will, when necessary, designate the objects. See cases in *Duke*, by *Bridgman*, 484.] So if a man give 20 *l.* to his kindred: it is said this is a good devise, and that a reasonable exposition shall be made of it, as near the intent of the testator as may be; *viz.* that those in the next degree shall have it first, and then those in the next degree to that shall have it afterwards; and if it be a devise to the kindred of another man, that they shall have it equally. (*Sed quære* of this devise, for it seems altogether uncertain.) [A bequest to kindred is now held to be good; and the persons who might have taken under the statute of Distributions, will be entitled; but, instead of taking *per stirpes*, and as tenants in common, they will take *per capita* and as joint-tenants, unless there be words of modification. So of relations. *Harding* v. *Glynn*, 1 *Atk.* 469. But under a power to appoint to kindred or relations, the donee of the power may select the objects, and is not confined to next of kin within the statute of Distributions. 1 *Atk.* 469.] So if a man give to *I. S.* or *I. D.* 20 *l.*; this is held to be a good devise, albeit it be

sinb. pt. 7 ct. 9.

somewhat incertain; and the disjunctive shall be taken for a copulative, and so *I. S.* and *I. D.* shall take both by this devise; but if, in this case, one of them be nearer of kin than the other, then it is said he shall have it for his life, and the other afterwards. [But the distinction cannot be supported.] And if one devise 20 *l.* to *A.* or *B.* which of them *I. S.* will appoint; this is a good devise, and he that *I. S.* shall appoint shall have it. And if one devise to *I. S.* and his children; this is a good devise and certain enough; and hereby he and his children shall take the thing devised together (47). 3. And as the person to whom the devise is made, must be capable, and certainly described and named, so must he be capable by that name by which the devise is made to him, or otherwise the devise is void. And therefore if a devise be to the heirs of *I. S.*, *I. S.* being living; this devise is void. [The law is now settled, that such a devise, or a devise to the heirs of the body, may be good as an executory devise. It amounts to a devise to the heirs when there shall be any. The objection formerly taken was, that the limitation was to the heirs *tanquam in esse*, and was void, since there was not any person to answer the description. But now it is understood, that the testator must have known that *A.* was living, and that he intended to suspend the operation of the devise till the death of *A.*, and consequently till the description of heirs should be fulfilled.] And yet if lands or goods be devised to the executor of *I. S.*, and *I. S.* die before the testator and make executors; this is a good devise to the executors. And if a man devise his land to *I. S.* for life, the remainder to the next of kin, "or next of blood" of *I. S.*; this is a good devise of the remainder. And if a man devise goods to the parishioners of the parish of *S.* to the use of the church; this is a good devise, and the churchwardens may recover it. And if a man devise *ecclesiæ sanctæ Andræ de* * *Holborne*; it seems this is a good devise to the parson of that church. [At this day such a devise is void by the statute of Mortmain, 9 Geo. 2, c. 36.] And if a man

Plow. 345. Co. 1. 105. 155. Perk. Sect. 508.

Fitz. Devise, 27. Plow. 523. Perk. Sect. 509, 510. Bro. Corporation, 55.

*P. 416.

(47) In what cases devises shall be deemed void, "*by uncertainty in the description of the person to take*," see *Bac. Abr. Devises* (L. 3.); also *Co. Lit.* 246, 13th edit. note 3.

devise to the city of London, university of Oxford, or to Queen's College in Oxford; these are good devises [to the different corporations. But by the statute of Wills, no devise can be made to a corporation. Some of the universities, &c. are capable of benefits under wills, notwithstanding the statute of 9 Geo. 2, c. 36.] But if one devise to the commonalty of a guild that is not incorporate, as to two of the middle men of the guild of the fraternity of Whiteacres in London, or the like; this devise is void (48). 4. That if the person be capable, well named, and capable by that name, if his name be truly set down, yet if his name be not so, but mistaken, the devise is void. [There is an evident mistake in the language of this proposition. It should be,—if the person be capable, yet if his name be mistaken the devise is void.] And therefore if one intending to give 20*l.* to *I. S.* devise to *I. N.* 20*l*; this devise is void both to *I. S.* and *I. N.* except the person be certainly denoted and described, by some other circumstance, as to *I. N.* the son of *I. S.* my landlord, or the like. [For the rule is, *nil facit error nominis cum de persona constat.* And the devise to *I. N.* would be good if there was any person of that name; for evidence to contradict the will is inadmissible.] So if one devise to the abbot of St. Peter, when the foundation is the abbot of St. Paul; this devise is void. And if one devise to a corporation, and there be none of that name at the time of the devise, nor during the life of the testator; this devise is void. And so also it seems the law is, if there be a college made after of that name. [Though such a corporation should be created in the testator's lifetime, still, under the rules of the common law, the devise would be void, unless the testator referred to it as a corporation, to be created and called by that name. These devises fail, as being to a body

Dyer, 4. Perk. Sect. 505. Swinb. 289, 290.

Misnaming.

(48) By the common law every corporation had a capacity to purchase lands for themselves and their successors; but they are excepted out of the statute of Wills: so that no devise of lands to a corporation by will is good; except for charitable uses, by statute 43 Eliz. c. 4, which exception is greatly narrowed by statute 9 Geo. 2, c. 36. See 1 *Bl. Com.* 479, 7th edit.; 10 *Co.* 30; *Hob.* 136. A devise to a corporation for a charitable use operates in the nature of an appointment, rather than a bequest, under the statute 43 Eliz. That statute, being subsequent, is said to supersede and repeal the statute of Wills, 32 Hen. 8; but the statute of Frauds, being subsequent to the statute 43 Eliz. renders it necessary that an appointment of lands to a charity by will should be attested by three witnesses; otherwise it is void. 1 *P. Wms.* 249.

tanquam in esse, while there is not any body answering that description.] But if one devise a thing to the wife of *I. S.* and before the devisor die *I. S.* die, and she take another husband, and is called by another name, yet this devise is good. So if one give a legacy to *I. S.* dean of Paul's, and the chapter there, and their successors; and after, before the death of the devisor, *I. S.* die, and another is made dean; yet this devise is good notwithstanding this mistake (49). [It is a devise to the corporation; and the corporation is the same, though there be a change of its head. But if a devise be to a man and his heirs, or heirs of the body, (so that the heirs are to take by limitation and by way of descent,) and *A.* die in the testator's lifetime, this devise will fail; and a mere republication of the will will not give the heirs a title, since, if they took, they would take by purchase, while the intention was, that they should take by descent. In other words, the will does not contain any gift to the heirs, but merely a gift to *A.* and the heirs are named only to ascertain the measure of the estate.] For the third and fourth thing required in a good devise, see before at *numb.* 4, *part* 2, 3. And for the fifth thing, it is to be known, first, that lands and tenements devisable by custom, may be devised by a nuncupative will, without any writing, for any time whatsoever, as uses at the common law, that are now within the statute, might have been. [The statute of Frauds and Perjuries, 29 Car. 2, c. 3, is now applicable to both these instances, and has altered the common law.] Also those uses that remain at the common law, and are not within the statute, may be devised by word without any writing (50). But no estate can be made of lands by devise on the statute [of Wills,] except the devise be in writing; and so a man may devise his land, albeit he make no executor; for an executor hath nothing to do with the freehold of land. [And therefore the probate is not material to a will, as far as respects estates of freehold or inheritance; and to prove a title to real estate on a devise thereof, although for a term of years created

Plow. 344.

Fifthly, in respect of the matter touching the matter and form of the devise. And how a devise may be made.

Co. super Lit. 111. Plow. 345. Swinb. pt. 1. sect. 12.

(49) See more amply who may take by devise, in *Com. Dig. Devise* (I.); *Bac. Abr. Devises* (A.)

(50) See the notes before, as to the statute of 29 Car. 2 c. 3.

by the will out of the freehold, &c. the will itself, or some available evidence of the will, must be produced. But these observations are not applicable to terms of years already created. These terms are chattels of the testator; and the probate is essential to the title of the executor, and he must on a trial produce letters of probate, or the book containing the act of court on granting probate. However an executor may assign or surrender before probate, although such assignment or surrender be not admissible in evidence, until the will has been authenticated by probate.] Also goods and chattels, leases for years of lands, wards, villains and the like, may be devised by words without any writing at all. [See 29 *Car.* 2, c. 3.] And yet it seems questionable whether a lease for years of a rent, common or such like thing, be devisable by word without writing. [It is apprehended it was, though it lay in grant; for if the rule respecting grants were to prevail, the lease, &c. could not pass without deed; and a will in writing, though sealed and published, is not a deed or an act *inter vivos.*] Secondly, the form of words in a devise is not at all regarded; and therefore if one say, I give, institute, desire, appoint, or will, that *I. S.* shall have my land, or that *I. S.* shall have 20*l.* or let *I. S.* have my land or 20*l.* all these devises are as good as if he say, I devise to *I. S.* my land or 20*l.* And therefore if one at this day, since the statute of uses, devise that his feoffees of the land shall be * seised of the land to the use of *I. S.* and his heirs; or to the use of *I. S.* and the heirs of his body; or if such a man devise that his feoffees shall make an estate of the land to *I. S.* and his heirs; or to him and the heirs of his body; this is a good devise of the land in fee simple, or fee tail. [In the latter case, the equitable interest only will pass, and there must be a conveyance by the trustees to complete the legal title.] And if a man make a feoffment of his land to the use of his last will, and then devise that his feoffees shall be seised to the use of *I. S.* this is a good devise of the land *per intentionem*; [and, if necessary, the use will pass to the devisee, and be executed into estate by the statute of uses; and in the meantime until the death of the feoffor, unless other uses are declared, the use will result

Plow. 345. Swinb. pt. 1. sect. 12. Dyer, 140.

Swinb. pt. 4. sect. 4. Plow. 23. Lit. Bro. Sect. 316. Dyer, 23.

*P. 417.

Pasch. 9 Jac. Newman's case.

to him in fee; or if there be a partial disposition, the ultimate use will result. See *Edward Clare's case*, 6 *Rep.* 17, b.] And if I devise that *I. S.* shall have, hold, and occupy my land for his life; this is a good devise of the land for his life. If a man have a lease for years, [or for life, *Wyndham* v. *Jekyll*, 2 *Ves.* sen. 682,] of land, and he devise his lease, or his term, or his ferm, or the profits or occupation of the land, [or the land itself;] by either of these devises, [notwithstanding the want of words of limitation, *Windle* v. *Cubit*; 1 *Roll. Abrid. Estate*, (A.); 2 *Vern.* 45; 2 *Prest. Abstr.* 4,] his whole lease and all his interest in the land is given, as well as by any other form of words.

Plow. 546. Co. 4. 66. 8. 95. Dyer, 122. 33. 128. Co. 1. 83. 6. 42. Dyer, 4. 33.

3. A man may devise lands, testaments, [*read*, tenements,] or hereditaments in possession, in fee, for life, or years; or he may devise it in reversion, *viz.* to one for life, the remainder to another in fee, or in tail, or in any other sort, as a man may grant it by his deed, and such devises are good. But if the fee simple of land be devised to one, the remainder cannot be devised to another, albeit the first devise be but conditional. And therefore if land be devised to *I. S.* and his heirs, and if he die without heirs, that it shall remain to *I. N.* and his heirs; this is a void remainder to *I. N.* [The rule is, no estate may be devised to take effect in remainder after an estate in fee simple; but a devise to vest, in derogation of an estate in fee previously devised, may, under proper limits, be good by way of executory devise. If after a limitation in fee by will, a disposition is made of an estate, to commence on the determination of the estate in fee, (except in particular cases, as forming an anomaly in law), the law, as it presumes the estate first devised will never end, treats the subsequent disposition as vain and useless. But where after a devise of an estate in fee there is another devise, that on a certain event, which must necessarily arise within the period of a life or lives in being, and twenty-one years; and the time of gestation, *i. e.* distance between the time at which a woman conceives, and at which she brings forth; the law allows such future devises, and the subsequent devise, as it is to supersede the former, and within reasonable time come in its place, is good. So there may be two alternate fees, one to take place

in case the other should fail of effect. 1 *Prest. on Est.* 83. 94. So if *I. S.* be a denizen or bastard, &c.; in either of those cases, as he cannot have any heir except descendants, he will have an estate tail, and the limitation over will be good as a remainder. But a devise to a bastard or alien, and his heirs, will pass the fee simple, unless there be a limitation over; because there is not any estate remaining in the devisor to dispose of, since the entire estate is already parted with. But this distinction is to be observed: where the person to whom the second devise is made, is in the line of succession to the first devisee; as the law will not suppose the devisor ignorant that the first devisee could not die without heirs general, while the second devisee is living, it will suppose him to have intended heirs of the body, and in construction qualify the first limitation accordingly, so as to pass only an estate tail, and thereby give effect to the devise over. But where the devisee over is a stranger, or of the half blood, and therefore not in the line of succession, the general rule prevails.] So if a man devise his land to *I. S.* in fee, *ita quod solvat I. N.* 20 *l.* and if he fail that it shall remain to *I. N.* and his heirs, this remainder to *I. N.* is void; for if *I. S.* fail of payment, *I. N.* shall not enter and have the land, but the heir of the devisor (51). [The law is now, under the learning of executory devises, altered.] And yet perhaps a rent may be devised after this manner. [The case of a rent does not make any difference.] Howbeit if another man have a rent-charge of 20 *l.* a year, issuing out of my land, for twenty years; and he devise this unto me until I have levied 100 *l.* by way of retainer, the remainder to *I. S.*; this remainder is not good. [What objection is there to this limitation, even under the rule which formerly prevailed?]

Dyer, 139, 140.

Plow. 523. Perk. Sect. 16. See Condition. Co. 8. 95.

4. A devise may be of lands, goods or chattels, simply and absolutely, or conditionally; the simple

Condition.

(51) See the case of *Marks* v. *Marks*, 10 *Mod.* 419, where the testator devised lands to his wife for life, remainder to his second son *C.* in fee; provided that if his third son *D.* should within three months after the wife's death pay 500 *l.* to *C.* his executors or administrators, then he devised to *D.* and his heirs; this devise to *D.* was held to be a good executory devise. See *Fearne on Cont. Rem.* 3d edit. 303. So in the case in the text, the limitation over would at this day operate as a limitation by executory devise. It is not too remote, as the payment is to be made by *I. S.* personally; but if it were to be made by one or his heirs to the other, or his heirs indefinitely, without any time fixed for the payment, the limitation over would be too remote, and void on that ground.

is good, so a devise to one and his heirs after the death of *I. S.* is good, [by executory devise; and the fee descends in the meantime, unless given by a special or a residuary clause.] If I devise land to *I. S.* and his heirs on condition, as, so as, or *ita quod*, he pay 10*l.* to *W. S.*; or paying to *W. S.* 10*l*; or *ad solvendum* 10*l.* to *I. S.*; the devise, in all these cases, is a good conditional devise: and if the condition be not performed or broken, the estate is ended, and the heir may take advantage of it. [These words should be omitted, the estate does not end *ipso facto*, but it may be avoided by the entry or claim of the heir; and in some of these cases a trust, rather than a condition, is created.] And therefore if lands be so given to the heir, the condition is idle, because none can enter but him. [In equity there would be a charge, and a limitation over would be good, and effectual, even at law.] And if I devise that if *I. S.* pay my executors 20*l.* that he shall have white acre to him and his heirs for ever, or for life, &c. this is a good devise, and after the contingent shall take effect accordingly, [under the learning of executory devises;] and in this case, and such like, the heir of the devisor must keep
*P. 418. the land, until * the contingent do happen; [and he has the fee by descent, subject to the devise.] In like manner as if it be a chattel, the executor shall keep the thing until the condition be performed; and after a condition broken, he shall take advantage of it. [These devises are more properly denominated conditional or contingent limitations.]

Limitation. 5. A devise may be also with a limitation, as in the cases before; as where one gives land to another and his heirs, so long as *I. S.* shall have heirs of his body; [and this is a determinable fee, and not an estate tail; but it should seem a devise to *A. B.* and his heirs, so long as he shall have heirs of his body, is an estate tail;] or where one doth devise his land to *A.* his son and his heirs for ever, paying to *B.* his brother 20*l.* when he shall come of age; and then that he shall enter and have it to him and his heirs, and if he die without heirs of his body, the said *B.* then living, then that *B.* his heirs shall have it in the same

the contingency that the first devisee, and his heirs of his body, shall die in the lifetime of the second devisee. *Pells* v. *Brown*, *Cro. Jac.* 590.]

Co. super Lit. 112, 113. 236. 6. A man that is seised of land in fee, may devise that his executors shall sell it; or may devise it to his executors to sell; or devise it to his executors, and that they shall sell it; and these devises are good. [In the first instance the executors have a power or authority, and in the latter instance the fee by implication.]

Dyer, 348. 100. 8. 84, 85. 7. A devise may be of a rent, or of land reserving a rent, with clause of distress; as if a man devise land to *I. S.* paying 10 *l.* by the year to his wife, and if it be unpaid, that she shall distrain for it; this is a good devise [of the land, and also of the rent.]

Clause of distress.

Warrantia. But a warranty cannot be made by will, [for a deed is essential to a warranty; and a will is not a deed, even though it be a writing sealed and delivered.]

Co. super Lit. 386. And yet if a man devise land to another for life, or in tail, reserving a rent; in this case the heirs of the devisor shall be bound to the warranty in law, and the devisee shall take advantage of it.

Plow. 523. 540. Dyer, 357. Co. 8. 94. 83. 8. A man may devise his land to one, and devise a rent out of the same land to another, and these devises are good. So a man may devise his land to one in fee, and after devise the same land to another for life or years; and these are good devises, and may stand together; [the devise for life or for years, or for any particular estate, operating merely as a partial disposition by way of exception. Or these subsequent gifts may be introduced with effect under the learning of executory devises.] So also if a man in the fore part of his will, by general words, devise all his land to one in fee, and in the latter part of his will devise some special part of it to another in fee; these devises are good and shall stand together: as for example, if one have a farm, and in the first part of his will give this farm to one, and in the latter part of his will give one close (a part of this farm) to another; or if a man devise all his land in *B.* (which is in the county of Gloucester) to *A.* his daughter, and in the latter part of his will deviseth all his land in the county of Gloucester, in the possession of *I. S.* to his son, and part of the land in *B.* is in the possession of *I. S.* and in

stand together; [for the latter devise amounts to an exception by construction of law.] But otherwise it is when the general clause doth come last, as where one doth give his land to *A.* his daughter, and in the latter part of his will doth give all his land in Hertfordshire, and in the possession of *I. S.* to *W.* and the land given to *A.* is in Hertfordshire, and in the possession of *I. S.* [and is all the land which the testator has there;] in this case the devises will not stand together, for the first devise is void. And so also it is where both the devises are particular; as where first in a man's will, he doth give white acre to *A.* and his heirs, and after in his will he doth give white acre to *B.* and his * heirs; in this case the first devise to *A.* is void. And yet in this last case, some have held the devises shall be good, and that *A.* and *B.* shall be joint-tenants: *ideo quære.* [It is understood that both devises shall stand, and that the several devisees shall be joint-tenants, or tenants in common in fee. By the better opinion they will be joint-tenants or tenants in common, according to the intention to be collected from the language of the will. See 1 *Inst.* 113; 1 *Fonbl.* 443; and authorities there cited.] If one devise all his land to *I. S.* and his heirs, excepting 20 *l.* for seven years, which he willeth shall be employed for his children; this is a good devise of this sum of 20 *l.* a year. 9. And a man may devise his land for so many years as *I. S.* shall name, and after appoint that his son shall have it during the minority of his son, and both these devises may stand together; and therefore if *A.* be possessed of the manor of *D.* for years, and he deviseth all his term to his eldest son if he live so long, and if he die before he have any issue of his body, then to his younger son in the same manner, but withal he doth appoint that his wife shall have the occupation of the land until his eldest son be one-and-twenty years of age; these devises shall stand together, and the wife shall enjoy the manor for that time by this devise. 10. A man may devise a term of years by way of remainder: as for example, a man that is possessed of a term of years of land may devise it to *I. S.* for life, the remainder to *I. D.* or to *I. S.* for life, and that it shall after remain to *I. D.* or to *I. S.* for so many years as

38 Eliz. C. B. Agreed divers times.

*P. 419.

Dyer, in his Lecture, 1; and per Just. Dodr.

Trin. 9 Ja. B. R.

Plow. 523. 546.

Co. 8. 95. Plow. 519. 546. 516. 539. Dyer, 277.

he shall live, and after to *I. D.* or in any such like manner; these are good devises, both to the first, and to him in remainder also, by way of executory devise, though not by way of remainder; and in this case, the first devisee cannot hinder the second devisee of the remnant of the term, [but the whole term is, in consideration of law, in the *quasi* tenant for life, and the person entitled under the limitation over has merely a possibility: an interest assignable in equity, but not at law. At law it cannot be granted, though it may be released. It is a legatory interest, and transmissible to executors.] But a man cannot by deed in his lifetime grant his term in this manner; [but he might make an underlease determinable, &c. and then limit the residue of the term to another. It is rather extraordinary that this expedient has not been more generally adopted. It is observable also, that in equity such limitations over, as may be made in wills by executory bequest, may be made of the beneficial ownership through the medium of trusts.] Nor if a man be possessed of a term [of years] can he entail it by his will; and therefore if a man possessed of his term of years of land, devise his term or his land to *I. S.* and his heirs, or to *I. S.* and the heirs of his body, or to *I. S.* and his issues, the remainder to *I. D.* this remainder is void, and it is a good devise of the whole term to *I. S.* and his executors (52); [and the heirs, as such, cannot by any form of words be made capable of a chattel interest in succession; but the term will vest in the party, and be transmissible to his personal representatives. But children, issue, or persons answering the description of heirs, may, by an appropriate form of words, take as purchasers, either under an executory bequest or a declaration of trust. This limitation over to *I. D.* is too remote, and on that

Co. 10. 87. 47. Parche, 17 Ja. B. R. Child v. Baily.

Grant.

(52) Where a term for years, or any personal estate, was devised to one for life, with remainder over, such a limitation was void at common law, and the whole property vested in the person to whom it was limited for life; but the law is now settled, that such limitations over in a *will* or by way of *trust* are good. *Fearne on Cont. Rem.* 304, 3d edit. Terms for years may be entailed by *executory devise*, or by deed of *trust*, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and twenty-one years after, and perhaps in the case of a posthumous child a few months more; a limitation of time, not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited, by way of remainder, as to postpone a complete bar of the entail by fine or recovery for a longer space. See note 5 to 13th edit. *Co. Lit.* 20, a. and the authorities there collected. as to this point of doctrine, and particularly the Duke of *Norfolk*'s case. 3 *Cha. Ca.* 1.

to *I. D.* had been to take effect on a failure of issue within a limited time, (allowed by the rule against perpetuities), it would have been good. See 2 *Prest. Abstr.* 157. Leases and copyholds for lives admit of *quasi* entails, so that heirs of the body may take as special occupants.] Also the use or occupation of a chattel personal may (as it seems) [this is now settled] be devised to one for life, and afterwards to another; but yet so as the latter must have the property only, and the first but the occupation only. [This distinction is now overruled; on the contrary, and in general, the property vests in the first taker, subject to be divested.] As if one devise that *I. D.* shall have the occupation of his plate for his life, and after that it shall remain to *I. S.* this is a good devise of the plate to *I. S.* (53), [and the property is in *I. D.* subject to the right of *I. S.* under the executory bequest.] But if the thing itself be devised to the first of them, then the devise to the second is void; [this distinction is overruled;] for the gift of a chattel personal for one hour, is the gift of it for ever. And so it did seem in the Lady *Daver's* case, Hil. 9 Car. B. R. [This is true, at law, in the construction of deeds, but not in the construction of wills or trusts; and even at law there may be a lease of a personal chattel, as a flock of sheep, but this is rather a bailment than a lease.] 11. A legacy of goods or chattels may be given to or until a certain time, or from or after a time certain or incertain; as for five years or from, or until the marriage of *A.* or the like; and these dispositions are good. 12. A man may devise his land for so many years as *I. S.* shall name; and if *I. S.* do name a certain number of years in the lifetime of the devisor,* this will be a good devise. [Also the devise will be good if *I. S.* name in his own lifetime, even after the death of the testator.] But if one devise his land for so many years as his executor shall name, it seems this devise is not good. [There is not any proposition in *Plowden* which warrants this distinction; and, it is presumed, it

37 H. 6. 30. Lit. Bro. Sect. 388. 334 309.

Swinb. pt. 4. sect. 17.

Plow. 534.

*P. 420.

(53) See accordingly the cases of *Hyde* v. *Parrat*, 1 *Pr. Wms.* 1; *Tissen* v. *Tissen*, *Ibid.* 500; and *Upwell* v. *Halsey*, *Ibid.* 651.

cannot be supported. The passage in *Plowden* is: "*Anderson* said, if a man devises so many of the years of his term as *I. S.* shall name, and *I. S.* afterwards names a certain number of years, the devise is good; but if he does not name any, the devise is void." *Plowd. Com.* 514. *Swinb.* 183, a. has the point as in the text. *Vin. Abr. Devise* (D.) pl. 4.]

Dyer, 371. Co. 8. 83. 6. 16. super Lit. 111. Perk. Sect. 499, 500. 497. 538. Lit. Sect. 167. Dyer, 155. Old N. B.

Sixthly, in respect of matter touching the thing devised, and what may be devised, and by what name. Devise of lands and tenements.

6. As touching the sixth thing required in a good devise, these things are to be known: 1. That lands, tenements, and hereditaments, for the nature and quality of them, are devisable as well as other things. And therefore, by the custom of some places, lands in possession, reversion or remainder, are devisable in fee, for life, or years; and a man that hath a lease for years of land, may devise the land at his pleasure during his term. But by the ancient common law, in favour to heirs, the lands that a man had in fee simple were not devisable by testament, except only in some special places, by the custom of the place, as gavelkind lands in Kent, and lands within certain borough towns, as London, Oxford, &c. And by the custom of those places such lands are devisable: and in some places the custom is, that they may devise their purchased lands only; and in other places, that they may devise their lands descended also: and in some places the custom is, that they may devise for life only; and in other places, that they may devise in fee simple and fee tail also. And in all these places where such customs are, they may devise their lands now as they might have done before the statute; for the statute hath not destroyed their custom; [but the statute of Frauds and Perjuries, 29 Car. 2, c. 3, hath, as to signature, &c. regulated the mode of devising under the custom.] And therefore at this day they that have such lands in such places, have their election either to devise according to the power the custom doth give them, or according to the power the statute [of wills] doth give them; and in the first case, the devise is good against the heir for the whole; and in the last case, it is good against him for two parts in the three only. [Since the abolition of military tenures, every part of the land is devisable.] Also by the common law, the uses of land were devisable, as goods and chattels were, at the pleasure of him that had them. But otherwise, and in other cases, lands and tenements might not be devised and dis

Perk. Sect. 496. 528. 538.

posed by will, until 32 Hen. 8, at which time the owners of lands, tenements, rents, &c. were by act of parliament enabled to devise and dispose [of] their lands as followeth: he that hath any land in possession, reversion, or remainder by socage tenure, and hath no land held *in capite* or by knight's service, may devise all his land, or any rent, common, or other profit *apprender* out of it, to any person in fee simple, fee tail, for life or years, at his pleasure. He that hath any such land held of the king *in capite* by knight's service, or by knight's service and not in chief, or held of any common person by knight's service, may devise two parts thereof in three, to be divided, or any rent, &c. out of those two parts at his pleasure, and no more; for the third part must descend to the heir, and come to satisfy the lord his duties; and therefore the devise of the whole land in this case is void for the third part. He that hath any such land held by knight's service *in capite*, and other lands held by * socage tenure, may devise two parts of the whole, and no more, or any rent, &c. out of it at his pleasure: he that doth hold land of the king by knight's service only, and not *in capite*, as if a mean [*read*, mesne] lord by knight's service, hath also other lands held by socage tenure, he may devise two parts in three of all the land held by knight's service, or any rent, &c. out of it, and all his socage land at his pleasure. So that now, by these statutes, a man that hath lands in fee simple [or for life, and all persons who have vested or contingent interests, *i. e.* either estates or possibilities coupled with an interest,] may devise them in fee simple, fee tail, for life, or years, absolutely or conditionally, at his pleasure, [and according to his estate.] And therefore if one devise his land to one for life, the remainder in fee or fee tail to another; or devise his land to *B.* the remainder to the next heir male of *B.* and the heirs male of the body of such heir male, or the like; these are good devises. But for the more full understanding of these things, it is to be known in the next place, [being propositions which even at this day are law:] 2. That this statute doth not enable men to devise land, that are disabled by law in respect of their persons or minds, as infants, women covert, [except so far as they act under powers or trusts,] men *non sanæ memoriæ*, or the like; nor such as are disabled in respect either of

Stat. 33 H. 8. c. 1. 34 H. 8. c. 5.

*P. 421.

See the Statute. Co. sup. Lit. 111. Perk. Sect. 544. Lit. Sect. 267. Dyer, 210. Old N. B. 89. Perk. Sect. 500. 539, 540. 496, 497, 498.

the nature of their land, as copyholders, (for copyhold land [held for a legal estate] is not devisable,) (54), [without a surrender to the use of the will; now by 55 Geo. 3, c. 192, it is devisable without a surrender;] or of the estate they have in land, as tenants in tail, or *pur auter vie* (55), or joint-tenants; for these can no more devise their land they do so hold, than they could before the statute. But such as are seised of land in common, or coparcenery, may devise their land as well as those that are sole seised. And if two be joint-tenants for life, the fee simple to one of them; he that hath the fee simple, may devise his fee simple after the death, [*i. e.* subject to the life interest,] of his companion (56). [A note in the Appendix should be read in this place.] Neither doth this statute enable those that are seised of lands in fee, in the right of their houses and churches, to devise the same lands; and therefore, bishops, deans, parsons, vicars, masters of hospitals, or the like, can no more devise the lands belonging to their bishopricks, &c. than they could before the statute; but the lands they are seised of in their own right, they may devise like other men. 3. Hereditaments that are not of any yearly value, are some of them devisable, and some not: for if the king grant to one and his heirs *bona et catalla felonum et fugitivorum vel utlagatorum*, fines, and amercements within such a manor or village; in this case, the owner can neither devise these things to another, as part of the two parts, nor leave them to descend for a third part. And yet if one have a manor

Co. 10. 81. 3. 32. super Lit. 111.

(54) A man cannot devise a copyhold by will at the common law, but must surrender to the use of his last will and testament, and in his will must declare his intent. *Co. Comp. Cop.* 83. Copyhold lands do not pass by the will, but by the surrender; for the will is only declaratory of the uses of the surrender. 1 *Bulst.* 200. And where a man purchases copyholds after making his will, surrenders to the use of his will, and after makes a codicil confirming his will, they will pass. See *Doe* v. *Davy*, *Doug. Rep.* 690. [The trusts of copyholds are devisable, and in some cases equity will supply the want of a surrender; and now, as to testators who died after the 12th day of July 1815, the necessity of a surrender to the use of a will is superseded.]

(55) But by the statute 29 Car. 2, c. 3, § 12, estates *pur auter vie* are devisable by a will in writing attested by three witnesses; and if such estates are not devised, the statute 14 Geo. 2, c. 20, § 9, directs them to be applied and distributed as personal estate. See before in page 108, and note 24 thereto.

(56) See the case of *Weeden* v. *Baldwin*, *Sir T. Raym.* 40. In *Swift* on the demise of *Neale and Wife* v. *Roberts*, in B. R. 3 *Burr.* 1488, the court held "that a will made by a joint-tenant during the continuance of the jointure, is not a good will (even as to *his share* of the estate) under the statutes of Wills in 32 & 34 Hen. 8, notwithstanding a subsequent severance of the jointure by a partition made after the time of making the will and before his death; unless there be a republication of it, after the partition."

appendant or appurtenant; there, by the devise of the manor with the appurtenances, these things may pass as incident to the manor: but if a man have an hundred, with the goods of felons, outlaws, fines, amercements, *retorna brevium*, and other such casual hereditaments within the same hundred, and these have been usually let to farm for a rent; in this case, these things may be devised
*P. 422. * or left to descend for a third part. 4. Such incertain franchises, as before, that are hereditaments of no yearly value, albeit they are not devisable, yet may restrain the devise of a man's lands and tenements, and make it void for a third part, if they be held *in capite*; for it is not requisite that the thing, held by the tenure *in capite*, be devisable; and such things as may not be left to descend to the lord for a third part, and to satisfy him his duties, may notwithstanding be devisable, or restrain the devise of other lands and tenements, and make it void for a third part. And therefore a reversion upon an estate tail, which is dry and fruitless, if it be holden of the king by knight's service *in capite*, will hinder the devise of the third part of a man's lands and tenements; also an estate tail, of lands held *in capite*, may restrain the devise of a third part of other lands. And therefore, if such lands be conveyed to one and the heirs of his body, the remainder to another, and he have other lands in socage; if he have any issue, he can devise but two parts of his socage land. And where the statute speaks of a remainder, it is to be intended of such a remainder only, as may draw ward and marriage by the common law; and this is that remainder only, that doth hinder a devise. And therefore if *A.* be seised of land, in socage tenure; and *B.* be seised of lands in fee, held *in capite* by knight's service; and *B.* make a lease for life, or gift in tail, to *C.*, the remainder to *A.* in tail, or in fee; in this case, *A.* during the estate for life or in tail, may devise all his socage land, notwithstanding this remainder. But if a man make a lease for life or years, and after grant the reversion for life or in tail, the remainder in fee, and after the grantee for life dieth, or donee in tail dieth, without issue; in this case this remainder, which now is in point of [law the] reversion, [*i. e.* an estate

Co. 10. 81. 82. super Lit. 111. Co. 3. 35. 30. 34.

Co. 10. 81. 11. 24. 3. 30. 34, 35. super Lit. 111. Dyer, 158.

third part. 5. In all cases where a man is restrained to devise any part of his lands held in socage, he must have lands held *in capite* at the same time; and therefore the time of having lands to devise, and holding of other lands *in capite*, and disposing of the lands to be devised, must concur. And therefore if a man be seised of an acre of land in fee, held of the king in chief by knight's service, and of other two acres in fee held in socage, and enfeoff his younger son of the acre held *in capite*, and of one of the other acres, or convey it to the use of his wife, or for the payment of his debts, &c. and after[wards] purchase lands held in socage; in this case, he may devise all the new purchased land held in socage without restraint. So if a man be seised of lands, held by knight's service *in capite*, in possession, reversion, or remainder, and of lands held in socage; and, by his will in writing, doth devise all the said lands; and after the land held *in capite* is recovered from him, or aliened by him *bonâ fide*; in these * cases, the devise is good for all the land held in socage: and hence it is, that if the king grant land to one in fee farm, to hold in socage at a rent, and after grant this rent to another and his heirs, to hold *in capite*, and the grantee of the rent doth grant it to him that hath the land; in this case, because the rent is extinct, and he cannot be said to hold lands *in capite*, this shall not restrain the devise of any of his lands. And yet if a man hold some lands by knight's service *in capite*, and other lands in socage, and be disseised of the lands held *in capite*, [so that he hath only a right of entry;] he cannot devise all his socage land, but the devise will be void for a third part, for he is said to have that land still, whereof he hath the right [of entry for the benefit of his heir.] And albeit the statute say, that he that hath lands held of the king *in capite*, and other lands in socage, may give two parts for the advancement of his wife, payment of his debts, preferment of his children, whereby he is restrained to devise any more. And therefore if, by act executed in his lifetime, he convey two parts to any such uses or intents, he cannot devise any more by his will, but the residue must descend,

*P. 423.

at the same time. For if a man be seised of lands held in socage of the yearly value of 20*l.* per annum, and he hath not any land held *in capite* by knight's service, and he make his will in writing, and by it devise the socage land to one in fee, and then purchase land to the value of twenty shillings per annum held *in capite*, and die; this will make the devise void for a part of the land that is held in socage. But if a man, seised of land in fee of socage tenure, assure it to the use of his wife for her jointure, and after purchase lands held *in capite* by knight's service; he may devise two parts in three of all this *capite* land, and the king shall not have any thing out of or for the socage land. If a man seised of lands, part of which are held *in* Co. 3. 34. 11 *capite*, and part in socage, make a feoffment of the 24. lands held *in capite* (being two parts in three of the whole) to the use of him and his wife for life, with divers remainders over; in this case he may not devise any of the socage land. And if a man have no socage land, but *capite* land only, and convey it away in fee simple, keeping on [*read*, no] reversion to any such use, and after purchase socage land, he may devise all the socage land newly purchased. 6. As the testator, enabled to Co. 3. 32. devise by this statute without restrainst, is and must be one that hath the land, he doth devise at the time of the devise made, and no other land then to be an impediment to his devise, so he must have a sole estate, [*i. e.* a several seisin or separate ownership,] as well in the land he doth leave to descend to the heir, as in the land he doth devise: and therefore if lands held *in capite* be conveyed to a man and his wife, and the heirs of their two bodies, and this man hath other lands whereof he is sole seised, held of the king *in capite* by knight's service; in this case, he may not devise
•P. 424. two parts of the whole, supposing * this may suffice for the king's third part; for he may devise but two parts of the residue; *i. e.* of that whereof he is sole seised, either at the time of making of the will, or at the least at the time of the death of the testator. 7. The estate of the land that is Co. 10. 84. held must continue after the death of the tenant, otherwise it will be no restraint. And therefore if tenant in tail be to him and the heirs males of

held by knight's service *in capite*; and he is seised of other lands in socage in fee, and by his will in writing devise all the socage land, and die without issue male; in this case, the devise is good for all the socage land. And so also it is where the estate which the ancestor had of the land held, is defeated by condition. 8. That which a man cannot dispose by any act in his lifetime, shall not be taken for any such manors, &c. whereof a man may devise two parts by authority of this statute at his death; and therefore in the case of an evident [*read*, entire] estate of lands between husband and wife, where the husband can[not] make no [*i. e.* any] disposition for longer time than during the coverture, these lands are not to be esteemed such as are to be accounted amongst the lands, whereof two parts in three are devisable. 9. The tenure by knight's service must continue after the death of the devisor, otherwise the land so held will be no restraint, [since the reason for the restraint fails.] And therefore if the king grant land to one and his heirs, to hold during his life by knight's service *in capite*, and after in socage; or to hold during his life in socage, and after by knight's service; in these cases, the grantee may devise all his land, notwithstanding the tenure of this land. 10. The king, or other lord, must have a full and clear yearly value of the third part left to descend to him, and the value is to be esteemed as it is, and doth happen to be at the time of the death of the testator; for the king, or other lord, must have the like or equal benefit for his third part, as the devisee hath for the two parts, without diminution or substraction; when therefore a man will have his devise good for the residue, he must take care that the third part be so left; for if the third part be not valuable, or be charged with any rent, &c. or be upon any incertainty, as if it be upon a possibility only; as where a man and his wife be seised of a joint estate tail made during the coverture, and he devise other lands to her on condition that she shall waive her estate made during the coverture, and so intend that that part of his land shall be left for the king's part; this devise will not be good for the residue: and albeit the wife do waive the estate after the husband's death, yet this will not

Co. 3. 33.

Co. 10. 84. 3. 34.

Co. 3. 32. 31. super Lit. 111. 10. 48.

part for which it was void before: but it is not material by what tenure the third part descending be held; for it is held, [*i. e.* settled] by the better opinion, that if a man be seised of 20*l.* land held of the king *in capite*, and 10*l.* land held of a subject by socage, and he devise all the *capite* land * to a stranger; that this is a good devise for the whole, and that the king shall be satisfied by the socage land. And if it be of the value of the third part, albeit it be but of an estate tail whereof the ancestor was seised, or if it be new purchased land, yet it is sufficient; and therefore if some lands be given to a man, and the heirs of his body, of the value of 10*l.* per annum, and he be seised of other lands in fee simple to the value of 20*l.* per annum, and all or part of these [lands] are held *in capite* by knight's service; in this case, he may devise the lands in fee simple, and leave the entailed land to descend for a third part: and if a man be seised of such land, and convey to the uses within the statute, or any of them, and after purchase new land, and leave that to descend, this is sufficient. 11. The third part that is left to descend to satisfy the king, or other lord, must descend immediately, and he must not stay for it; and therefore if a man be seised of three acres of land held by knight's service *in capite*, and make a lease of one acre for life, and after devise the other two acres; this devise is not good for the whole two acres, but for two parts in three thereof only: and albeit the tenant for life die afterwards, yet this will not help the matter. But if the devisor leave a full third part immediately to descend in fee simple or in fee tail, he may devise the other two parts at his pleasure. And if he do not leave a third part to the full, it must be made up and supplied out of the other two parts, which in case of the king is done by commission out of the court of wards, and in case of a subject by commission out of the chancery. 12. The third part left to descend must be of as good value as either of the other two parts is at the time of the death of the testator, or otherwise the devise of all the residue will not be good, for so must it be taken out of the lands of the testator indifferently; and therefore if a man be seised in fee of land held in

*P. 425.

Co. 3. 34.

Co. super Lit. 111. 9. 139. 3. 32. 30.

the one half of it to the use of himself for life, and after to the use of one he doth intend to marry, and after to the use of another in remainder, or to any other such like uses within the statute, and after he doth marry the same woman, and after he deviseth the other moiety to his wife, children, or any other; in this case, albeit the wife's estate have precedency, yet the king shall have the third part of both the moieties equally. So if one be seised of gavelkind land held *in capite*, and, his son being dead, devise part of it to one of his grand-children, and part of it to another, and part to a third in tail; in this case, the king's third part shall come of all the three parts equally, and accordingly the devise will be void for so much to every one of them. So if one hold three several manors of three several lords, he cannot devise two of these manors, leaving a third to descend; but he may devise two parts of every of the three manors, and a third part of each manor must * descend to each lord, for there must be an equality in these things. For further illustration of which things, the examples following are to be heeded: *W. B.* being seised of the manor of *Thoby in capite*, and of lands in *Fobbing*, held in socage, in fee, and he and his wife being seised of the manor of *Hinton*, held *in capite*, to them and the heirs of their two bodies begotten, by an estate made to them during the coverture, for the jointure of the wife, the reversion to *W.* in fee, and *thoby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W. B.* by his will in writing, doth devise *Thoby* to his wife for life, upon condition that she shall not take her former jointure, with divers remainders over, and die, and she refused her former jointure in *Hinton*; in this case, it was adjudged that the devise was not good for the whole manor of *Thoby*, and that the manor of *Hinton* was not a sufficient third part to descend. *L. L.* being seised of the manors of *Affaland*, *Heauton*, *Rillaton*, *Pengelley*, *Willesworthy*, and *Trivesquite* (the last only held *in capite*) in fee, and having issue *Thomas* his eldest son, *William*, *Humphrey*, and *Richard*, younger sons, which *Richard* had issue *Leonard*, makes a feoffment of these manors to divers uses, *viz.* of the manors of

*P. 426.

Co. 3. Butler's and Baker's case.

Co. 10. 78. Leonard Lovie's case, Co. 11. 24.

R. P. W. and *A.* to the use of the feoffor for life, and after to the use of such person as he should appoint by his last will, and after to the use of *W.* his second son in tail, and after to his other sons in tail, and after to the use of the feoffor and his wife in tail, and after to the use of the feoffor and his heirs for ever; and of the manor of *H.* to such like uses; and of the manor of *T.* also to such like uses; and the same uses were with power of revocation: and after the feoffor purchased eight acres of other land held in socage, and after did revoke the uses of the manors of *R. P. W.* and *A.* and after[wards] devised some of the said manors (excepting some pieces), and the said eight acres of land, to his eldest son and the heirs males of his body, for five hundred years on certain conditions, and if he die without issue that it shall go to *William*, &c.; and afterwards he die seised of the said eight acres of land; and the lands devised by the will, at the time of the death of the testator, were of the yearly value of 24*l.* 14*s.* 10*d.* per annum, *et non ultra*; and the lands whereof the feoffment was made, and not revoked, were at the time of the death of the testator of the value of 55*l.* 6*s.* 8*d.*; in this case, it was adjudged that the devise of the eight acres, newly purchased, was void at least for a third part, and restrained by the reversion in fee, expectant upon the estate tail, made to the younger son of the manor held *in capite*. And it was resolved, that if a man be seised of three acres of equal yearly value, one of them held of the king by knight's service *in capite*, and have issue two sons, and give the acre so held, and another of the acres, to his younger son, whereby he hath so executed * his power by the statute, that he cannot devise by his will, any part of the third acre; and after he purchase three acres of equal value held in socage; that in this case, because he hath the reversion in fee upon the estate tail made to the younger son, he can devise no more but two parts of the said land so newly purchased: but if the reversion be gone before the purchase, he may devise the whole. But if a man be seised of lands in fee, part of which are held of the king *in capite* by knight's service, and he convey two parts of it unto any of his sons, or to the use of his wife for life, or in

*P. 427.

Co. 6. 16. super Lit. 111.

of the residue, yet he may by his will devise the reversion of the two parts. And in case, where he hath not conveyed the full two parts, he may devise so much as to make up that he hath conveyed full two parts. And it was further resolved, in the same *Leonard Lovie's case*, that whereas the statute saith, all persons, &c. having, &c. any manors, &c. in possession, reversion, or remainder, &c. and the feoffor *L. L.* in the case before, had a remainder in tail, expectant upon the estates in tail, limited to the sons; that this remainder was not within the statute, nor would have restrained the devise, but for the reversion in fee afterwards. *A. B.* being seised in fee of the manor of *Gracediu*, held *in capite*, and of the value of 30*l.* per annum, and of the manor of *Normanton*, held *in capite*, of the value of 18*l.* per annum, in consideration of a marriage with *M.* did covenant to stand seised of the manor of *G.* to the use of himself and the heirs male of his body, on the body of the said *M.* and after to the use of *W. B.* his brother, and the heirs male of his body, and after to the use of another brother in tail, and after to the use of his own right heirs, and of the manor of *N.* to the use of himself and *M.* he is [*read*, whom he was about] to marry, and the heirs of his body, and after the remainders as before of the other manor; and after the marriage is had, *A. B.* doth purchase other lands held in socage of the value of 3*l.* per annum, and then devised the same new purchased lands; in this case, it was adjudged that the devise was void for a third part of the socage land, in respect of the reversion dependant upon the estate tail, and yet that it was a good devise for two parts of the new purchased land; albeit he had executed his power, and given more than two parts to the use of his wife. And in these cases, where a man hath land held *in capite*, and other land, and he convey the land held *in capite* to any of the uses within the statute, as to his younger children or the like, or convey it with power of revocation only, so that he hath power of the land still, and after he purchase land held in socage; in this case, it seems he may devise all the land newly purchased, as if

Co. 11. 23. Hen. Harper's case.

. 10. 83.

6. 17. Sir vard Clere's

the land were conveyed without such power of
*P. 428. revocation. *A.* being seised of land in fee, * held of the king *in capite*, made a feoffment of two parts of it to the use of his wife for her life, for her jointure, and after made a feoffment of the third part to the use of such person or persons, and of such estate and estates as he shall limit and appoint by his last will and testament in writing; and afterwards he did by his last will in writing devise this third part to one in fee; in this case, it was resolved that the devise was good for the whole third part. And yet if a man make a feoffment in fee of land, held *in capite*, to the use of his last will, albeit the devise of the land be with reference to the feoffment, yet it is void for a third part. *E. B.* being seised of six manors, the one in fee, and the rest in tail, with the reversion expectant to him and his heirs, and hath issue *T. B.* divers of which manors are held of the king *in capite* by knight's service, and every of them of equal yearly value, by his last will in writing did devise all the said manors to divers persons and their heirs, for payment of his debts, and advancement of his children, and then died, and the estate in tail that descended to his issue was more than a third part of all; in this case, it was resolved that the devise was good for two parts of the reversions, and for the entire manor in possession, and not void for a third part of the manor in possession, and for all the reversions in fee. A man being seised in fee of gavelkind land in Kent, part whereof is held of the king *in capite*, and part of common persons in socage, hath issue *A.* who hath issue *B.*, *C.* and *D.* and he deviseth some of these lands to *B.* and some to *C.* and some to *D.* his grand-children in tail; in this case, the devise is void for a third part of the whole, as well for the land held in socage, as the land held *in capite*. And yet if in this case no will be made, the king shall have but a third part of that which doth descend to the eldest son, the heir at the common law, and not the third part of that which doth descend to the younger sons by custom. And if lands devisable by custom come into the king's hands, and he grant them to hold of him *in capite*, and the patentee devise them to the use of his wife, children, or for payment of his debts, &c. in

Co. 10. 18. Trin. 34 Eliz. Bedinfield's case.

Co. Rep. Stand per, 8.

this case, the devise is void for a third part (57). And here note, that in all the cases before, where a man is restrained to devise a third part of his land, if he devise the whole, the devise is good notwithstanding for so much as he hath power to devise. And, as touching the thing devised, it is further to be known; 3. That a man must have right to and possession of the land he deviseth, [*read*, must have an estate in possession, reversion or remainder; or an interest contingent or executory, being part of the ownership; in other words, a possibility coupled with an interest. *Roe* v. *Jones*, 1 *Hen. Black.* 38;] or else the devise is not good (58). And therefore if a disseisor devise the land he hath gotten by disseisin, this devise as to the devisee [*read*, disseisee] is void; [*i. e.* the devise is good, subject to the right of the disseisee.] And if a man be disseised of his land, so that he hath nothing but a right thereof left, and then he devise this right, or devise the land, this devise is void (59). [But a possibility, coupled with an interest, is devisable. So if a man devise, and is afterwards disseised, and die before re-entry, the devise will fail, since the heir, and not the devisee, must re-

Plow. 485.

Devise of a right to land, or of land that is another man's.

(57) By the statute 12 Car. 2, c. 24, "for taking away the court of wards and liveries, "and tenures *in capite*, and by knight's service, and purveyance, and for settling a revenue "upon his majesty in lieu thereof," all tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by socage *in capite* of the king, and the fruit and consequence thereof are taken away and turned into free and common socage: and it is thereby enacted, that all tenures thereafter to be created by the king, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any estate of inheritance at the common law shall be in free and common socage, and not by knight's service or *in capite*. But that act does not extend to take away or alter tenures in *frank-almoign*; nor to change any tenure by copy of court roll, or any of the services incident thereunto; nor to take away the honorary services of grant serjeanty, other than of wardship, marriage, and other charges incident to tenure by knight's service. Mr. Justice *Blackstone*, treating of this statute (in vol. 2 of his *Comm.* p. 77,) deems it "a greater acquisition to the civil property "of this kingdom than even *magna charta* itself; since that only pruned the luxuries that "had grown out of the military tenures, and thereby preserved them in vigour: but the statute "of King Charles extirpated the whole, and demolished both root and branches."

(58) It seems to have been for some time doubtful, whether a possibility was devisable within the stat. of Wills; 1 *P. Wms.* 663; 3 *P. Wms.* 414; but these doubts appear to have been fully obviated in the affirmative by several cases, and particularly those of *Goodtitle* ex dem. *Gunnel* v. *Wood*, Trin. 14 Geo. 2, C. B.; *Selwyn* v. *Selwyn*, 2 *Burr.* 1131; *Moore* v. *Hawkins*, in Chanc. 1765, coram Lord *Northington*; *Doe* ex dem. *Noden* v. *Griffiths*, 1 *Bl.* 605; and *Jones et al.* v. *Roe*, lessee of Perry, 3 *Durnf. & East*, 88. In that of *Doe* ex dem. *Noden* v. *Griffiths*, Lord *Mansfield*, adverting to the case of *Selwyn* v. *Selwyn*, observed, that it is now fully settled that contingent, springing and executory uses, where the person who is to take is certain, so that the same may be descendable, they are also devisable, they were convertible terms.

(59) But if the disseisee re-enters, the devise shall be good; for he was seised *ab initio*. 1 *Salk.* 237; *Bunter* v. *Coke*. [*Bunker* v. *Cook*, *Gilb. Dev.* 126.]

enter. But if the heir disseise his ancestor by fraud, this disseisin will not defeat the title of the devisee. *Pow. on Dev.* 611. But a trust, or equity of redemption, is devisable, though it be a *quasi* chose in action; and the right to be relieved in equity, concerning a title to real estate, as to set aside a conveyance obtained by fraud, is devisable.] And if one contract for land, and pay his money for it, but * hath no assurance of the land, and he devise this land to another; this cannot be a good devise of the land, but perhaps the devisee may in a court of equity compel him that hath received the money to assure and settle the land according to the devise (60). [It is now settled that the interest, by reason of the contract, is devisable; *Greenhill* v. *Greenhill*, 2 *Vern.* 679; *Sugd. Vend. and Purch.* 156; and the executors of the testator, unless the contract be such that a court of equity would not relieve by specific performance, (*Broome* v. *Monck*, 10 *Ves.* 597,) must pay the purchase money, as a debt of his personal estate.] And if one devise another man's land, this devise is void, [except so far as in equity it may raise a question of election against the owner;] but if he, after the devise made, purchase this land, now is the devise good (61). [The devise is good only in case of a republication of the will after the purchase, and in case there be sufficient language in the will to comprise the lands.] If a man bargain and sell land to me, on condition to re-enter if he pay me 10 *l.* and I covenant that I will not take the profits until default of payment, and he make a lease of six years of it to another, and after break the condition; in this case, I may, [as to the legal estate,] devise this land, and the devise will be good. [Also this equity of redemption, though not the

*P. 429.

Nevil's case.

Plow. 344. Fitz. Devise, 7.

Adjudged Powdey and Blakeman's case.

(60) If, after articles are entered into for a purchase, and before a conveyance executed, the purchaser devises the land, it shall be good in equity; for the vendor is considered as seised in trust for the purchaser, who is deemed the real owner of the land, and is therefore allowed in equity to dispose of it. 1 *Chan. Ca.* 39. And if the articles are entered into in the name of an agent or a trustee for the purchaser, the devise will be good; an equitable interest being as well devisable as a legal estate. *Greenhill* v. *Greenhill*, 2 *Vern.* 679. [Equity will go further in favour of creditors; for, in *Pridex* v. *Gibbin*, 2 *Chan. Ca.* 144, the chancellor said, that if a man devise all his lands for payment of debts, and after purchase lands, that he would decree a sale, although there be no precedent articles.]

(61) See fully in what cases lands, acquired after the time of making the will, shall be said to pass, in *Vin. Abr. Devise* (I. 4.) [Not without a republication. As to a republication, what shall be deemed to amount to it, and when it will render a devise valid, see *Bac. Abr. Wills* (D. 3,); *post*, in the note to p. 438.]

a person ascertained, who is to have lands on a condition precedent, as by executory devise or a contingent remainder, may devise them. *Roe* v. *Jones*, 1 *Hen. Black.* 30. (62). See Appendix.]

Perk. Sect. 538. Lit. Sect. 585, 586. Dyer, 253. 140. 5. 52. F. N. B. 121. Co. super Lit. 111. 8. 83. 3. 33.

14. A seigniory, rent, or the like thing, is devisable as land is, and will pass without the attornment of the tenant. The like law is of a reversion also; [and even of a reversion after, and expectant on, an estate tail. The like point is law as to remainders.] And a man may [by] devise [create] a rent *de novo* issuing out of land, or [devise] a rent issuing out of land, [being a rent] that is *in esse* before. And therefore if a man make a lease for life, or years, rendering rent, the lessor may devise this rent. So if a rent be granted to one and his heirs, the grantee may devise this rent. So a man that is seised of land in fee may devise any rent out of it at his pleasure. And therefore if a man, that holdeth his land by knight's service in chief, by his will devise any rent, common, or other profit out of it; this devise is good, and that albeit the rent or profit doth amount to the value of the whole land; as if one had three acres of land worth 3*s.* by the year, and he devise 3*s.* rent out of it, this is a good devise of the whole rent; but, in this case, the rent shall issue out of two parts of the land, and a third part shall be free and not charged with it, but he may charge two parts in three parts of such lands at his pleasure. And so also it is if a man have lands holden by knight's service and not *in capite*, and other lands in socage, he may charge two parts of the knight's service land, and all his socage land at his pleasure. [These observations apply to the law as it stood before the abolition of military tenures.] And if a man have lands held in socage, and no lands held *in capite*, or by knight's service, he may devise what rent he will out of it. But a man cannot devise a rent, common, or any such thing out of another man's land that is none of his own, nor out of that [land in which] he hath not [any estate or interest which is devisable.] And therefore if one devise 10*l.* out of his manor of *Dale*, when in truth he hath no such manor; [or sells this manor in his lifetime;] this devise is void. [But it may be good

Devise of rent, common, seigniory, or the like.

(62) But this would be considered as a mortgage in equity, and the bargainor would have relief against the devisee.

be granted to me for the life of *I. S.*; it seems I may not devise this rent, but that the terre-tenant shall hold it as an occupant (63). [The law is altered by the statute, which makes estates *pour autre vie* devisable. The point was law prior to this statute; and see *Prest. Est. ch. Life*; 1 *Prest. Abstr.* 434.]

Devise of houses, doors, glass, wainscot, &c.

15. Where a man is seised of a house in fee, and may devise the house itself, there it seems he may devise the doors, windows, wainscot, or the like incidents of the house, [either together with, or separate from the house.] And where a man may devise the land itself, it seems he may devise the trees or grass growing upon the land, [either together with, or distinct from the land,] *quando licet id quod majus, videtur et licere id quod minus.* But where the land itself, [or rather the estate therein,] is not devisable, there such things incident or annexed to, * or growing or being upon it, are not devisable. And therefore a tenant in tail, for life or years, of land may not devise the houses or windows, doors or wainscot of houses, or trees or grass being or growing thereupon; but this devise is void, [except so far as he has a property in them, as emblements, or as fixtures removable by his personal representatives.

Co. 4. 63. Perk. Sect. 512. 518. Co. 11. Rich. Liford's case. Kelw. 88.

*P. 430.

Devise of a use.

16. Where a man hath a use that is not executed by the statute of uses, [*viz.* a mere trust,] but remains at the common law, he may devise it as he may any other thing; and therefore if one be possessed of a term of years, and grant it over to another to the use of the grantor, he may dispose of this use by his will, for it is in the nature of a chattel. [So if it be of the nature of an inheritance, or an equity of redemption, or a right to relief in equity.] But if a man have such use in joint-tenancy, he cannot devise it. [But if a joint-tenant of a personal chattel, or a term, or a chose in action, survive his co-tenant, the will of the survivor, made while he was a joint-tenant, may be effectual; though, under the like circumstances, his devise of lands, held in fee simple or for life, would be void.]

Perk. Sect. 500.

See Uses.

Devise of goods and chattels.

17. All manner of goods and chattels, real and personal, may be devised by testament. And therefore

Swin. pt. 3. sect. 5. Perk. Sect. 511. 525.

(63) See note 28 to page 108, and the several references therein.

common, or the like, wardships of the bodies and lands of heirs of tenants by tenure *in capite*, and by knight's service (64), cattle, as oxen, sheep, horses, &c. gold, silver, money, plate, household stuff, as beds, pots, pans, platters, &c. corn, wool, and implements of husbandry, may be devised by will; and not only those a man hath at the time of the devise, but those a man is to have or may have afterwards. [And, by apt words, a man may bequeath a term before he is owner of it; and a devise of all his leasehold estates, will pass all estates of that description which he may have at his death.] And therefore it is held, that a man may give his corn that shall grow in such a ground the next year after his death, or the wool or lambs his flock of sheep shall yield the next year after his death, and that these devises are good; but [if the lands be of inheritance, the will must, it is apprehended, be duly attested by three witnesses; and] if in this case there shall be no such corn growing in that ground, or any lambs or wool arising out of his flock that year, the legacy is fruitless. [It fails of effect, because the subject fails.] And yet if the testator devise to *I. S.* twenty quarters of corn, or twenty lambs, and doth will that the same shall be paid out of his corn that shall grow, or out of his flock the next year, and there be not so much corn, or not so many lambs, or not any at all growing or arising, yet this is a good devise, and the things must be paid; [for it is a bequest of quantity with an appropriated fund; but not a specific legacy.] In like manner, if a man give to *I. S.* a horse, or a yoke of oxen; in thiscase, albeit the testator have neither horse nor yoke of oxen, yet the devise is good and must be performed. 18. Things in action, as debts, and the like, albeit they be not grantable by deed in the lifetime of the party, yet are they devisable by will. And therefore if the testator doth, by his will, give any debt due to him on an obligation, or on a contract, or the like, this devise is good. And the thing devised may be had thus: the testator may, if he will, make the legatary executor as to that debt, or if he do not, the legatary may sue the executor in the spiritual court, or in some

Devise of debts and things in action, possibilities and uncertainties.

(64) See the statute 12 Car. 2, c. 24, mentioned before.

either to recover it himself, and so to pay it to the legatary, or to give the legatary power to sue for and recover it himself in the executor's name. But if it be such a cause of action, as is altogether uncertain, as where a man may have an action against another for taking away his goods, or to compel him to make an account, or the like; this is such a cause of action as is not devisable. [This is not correct: the benefit of such action may be given by will.] *P. 431. * And yet possibilities and incertainties are in divers cases devisable. And therefore if one have money to be paid him on a mortgage, he may devise this money when it comes; as if I enfeoff a stranger of land, upon condition that if he do not pay me 20*l.* such a day, that I may re-enter; in this case I may devise this 20*l.* if it be paid, and the devise is good, albeit it be made before the day of payment come. [In short, every thing which an executor may take as such, may be given by will, since the directions of the will must be observed by him. And, by apt words, a man may bequeath a term before he is the owner of it; and a bequest of all his leasehold estates, or all his leasehold lands, will pass all estates of that description, which he shall have at his death.] And if a man be possessed of a term of years, and devise all the residue of that term of years that shall be to come at the time of his death; this devise is good, and yet such a grant by deed is void. [So a man may, by express words, give a particular tenement for all the estate he shall have therein at his death, so as to pass newly acquired interests. *Abney* v. *Miller*, 2 *Atk.* 594; 3 *Atk.* 199.] But a mere possibility, and a thing altogether incertain, is no more devisable by will, than it is grantable by deed. [It is now settled that all possibilities, coupled with an interest, not being mere rights or titles, are devisable. *Roe* v. *Jones*, 1 *H. Black.* 30; and, at all times, mere possibilities of terms were the subject of testamentary gift; so as to communicate the benefit of the gift through the medium of the executor. *Lampet's case*, 10 *Rep.* 46; *Manning's case*, 8 *Rep.* 94.] 19. Emblements, *i. e.* the corn that is sown and growing upon a man's ground at the time of his death, and which

Perk. Sect. 527. Bro. Sect. 457. Dyer, 272. Plow. 530.

Child's case, 17 Ja. B. R.

Perk. Sect. 520, 521, &c. See in Grant.

Devise of emblements.

the harvest, (as in most cases he shall where he doth sow it), are devisable. And therefore if a man have land in fee simple, fee tail, for life, or years, and sow it with corn; he may devise the corn at his death to whom he pleaseth (65). [But, unless tenant in fee devise the emblements specially, they will belong to the heir, if the lands descend to him; but, if the lands are devised, the emblements will belong to the devisee. *Toller's Executors*, 203. And, although the lands are devised to one person, the emblements may be given to another person, and they will pass by the words goods, stock, and cross; and of course, any other term, by which they are more distinctly described.] And yet if lessee for years sow his land so little a while before his term expire, that it cannot be ripe before the end of the term, and he die, it seems he cannot devise this corn; for if he had lived, he could not have reaped it after the end of the term. [Those tenants only are entitled to emblements whose estate may determine in an uncertain event; as tenants in tail who die without issue, tenants for life, for years determinable on lives, and at will.] 20. Obligations, counterparts of leases, and such like things, also are devisable; but, in this case, the devisee cannot sue upon the obligation in his own name, nor enter for the condition broken upon the lease, if there be cause; but he may, [after his title is perfect by the assent of the executor,] cancel, give, sell, or deliver up the obligation, or counterpart to the obligor, or lessee. And finally, whatsoever shall come to the executor after the death of the testator, in the right of his executorship, may be devised by the last will and testament of the testator. [It is apprehended, a devise of freeholds held for lives, and limited to executors, will pass in equity by a devise attested by two witnesses, because the legacy is a direction to the executor; and the executor ought not to claim against the will; or the residuary legatee, in opposition to an express bequest; besides, the statute of 14 Geo. 2, c. 20, § 9, seems to control the 29 Car. 2, c. 3, in this respect. This point is now settled by

[Toller's Executors, 203.]

Perk. Sect. 527.

Devise of obligations. Counterparts of leases, &c.

(65) As to the doctrine of emblements, see the books referred to in the note to p. 244; and *post*, *numb.* 25; and more fully who may devise them, in *Vin. Abr. Devise* (I. 5.)

Ripley v. *Waterworth*, 7 *Ves.* 425. On the same principle, a bequest of stock in the public funds would be effectual, and binding on the executors, although the will be not as the statute law (35 Geo. 3, c. 14, § 16,) requires, attested by two witnesses. 7 *Ves.* 452.]

Devise of the things a man hath in jointure with another.

21. The goods and chattels that a man hath jointly with another, are not devisable, [as against the joint-tenant.] And therefore if there be two joint-tenants of goods or chattels, as where such things are given to two, or two do buy such things together, and one of them devise his part of the things to a stranger; this devise is void, [unless he survive] (66). Insomuch, that if, in this case, the testator make the other joint-tenant his executor, the will, as to this [subject,] is void, and he shall not be charged as executor for those goods; but he shall have them altogether by right of survivorship. [Except so far as a question of election may by an express gift be raised against him, the doctrine of survivorship takes place as to the legal ownership, subject only to an account between the survivor and the executors of the deceased.]

Perk. Sect. 526. Lit. Sect. 287. Doct. and Stud. 167.

Devise of the things a man hath in another's right.

The goods and chattels that a man hath in another's right, are not devisable; and therefore, an executor or administrator cannot devise the goods and chattels he hath as executor or administrator, for such a devise is void; [and they will belong to the executor or administrator of the first testator. So a husband cannot by his will give goods which his wife has as executrix, nor can they be taken in execution for his debt.] Howbeit, the executor may appoint an executor of the goods of the first testator, [so that the executor of the executor will have the same authority as the executor of the first testator,] which the administrator cannot do; and of the profits that do arise by the goods and chattels the executor or adminis-

Plow. 525. Bro. Administrator, 7. Fitz. Adm. 6.

(66) But an exception must be made of the goods and chattels of merchants or traders; for the wares, merchandizes, debts, or duties, which they have as joint-merchants, shall not survive, but shall go to the executors of the deceased, *per legem mercatoriam*, which is part of the law of this realm, for the advancement of trade and commerce, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. *Co. Lit.* 182, a. See further *Vin. Abr. Joint-tenants* (B.); *Bac. Abr. Joint-tenants*, &c. (C.) Will by a joint-tenant of freeholds will not sever the joint-tenancy, it not taking effect till after the testator's death, and therefore a void devise. *Bac. Abr. Joint-tenants* (I. 3.) and the various cases there cited. But *aliter* in copyholds; for there, if a joint-tenant surrenders his moiety to the use of his will, and dies even before the surrender is presented, and after surrender makes his will, it is a severance of the jointure; for, being presented, it has relation to the surrender. *Cro. Jac.* 100; *Roll. Abr.* 501; *Gilb. Ten.* 275; *Co. Lit.* 59, b.

trator hath during the time of his
he may make disposition, [subjec
Doct. and Stud. lib. 2. c. 35. Perk. Sect. 498. 498, 499. 560. Doct. and Stud. c. 7. The goods and chattels belonging hospitals may not be devised by of the * masters or governors th goods and chattels belonging to tions, by the mayors, bailiffs, or And the goods and chattels that have in the right of the church, visable. All the chattels real that in the right of his wife by her mea holds them in her right,] and all the o are made to her alone before o time of the coverture, and the cl personal that his wife hath as exe other, are not devisable by the tes husband (67). But all the chattels a man hath by his wife, which she ha right, and the debts due upon obli to the husband and wife both during t [thus disagreeing to the gift in favour are devisable by the testament of the h 23. Such things as are annexed, an a freehold or inheritance, so that th severed from it by him that hath th
Perk. Sect. 526. Kelw. 88. See before. them, as wainscot, and glass to hou like, are not devisable, but in such cas thing itself to which it is annexed [except such fixtures as are severab tenant in tail or tenant for his life, peachment of waste, dispose of such his will.] 24. The goods and chatt another man's are not devisable; and a man give another man's horse, it is
Plow. Grantham's case. Co. super Lit. 185. 308. vise; [but may raise a question of ele if one devise the things that, by specia some places, (as the heir-looms) do be

(67) A man may sell or dispose of *chattels* real which he hath he does not do so and survives his wife, they become absolutely h his wife, without having made any disposition, he cannot dispo *in action*, which a man hath in right of his wife, he may reduce or recovering them at law; and if he does so they become absol bequeath them by will; but if he dies before his wife, without h them, they shall survive to the wife. *Co. Lit.* 300, a. 351. S 433; *Bac. Abr. Executors* (H. 4.)

(68) A husband by will disposes of jewels which the wife was bought partly with her own and partly with his money, to his b cutor; but it was held the wife was entitled to those which were paraphernalia. *Northey* v. *Northey*, 2 *Atk.* 77.

from him; [because the custom operates before the will. *Sed quære.*] 25. If a bishop have a ward belonging to his bishoprick fallen, he may devise it; but if a church of his become void in his lifetime, he cannot devise the presentation. [The ward is a fruit fallen, and becomes his personal property, and therefore may be disposed of; but the next presentation belongs to him in right of his church, and no one except the bishop for the time being, or the person entitled by lapse, can present; while a presentation fallen to an individual will belong to the executor, but if the parson be the patron, the presentation will belong to his heir. *Toll. Executors*, 189.] If a parson of a church have the advowson in fee, and he devise that his executors, two or three of them, shall present at the next avoidance; this is a good devise; [on account of the priority in an instant, since he must die before the church is avoided, so that there is not any avoidance in his lifetime; for if an avoidance happen in the testator's lifetime, he cannot devise the right of presenting on that vacancy. This is an example of a right in executors, which the testator cannot, as it is apprehended, control, by any disposition.] 26. All these things before that are devisable, when they are devised must be named, and devised either by their proper name, or otherwise described by some other matter whereby the mind of the testator may be known and discerned; for if he err and mistake in the name or substance of the thing devised; or it be so uncertainly devised and described that it cannot be perceived what he intendeth, the devise is void [for uncertainty.] And therefore if one devise a piece of ground by the name of a messuage, except it be so called, the devise is void. And yet by the devise of the use, profit, or occupation of land, the land itself is well devised; and by the devise of land itself, the reversion thereof may be devised; [and by the devise of ground rents, &c. the lands and the reversion of them, and the rents annexed to the reversion will pass; for the gift of the rents is the substance, and the name a false demonstration.] But if one intending to devise a horse, doth devise an ox; or meaning to give gold, doth give apparel; these legacies are void, [the illustration is

Devise of a presentation to a church.

Trin. 13 Ja. Curia, B. R.

Swin. pt. 7. c. 6. Plow. 525. Perk. Sect. 600.

Mistake or error in the thing devised.

by some circumstance to be othe
man have but one horse, and he b
del, and he devise his horse *Buceph*
is good enough. [Here the rule is
error nominis, &c. or *falsa demonst*
But if a testator had two horses
and should bequeath his horse *C.*
would be void for uncertainty.]
give all his money in such a chest,
there is no money in that chest; or g
the 10*l.* which *I. S.* doth owe him,
I. S. doth not owe any such mone
is void; [it fails for want of subjec
if the devise be thus, *viz.* I give t
and * I will that the same be paid o
have in such a chest, or of the mone
a man doth owe me; in this case
good, albeit there be not any money
or owing; [because the gift is of qua
perfect in the first instance; and sha
feated by a subsequent direction,
avoid the bequest:] and if one give 1
in such a chest, whereas in truth th
in the chest; in this case, the legac
the 5*l.* But error and mistake in
and quality of the thing devised, wh
for the substance of it is certain, dc
and therefore if the testator, meaning
fourth part of his goods, give the o
meaning to give but 50*l.* give 100*l.*; o
meaning to give a greater, doth give a
or sum; in these cases, the legacy is
the legatary shall have as much as the
mean. [These propositions are too g
a man give his white horse, when in t
but one horse, and that is black; thi
devise of this horse. [But if he had
and neither was black, the gift would
Swinb. pt. 7. c. 10. uncertainty.] And if the thing devis
such general words that the mind of
cannot be known by it, the devise is
therefore if the testator say, I do bequ
thing, or I bequeath a substance, or I
body, or I bequeath, or the like; these
void for uncertainty: so if he say, I do
or I do give goods, [unless the word

supplied by construction;] these devises are void. And yet if the testator give a horse, an ox, a gold chain, or the like, indefinitely; in these cases, the devise is good, albeit he have no such thing; [and the executor must provide the article at the expence of the estate. In all cases of this sort the testator ought to fix the value, as the only means of avoiding a suit and a reference to the master; or should give the executor a discretionary power as to the sum to be expended.] But if one devise thus, I give lead, money, wheat, oil, or the like, and say not how much, or what quantity; this legacy is void for incertainty, or at least the executor may deliver what quantity thereof he will, and this shall satisfy the legacy.

Seventhly, in respect of the tenures and conditions, causes and ends of the devise.

7. As touching the terms of a devise it must be known, that if one devise any thing to wicked ends, or upon wicked conditions, as to the end that the devisee shall kill a man, or because he hath killed a man, or the like; these devises are void, in like manner as it is when the cause or motive is false, as because one is my cousin, or hath lent me money, I devise to him 20*l.* and he is not my cousin, or did not lend me money; these devises are void. [These conclusions are founded on the maxim of the civil law, *causa data non secuta.*] And, as touching the rest of the properties of a good devise, see them before in the properties of a good testament: and here by the way, be advised if thou hast land to settle, rather to do it by act executed by advice of learned counsel in thy life and health-time, and therein add such conditions and provisoes of revocation and otherwise as thou wilt; or if thou wilt do it by will, then do it in thy perfect memory and by learned advice; let the will be indented and of two parts, and leave one part with a friend, that it be not suppressed after thy death (69); let there be credible witnesses to the publication thereof, and let their names be subscribed to it: let the whole will be written with one hand and in one piece of paper or parchment, for fear of alteration, addition, or diminution: let * the hand and seal of the devisor be set to it: and, if it be in several parts, let his hand and seal

Swinb. 289.

A caveat for making of testaments.

Co 3 36.

*P. 434.

(69) Where there is a duplicate of the will, and the testator cancels that part which is in his own custody, it is an effectual cancelling of the will, although the other part remains whole and uncancelled. *Onions* v. *Tyrer*, 2 *Vern.* 742; 1 *P. Wms.* 345, S. C.; *Comp.* 52. But an alteration, by way of draft, of one part, will not be a revocation. *Pow. Dev.* 633.

and the hands of the witnesses be
if there be any razing or interlinir
a *memorandum* of it. And if thou
cation of thy will, do it by good
writing; *vox audita perit, litera scr*

Plow. 540. Co. super Lit. 322.

The general rules for the exposit
these; that they must have a favour
interpretation; and as near to the n
of the testator as may be; and yet
his intent may stand with the rul
be not repugnant thereunto. It is s
fore a maxim of law, *quod ultima vol*
perimplenda est secundum veram inte
according to these verses:

Sed legum servanda fides; suprema vo
Quod mandat fierique jubet, parere nec

[The rules for the construction o
wills are the same, except that in
of technical words may be supplied
terms, or implied from circumstance
Exposition of Deeds, 2 *Prest. Est.* 6
Est. chap. Tail; and, in wills, ar
arise from mere implication, while
cannot arise without a gift in express
testation, by subscribing witnesses,
cessary when required by powers. I
necessary by the statute law, as t
tenements held in fee simple, or for
cially if the heirs be named to tak
occupants; and even as far as respect
tion at law, as distinguished from eq
the heirs be not special occupants.
does not, by its own operation, extend
lands, or to annuities in fee, (2 *P.*
or to customary lands, which are n
without a surrender to the use of th
it extends to customary lands which a
without a surrender to the use of the will
c. 192. The will must be attested b
scribing witnesses. The subscription
their names, or by marks. In one case
attested by three witnesses, each of wh
mark, and on an issue *devisavit vel*
distance of many years from the death
tator, the will was established. The wit

(70) See the notes and references to p. 410 and 411,

Brice v. *Smith*, *Com. Rep.* 1. Consequently, though it be usual, it is not necessary that the witnesses should attest in the presence of each other; but there must be a publication and signing, or acknowledgment of signing, in the presence of each of the witnesses. The attestation must be in the presence of the testator, and therefore, 1. He must be in sound mind, and not in a state of insensibility or aberration of mind; he must be mentally as well as corporeally present. 2. He must be so present, that he has the power of seeing the attestation; *i. e.* it must not be done in his absence, or in a situation in which he could not, if he would, see the fact of attestation. But if he may see the attestation if he would, the attestation would be sufficient, though in point of fact he did not see it. This is a general view of the rules to be observed, respecting the attestation of wills of real estate, and is exhibited as a key only to the learning, as collected by Mr. *Powell on Devises*, 68. 710. and Mr. *Roberts on Frauds*, 437.]

Terms of the Law, tit. Devise. Co. super Lit. 25. Plow. 414.

If a devise be made of land to *I. S.* and the heirs male of his body; by this devise the sons, and not the daughters, [*i. e.* the male, and not the female, issue] of *I. S.* shall have the land. And if a devise be made of land to *I. S.* and the heirs female of his body; by this devise the daughters, [*viz.* female,] and not the sons of *I. S.* [*viz.* male issue,] shall have the land. And yet it hath been said in these cases, that if, in the first case, the devisee have issue a daughter, who hath issue a son; or, in the last case, hath issue a son, who hath issue a daughter; that this son and daughter shall take by this devise in these cases; but it seems the law is otherwise. [The first inquiry always must be, what was the intention of the testator; and secondly, is that intention consistent with the rules of law? And the intention must, in all cases, be carried into effect, as far as it is consistent with the rules of law. But if there be a particular intention, and also a general intention, the general intention shall prevail over the particular intention. See *Prest. Est. chap. Tail.*]

27 H. 8. 17.

If a devise be made of land to *I. S.* and his heirs male; by this devise *I. S.* hath an estate tail; [notwithstanding the absence of words of procrea-

is of such a limitation by deed; for
give land to another and his heirs
[gift] the donee hath a fee simple,
general shall have it, [for want of
creation, designating the body from
are to proceed. *Idle* v. *Cook*, 1 *P.*

Co. super Lit. 27. If a devise be of land to *I. S.* an
heirs female of his body; by this
daughters, and not one of them only
[for this is an estate tail in the paren
tail may, in the course of its desc
a degree.] So if one devise gavelki
man and his eldest heirs; this doth
custom, but by this [gift] all the so
[But under a devise to the right hei
sers, the common law heir; *i. e.* t
would take. 1 *Prest. Estates*, 449. 4

Fitz. Devise, 2. If a man devise his land to his wif
remainder to his son and the heirs
body engendered, and for default o
the remainder to his next heir male,
male of the body of that heir male,
son die without issue (living his wi
devisor hath issue a daughter, who hat
in this case, and by this devise, it
daughter [by descent,] and not her
will,] shall have the land, and that in
[for, to entitle a person to take by t
heir male, the donee must be both a
and general heir, unless the intention o
of the estate be clearly otherwise, pc
particular person as special heir. *N*
Barkham, 2 *Vern.* 729; *Fearne Cont.*
574. And the remainder to the next
though good in its inception, fails by t
nation of the prior estates, before the
can vest.]

Trin. 9 El. Adjudged Curteis' case. If a man devise his land to his wife f
after to his own right heirs male, and he
three daughters, and after his death or
hath a son; in this case, and by this de
next collateral heir male of the devisor
the son of the daughter, shall have
[Does not this devise fail of effect?]

Dyer, 122. If a man have issue two sons and a
and devise his land to his wife for ten

remainder to his younger son and his heirs, and if either [*read*, each] of the said two sons die without issue of their bodies, the remainder to the daughter and her heirs, and the younger son die in the lifetime of the father, and after the father die; in this case, and by this devise, the daughter hath a good remainder; but it seems the elder son hath first an estate tail by the intent of the devisor; [*i. e.* by implication. *James* v. *Romilly*, 6 *Taunt.* 263; *Walter* v. *Drew*, *Com. Rep.* 372.]

If a man devise some land to *A.* his eldest daughter, and her heirs, and if she die without issue, to *T.* his youngest daughter, and her heirs; and if she die within sixteen years, that *A.* shall have her part to her and her heirs; and if *A.* marry such a one, that *T.* shall have her part to her and her heirs; and if *T.* die having no issue, that all her part shall go to *M.* and *E.* his nieces; and if *A.* die without issue, that *T.* shall have her part to her and her heirs; and *T.* after sixteen years, doth die without issue; in this case, the nieces *M.* and *E.* and not *A.* shall have her part that is dead. Dyer, 330.

If land be devised to *A.* for life, the remainder to a monk for life, the remainder to *I. S.* in fee; by this devise, he in the remainder in fee shall take presently after the first estate for life ended; and if the devise be to a monk for life, the remainder to *I. S.* in fee; by this [devise] *I. S.* shall take presently. [This case applies to all persons incapable, as well in a deed as in a will; the remote remainder will commence immediately after the determination of the particular estate, although a mesne remainder be void, or fail of effect. But in conveyances, at the common law, the remainder will be void, unless the particular estate take effect. But in wills and conveyances to uses, the limitation by way of remainder may be good, although the particular estate be void. In executory devises, if one class of limitations be void, because too remote, all the limitations over will be void, as too remote; but an executory devise may be good in one event, and void in another event. 2 *Prest. Abstr.* 155.] Perk. Sect. 566, 567.

If a man devise his land to a woman and her brother, and the heirs of either of their two bodies, and for default of issue of the said woman and her Dyer, 326.

brother, the remainder to the right heirs of the devisor, and after the death of the devisor, the brother dieth without issue, and the sister hath issue and dieth; in this case, and by this devise, her issue shall have a moiety and no more of the land. [From modern determinations, it should seem, that the brother and sister were tenants in common in tail; so that, on the decease of the brother, and failure of his issue, the sister would take the entirety, partly under the original limitation, and partly under the cross-remainder. In 1 *Prest. Est.* p. 94, and *chap. Tail*, the learning on cross-remainders will be found.]

Dyer, 304. If one devise two parts of his land to his four younger sons in tail, and that if the infant in the womb of his wife be a son, that he shall have the fifth part as co-heir with the four; and if his five sons die without issue, that the two parts shall revert; and then the devisor dieth, and after a son is born, and after he and three of the other sons die; in this case, and by this devise, the infant shall not take any thing, because he is incapable, and the two parts shall not revert to the heir until the five sons be dead without issue. [It is now settled, that an infant in *ventre sa mere* is capable, so that this objection is obviated. And, according to the existing authorities, the five sons would be tenants in common in tail, with cross-remainders between them in tail.] (71).

Adjudged C. B. M. 36, 37 Eliz. Brown's case. If one devise the manor of *Dale* to the eldest son of *I. S.* in fee, and the manor of *Sale* to *I. D.* for life, the remainder to such of the children of *I. S.* as shall be then living, and shall have the manor of *Dale*, and the eldest son of *I. S.* after the testator's death, doth sell the manor of *Dale*, and after *I. D.* dieth; in * this case, and by this devise, none of the children of *I. S.* shall have the manor of *Dale*, but it shall go to the heirs of the devisor; [*i. e.* the reversion in fee descends to the heir, till it can vest. This interest is contingent, to vest in a child having the manor of *Dale* at the death of *I. S.* The remainder fails, for want of a person answering the description; since, at the death of *I. D.* no one of the children of *I. S.* hath the manor of *Dale*.] *P. 436.

(71) See the note to page 414, and the books therein referred to, touching a *devise* to an infant *en ventre sa mere*.

by this devise the children that *I. S.* hath at the time of the devise, or at the most, the children that *I. S.* hath at the time of the death of the testator, [the latter proposition expresses the law, when the gift is immediate,] and not any of them that shall be born after his death, shall take. [This position is true when there is an immediate devise to children *eo nomine*, and there are children living at the death of the testator. But every case of this description depends on its own circumstances, and the language of the will. When the gift is by way of remainder, all children who come *in esse* during the particular estate, are capable. *Mogg* v. *Mogg*, 1 *Meriv.* 654, exhibits many important distinctions on this subject.]

If one have two daughters by divers women, and devise a moiety of his land to his wife for seven years, and that the elder daughter shall enter into the other moiety at her day of marriage, and if his wife be with child of a daughter, that then she shall have an equal portion with the other sister, and the devisor dieth, and the wife doth enter and hath not a daughter, and then the elder daughter doth take a husband, and enters upon a moiety, the younger daughter dies without issue, and the seven years expire; in this case, and by this devise, the collateral heir of the younger daughter shall have the moiety of the whole, and not the moiety of a moiety only, and that by descent. [It follows, that the elder sister took a moiety by descent, and not by the will, so that the younger daughter had a seisin of the freehold, and inheritance of one moiety; and the rule, that *possessio fratris facit sororem esse hæredem*, gave a title to her heir of the whole blood, to the exclusion of the sister of the half blood. *Church* v. *Edwards*, (2 *Bro. C. C.* 180. 3 *Prest. Convey.* 93. 105,) exhibits the learning which governs cases of this description.] Dyer, 348.

Next of blood.

If a man have issue *B. C.* and *D.* sons, and he devise his land to *D.* his son, the remainder *proximo de sanguine*, [*query*, the time of ascertainment of the object? *Cholmondeley* v. *Clinton*, 2 *Mer.* 173; 1 *Prest. Est.* 148;] or to the next of blood of the testator; in this case, and by this devise, *B.* shall take after the death of *D.* as the next of blood. In Curia, B. R. Mic. 20 Jac.

like manner, if the testator have four daughters, and he devise his land to the youngest in tail, the remainder to the next of blood; by this devise the eldest daughter, and not all the rest, shall have the land. And if the testator have issue *B.* his elder son, and *C.* his younger son, and *B.* have issue *D.* his son, and *B.* is attainted and dieth; and the testator deviseth his land to *I. S.* for life, the remainder to the next of blood of the testator; by this devise *D.* and not *C.* shall have the land. [For, notwithstanding the corruption of blood by the attainder, *D.* is still of the blood of the ancestor, and he may take as such, though he could not take as or by the name of heir.]

Bro. Descent, pl. 19. 8 Ass. pl. 6.

If *A.* have issue *B.* and *C.* sons, and *D.* a daughter, and devise his land to *C.* for life, and after that it shall remain to the next of blood to his children, or to the next heirs of the blood of his children, and *C.* and *B.* die without issue, and *D.* hath issue a daughter; in this case, and by this devise, the heirs of *A.* shall not take, but the next of blood to the children of *A.* which is the daughter of *D.* and his children themselves are excluded; and if the sons have any issues living, [and in equal degree,] they shall take with her by this devise.

Adjudged M. 20 Jac. Perin v. Pearse, B. R.

If the testator have issue by *A.* his first wife, three daughters, *Joan*, *Elizabeth*, and *Anne*; and by *B.* his second wife, *Alice* and *Elizabeth*; and by *C.* his third wife, *William* a son, and three daughters, *Mary*, *Katherine*, and *Joan*; and he devise his land to *Joan* his youngest daughter for life, paying 13*s.* 4*d.* to the son, and after her death to the son and the heirs of his body, and after his death * without issue to *Elizabeth* the daughter of the second wife, and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the devisor for ever, and the elder *Joan* hath issue *I. P.* and dieth, the son dieth without issue; the younger *Joan* hath issue and dieth; *Elizabeth* daughter of the first wife hath issue and dieth; *Anne* dieth having issue; *Alice* dieth without issue; *Mary*, and *Elizabeth* born of the second wife, die without issue; *Katherine* dieth without issue; in this case, and by this devise, the son and heir of the elder daughter after the death of the son without issue, and of *Elizabeth* *P. 437.

children, shall have the land; because *proximo* in Latin doth denote a person certain, [and expresses worthiness of blood;] and there be express devises to others: but if, in this case, the remainder be limited in general to the next of blood without any other matter, [*i. e.* context,] all the daughters perhaps may have it as joint-tenants.

If a man have two sons, and a daughter which hath two daughters, and he devise his land to a stranger for life, the remainder to his second son for life, the remainder in fee to the next of blood to his son; in this case, if the eldest son die without issue, the daughter and her daughters shall have the land. [This case is not correctly quoted; *Perkins* supposes the daughter to die, and then says, that her daughters shall have the land.] Fitz. Devise, 9. Perk. Sect. 508.

Secondly, in respect of the thing devised.

Whatsoever will pass by any words in a deed, will pass by the same words in a will, and more also; for a will is always more favourably interpreted than a deed: and therefore if a man devise the profits, use, or occupation of land; by this devise the land itself is devised. [And by a devise of ground rents the lands themselves will pass, (2 *Ves. & Beam.* 74.) if the testator has the reversion of the lands, and the ground rents are annexed to the reversion.] See in the Exposition of Deeds, supra. Co. 8. 94. Plow. 526.

If a man devise thus, I give all my lands to *I. S.* or I give all my tenements to *I. S.* or I give all my lands and tenements to *I. S.*; by this devise *I. S.* shall have not only all the lands whereof the devisor is sole seised, but also all the lands whereof he is seised in common or coparcenary with another; and not only the lands he hath in possession, but also the lands he hath in reversion of any estate in fee simple; but by this devise, regularly, leases for years of lands will not pass. [The word *farm* though coupled with words proper to pass freehold lands in a will, will also pass a leasehold estate, if it appear to have been the intention that it should so pass. 6 *Term Rep.* 345; 3 *Prest. Abstr.* 210. The general rule is, that leasehold lands will not pass by general words giving messuages, lands, &c.; but a context may bring leaseholds within the influence of the words. 3 *Prest. Abstr.* 179. 210. See 438, *infra.*] Mevil's case, Fitz. Devise, 4. Bro. Done, 41.

If a man devise thus, I give all my land in pos- Plow. 66.

session only; by this devise there is
he hath in possession only, and non
he hath in reversion.

Plow. 343, 344. Old N. B. 89. Fitz. Devise, 17.

If a man be seised of land in fee si
and devise thus, I give all my lands in
and after the will made and publis
purchase other lands in *Dale* and
case, and by this devise, *I. S.* shall
new purchased lands (72): and in th
been held further, that if the testato
of mouth, after the purchase of th
declare himself to be minded that *I.*
the same new purchased lands also b
that notwithstanding *I. S.* shall not l
this devise. [It is a general rule that
devise any lands, except those of whic
at the time; but after-purchased land
the will be republished after the purcl
terms of the will are sufficiently com
embrace these lands; but then the cod
republication of the will generally, an
an alteration as to a particular pa
Rep. 482. So lands which a man ha
to purchase will pass, since in equi
owner. *Greenhill* v. *Greenhill*, 2 *Vern.*
dix. And the devise may remain in o
withstanding the equitable be conve
legal estate. *Rose* v. *Conyngham*, 11 V
the other hand, the equitable effect of
be revoked by a new modification
Rawlins v. *Burgess*, 2 *Ves. & Beam.* 3
equity a person may by a direction, resp
purchased lands, raise a question of elec
his heir. *Woodford* v. *Thelusson*, 13

Mich. 37 Eliz. B. R. Breckford v. Parincote.

And yet it hath been adjudged, tha
* case one come to the devisor to b
purchased lands, and he say nay, bu
have it as the rest; that this is a n
tion of the will, and that *I. S.* by this

(72) Because a devise of lands is a *species of conveyance*, an
er the execution of the will cannot pass by such a devise, (*M*
nt in Perrin v. *Blake*, *Harg. Tracts*, 502,) without a republi
rchased after the making a will do not pass, extends to lands
e statute of Wills. See an excellent case on this subject in *Gil*
Salk. 237. With respect to copyhold lands purchased afte
ntract, and before admittance, the purchaser died, having mad
d held, the lands contracted for passed. 1 *Chan. Ca.* 39; *Gil*

have these new purchased lands; for a new publication of the will in these cases will make the land to pass (73). [At this day the republication must be attested by three witnesses, in consequence of the statute of Frauds and Perjuries, 29 Car. 2, c. 3.] But if a man devise the manor of *Dale*, and at the time of the devise he hath it not; or devise his land in *Dale*, and at the time of the devise he hath no lands there, and afterwards he doth purchase the manor of *Dale*, or lands in *Dale*; by this devise, and in this case, the manor and the new purchased lands will pass; for, in this case, it shall be intended he meant to purchase it (74). [*Bunker* v. *Cook*, *Gilb. Dev.* 126; *Salk.* 237; seems to have settled the law on this point, by denying effect to the will.] And yet the statute enabling a man to devise lands, saith, *any person having*, &c. *Co.* 3. 30. See before.

If one have an ancient tenement, and lands belonging to it, and then purchase more lands, and occupy them altogether with the tenement many years, and being all thus in his occupation, he doth make a devise after this manner, I give my tenement in *Dale*, and all my lands belonging to it now in my occupation to *I. S.* by this devise *I. S.* shall have the ancient land only, and none of the new purchased land; but if there be no ancient land belonging to the tenement, but new purchased land only, there perhaps it may be otherwise; for in this case the words cannot else [*i. e.* by any other construction,] be satisfied. As in case where a man hath some lands in fee simple, and other Loftus v. Baker, Hil. 20 Ja. B. R.

(73) In what cases lands acquired after the making of the will shall pass, see page 429, and the notes thereto: and further, as to a new publication of the will after a new purchase, in *Com. Dig. Devise* (E. 4.); *Bac. Abr. Wills*, &c. (D. 3.); 4 *Burn's Ecc. Law*, 65; *Swinb.* 194. 516; *Vin. Abr. Devise* (I. 4.); *Dens* on dem. *Harris* v. *Cutler*, Trin. 10 Geo. 3, B. R.; *Heylin* v. *Heylin*, Trin. 14 Geo. 3, B. R. in *Cowp.* 130; and *Spring* on dem. *Fitcher* v. *Biles and another*, cited 1 *Term Rep.* 435. These last cases relate to copyholds purchased after the making the will. In *Heylin* v. *Heylin*, the surrender to the will being to the uses *declared* or to be declared in the testator's will, the surrender was held to amount to a republication, and the new acquired lands consequently passed by the will. There is no republication in equity that is not so in law. *Per* Lord *Mansfield*, in *Heylin* v. *Heylin*, *Cowp.* 132.

(74) And if they shall not pass *the will is void to all intents*. *Arg. Pl. C.* 344, a. Trin. 10 Eliz. *per Loveless*, Serj. in *Bret* v. *Rigden*. *Holt*, Ch. J. in the debate of the case of *Bunker* v. *Coke*, held strongly of opinion with this of Serj. *Loveless*; but when he came to deliver the opinion of the court, he held it not to be law, and held that 39 Hen. 6, 186, in *Devise*, 15, does not warrant that opinion; (to which *Powell*, J. who likewise held otherwise before, now agreed.) *Bronker* v. *Cook*, *Holt's Rep.* 247; 7 *Mod.* 197, S. C. cited and remarked upon by *Holt*, C. J. accordingly.

lands for years only in *Dale*, and he devise all his lands and tenements in *Dale*; by this devise the lands he hath for years do not pass. [3 *Prest. Abstr.* 210, states the rule and the distinctions.] But if he have no other lands in *Dale* but these lands, in this case perhaps, [indeed unquestionably,] this land will pass. [As to mistake in the name of a parish, see *Vin. Abrid. Devise* (K. b.); 2 *Roll. Rep.* 547; 1 *Bos. & Pull.* 53.]

In Mervil's case. If one have a moiety of lands in Essex, and a moiety of lands in Kent, and he devise thus, I give my moieties, and all my other lands in Kent to *I. S.* it seems by this devise the moieties in both counties do pass, and that *I. S.* shall have both the moieties.

Pasch. 20 Ja. adjudged Scattergood's case. If a man be seised in fee, in possession, of the moiety of a farm called the farm of *C.* and of the reversion in fee of the other moiety, expectant on a lease made to *A.* and *B.* for their lives, and he make his will thus, I will that my wife shall have all my living, [namely farm,] which I now occupy, until my son come to twenty-one years of age; and then I will have her have the thirds of all my living, and that my son shall have all my farm of *C.* to him and his heirs; by this devise if *A.* and *B.* die before the heir be twenty-one years of age, the wife shall have the thirds of the whole farm, and not of the moiety in possession only.

Dyer, 261. If a man be seised of land in a village, and in two hamlets of the same village, and he devise all his lands in that village, and in one of the hamlets; by this devise, [and by reason of the context,] none of his land in the other hamlet doth pass; [since a different construction would exclude the words which refer to one of the hamlets from any application. The testator has distinguished the hamlets from the village, *sed quære*; and circumstances may vary the construction.]

Plow. 343. If a man make his will the 1st day of May, and thereby give the * manor of *Dale*, to one in fee, *P. 439. and the 10th of May one of the tenancies escheat, and the 20th of May the devisor dieth; in this case, and by this devise, it seems the devisee shall have the tenancy that doth escheat; [for the tenancy is extinguished in the seigniory, and the lands escheated constitute part of the manor. *Dudley* v. *Paul*, 15 *Ves.* 167. But if a tenant purchases the

seigniory, then neither the tenancy nor the seigniory will pass without a republication of the will.]

Thirdly, in respect of the estate and time that is devised.

Fee simple.

If one devise his land thus, I give my land in *Dale* to *I. S.* and his heirs, or to *I. S.* in fee, or to *I. S.* in fee simple, or to *I. S.* for ever, or to *I. S. habendum sibi et suis*, or to *I. S.* and his assigns for ever; or thus, I give my land to *I. S.* to give, sell, or do therewith at his pleasure; by all these, and such like devises, a fee simple estate is made of the thing devised, and *I. S.* shall have the same to him and his heirs for ever (75). [The rules which govern this subject, and the cases which illustrate the rule, are collected in 2 *Prest. Est.* 73. The rules may, with propriety, be added in this place. They are—

Bro. Sect. 133. Perk. Sect. 1. 6. Lit. Sect. 586. Kelw. 43. Co. super Lit. 19. 20 H. 6. 35. Bro. Sect. 432. 19 H. 8. 10.

Firstly, That the testator has, in direct terms, expressed an intention that the devisee shall, 1st, have the land for ever; or, 2nd, have the power in point of estate over the fee; or, 3d, that his estate in the land shall not determine at his death, nor be confined to his issue; for a gift confined to the issue would be an estate tail; or, 4th, where the objects of the devise are named by a term, which refers to them in a particular character, as having a perpetual continuance.

Secondly, That the terms, in which the testator has expressed his will, do, in common acceptation, import a gift of all his interest in point of estate.

Thirdly, 1st, That the purposes of a trust he has created, or any other purpose he has expressed, cannot be certainly performed; or, 2nd, an act he has directed to be done cannot certainly and effectually be accomplished; or, 3d, a charge he has imposed cannot be sustained; unless it be determined that an estate in fee is devised.

Fourthly, That the person in whose favor the devise is expressed is made personally liable to the payment of a sum in gross, or an annual sum, and no estate is expressly limited to him; and he may receive a prejudice and sustain some loss, unless it be held that he take an estate in fee.

Fifthly, That the estate of the devisee is not to determine merely and simply on his death, but on an event connected with his death, and leading to

(75) Trustees have a fee without words of limitation, where the purposes of the trusts require it; and in a devise to trustees it is not necessary the word "heirs" should be inserted to carry the fee at law. *Per* Lord *Hardwicke*, 1 *Ves.* 491; see also 3 *Burr.* 1686.

the conclusion that he is not to have an estate for life only.

Trust estates, as well as legal interests, are equally within the scope of these five several classes.

There is a sixth class of cases, and they afford a rule peculiar to trust estates; thus—

Sixthly, When the legal estate is devised in fee, and there is an apparent intention that all the beneficial interest of that estate should belong to a particular person, or to a class or description of persons, although in the devise to them of the trust or beneficial ownership, there are not any words of limitation, the fee of the trust will pass.]

But if land be granted by deed after this manner, *I. S.* by this grant in all these cases, except only in the first case, hath only an estate for life [at law; but in case of a purchase, equity would decree an estate in fee to be granted.] And if a man devise his land to *I. S.* and say not how long, nor for what time, by this devise *I. S.* hath an estate for life only in the land; [except in particular cases, as where there is a charge for payment of debts, a limitation over, and the like. See cases, 2 *Prest. Est.* 207.] Deed.

Fitz. Devise, 111.

Co. super Lit. 9. Perk. Sect. 57. 239. New Terms of the Law, tit. Devise. Trin. 2 C. B. R. Reply and Daniel's case. Co. 6. 16. Dyer, 126.

If a man devise his land to *I. S.* and his assigns, without saying "for ever," it is said by some, that by this devise *I. S.* hath only an estate for life. But the contrary is [erroneously and by mistake] affirmed elsewhere, and that it is a fee simple. [The former is the better opinion; as there are not added to the disposition of the land any words declaratory of the intention of the testator, that the person to whom the land is given should have any power over it beyond the term of life. The word "assigns" is perfectly compatible with an estate for life; and to carry the intention beyond that period, some words of perpetuity, or equivalent expression, must be added.]

If one devise his land to his wife, to dispose thereof at her will and pleasure, and to give it to one of her sons; in this case, and by this devise, she hath a fee simple; [*read*, a fee, subject to a condition;] but it is qualified, for she must convey it to one of her children, [*read*, sons,] and cannot convey it to another (76).

(76) In the case of *Thomlinson* v. *Dighton*, 1 *Salk.* 240, *H.* being seised in fee, devised to his wife for her life, *and then to be at her disposal to any of her children who should be then living:*

If one devise his land to *I. S.* paying 10*l.* and use no other words; by this devise the devisee hath the fee simple of the land, albeit the 10*l.* be not the hundredth part of the worth of the land (77). And yet if one devise his land to *I. S.* for his life, paying 10*l.*; by this devise *I. S.* shall have an estate for life only; [for *expressum facit cessare tacitum*] (78). Adjudged Hil. 26 El. Co. B.

If one devise land of the value of 50*l.* per annum to *I. S.* for life, the remainder to *I. D.* paying 40*l.* to *W.*; by this devise *I. D.* [by reason of the charge] shall have the fee simple of the remainder upon condition. [Upon condition should be omitted. There is, it is apprehended, a charge only, and not a condition.]

If one have two sons, and he devise his land first to his wife, and then he saith thus: in like manner, I will that my son *A.* shall have it after my wife's death; and if my wife die before my son *B.* then that my son *A.* shall pay to *B.* 3*l.* by the year during the life of *B.* and also 20*l.* to *W. S.*; by this devise, *A.* shall have the fee simple of this land; [since from the charge of the annuity during the life of *B.* it is obvious that *A.* is to have the land for a longer period than his own life.] Hil. 17 Jac. B. R. adjudged Spicer's case.

If one devise his land thus: I will my land to my son *W.* for his life, and after his death to my son *T.* and if my son *W.* purchase land as good as that land for my son *T.* then that my son *W.* shall sell the land devised to my son *T.* as his own, and I will that my son *W.* shall pay to his sisters 10*l.* by 20*s.* a year; in this case, and by this devise, *W.* hath a fee simple; for power [or rather right or ownership] to sell, giveth by implication an estate in fee simple, and it is paying also, &c. Curia, M. 18 Jac. B. R. Green v. Dewel.

---

the court held it to be only an estate for life, with a power to dispose of the inheritance. See the same case more fully reported in 1 *P. Wms.* 149. As to the execution of a power of appointment among children, see the case of *Robinson* v. *Hardcastle*, Mich. 26 Geo. 3, *Bro. Rep.* in Canc. vol. 2, p. 22.

(77) See accordingly *Wellock* and *Hammon's case*, 2 *Leon.* 114, and further in *Vin. Abr. Devise* (S. a.)

(78) And therefore agreeable to these principles is the case of *Doe* v. *Fyldes*, in *Cowp. Rep.* 841, it was held, that where lands are devised *without words of limitation*, and the lands *are charged with a gross sum*, the devisee by implication of law takes a *fee*, because the manifest intent of the testator being decisive, and no technical form of words necessary to express it, the certainty that the testator must mean a bounty to his devisee, is sufficient to supply the want of a formal limitation; but where an *express* estate for *life*, or an *express* estate *tail*, is given in terms, no such implication can arise from such charge only.

[The decision was, that *Thomas* had a fee simple by reason of the charge. *William* did not perform the condition on which he was to have the fee.]

Pasch. 14 Jac. B. R. Curia. If one devise land to his wife and her heirs, and if the heir put her * out that she shall have other land; by this devise she hath the fee simple of the first land, and is not abridged by the latter words. *P. 440,

Trin. 30 Eliz. If one devise his land thus: I give *Whiteacre* to my eldest son and his heirs for his part: *Item*, *Blackacre* to my youngest son for his part; by this devise the younger son shall have the fee simple of *Blackacre*. [*Query*; and see 2 *Prest. Est.* 195.] So if I give *Whiteacre* to *I. S.*: *Item*, *Blackacre* to *I. S.* and his heirs; by this devise *I. S.* shall have the fee simple of *Whiteacre* also. [*Fenny* v. *Eustace*, 4 *Maul. & Selw.* 58.]

Perk. Sect. 566. If one give land to his wife for life, the remainder to his son and the heirs male of his body, and, for want of such issue, the remainder to the next heir male of the donor and the heirs male of his body; it seems by this devise, that the next heir male of the son [*read*, of the donor,] hath a fee simple (79). [It is apprehended, the person who answers the description, at the determination of the prior estates, will have an estate tail. 1 *Prest. Est.* 278.]

Co. super Lit. 21. 26. If one devise his land thus: I give my land in *Dale* to *I. S.* and to his, or (to the) heirs male, or heir female of his body, (or of his body begotten,) or to *I. S.* and his issues male, or his issues female; or to *I. S.* and the heirs male of his body begotten on *M.*; or to *I. S.* and *E.* his wife, and the heirs male, or heirs female of their two bodies begotten; or to *I. S.* and his heirs, if he shall have any heirs of his body, else that the land shall revert; or to *I. S.* and his heirs, if he have any issue of his body; or to *I. S.* and the right heirs male of his body; or to *I. S.* and his Fee tail.

(79) See more amply what words will pass a fee, in *Com. Dig. Devise* (N. 4.); *Vin. Abr. Devise* (L. a.); *Bac. Abr. Devises* (C.); 1 *Atk.* 436; *Frogmorton* on dem. of *Wright* v. *Wright and Kershaw*, 3 *Wils.* 414; *Gilb. Dev.* 17 to 26; *Treat. of Eq.* 59; *Right* v. *Sidebotham*, *Dougl.* 730. In the case of *Hogan* v. *Jackson*, *Cowp.* 299, in appeals from Ireland " all the *remainder and residue of all his* EFFECTS both *real* and *personal* which the testator should die possessed of," was held to give a fee. All these cases are upon " I devise *my land*," &c. no mention of estate or *interest*. Devise of " all my estate," or " all my interest," are tantamount to an express *devise* in fee; but " *all my lands lying in such a place*," only give an estate for life. See Lord *Mansfield's* decision in *Right* v. *Sidebotham*, *Dougl.* 734; see also *Cowp. Rep.* 660.

heirs, provided that if he die without heirs of his body, that the land shall revert; by all these and such like devises, an estate tail is made of the thing devised, and *I. S.* the devisee shall have the same accordingly (80).

Deed. If one devise his land thus: I give my land in *Dale* to *I. S. et semino suo*; by this devise *I. S.* hath an estate tail: but if he say, I give my land in *Dale* to *I. S. et sanguini suo*; it is said by this devise *I. S.* hath the fee simple of the land. If one devise his land to *I. S. et exitibus, vel prolibus de corpore suo*; by this devise, if *I. S.* have no children at the time, it seems he hath an estate tail. [At this day, it is apprehended, the devisee would have an estate tail, although there were issue at the date of the will.] But by such a limitation by deed is made only an estate for life. If one devise his land thus: I give my land in *Dale* to *I. S.* for life, the remainder to *I. D.* and *E.* his wife and their children; or to *I. D.* and *E.* his wife and their men children; or to *I. D.* and *E.* his wife and their issues; by these devises, if the husband and wife have no children at the time of the devise, is created an estate tail; and if they have any children at the time of the devise, then hereby is created an estate for all their lives only in joint-tenancy. [Cases of this sort depend on the context and the general intention. Such expressions sometimes create an estate tail.] And if land be devised to *A.* for life, the remainder to *B.* and the heirs of his body, the remainder to *I. S.* and his wife, and after to their children (81); by this devise *I. S.* and his wife have estates for their lives only, and their children after them estates for their lives jointly; and albeit they have no children at the time, yet every child they shall have after, [during the particular estate,] may take by way of remainder. [At this day such generic words may, in favor of a general intention, create an estate tail. 2 *Prest. Est. chap. Tail.*] And so also it Deed. seems is the law upon such a limitation by deed.

Co. super Lit. 9. Bro. tit. Tail, 21. Co. super Lit. 20. 6. 16.

(80) Devise to a man and the heir of his body, though in the singular number, is an estate tail, if he had none at the time that might take jointly with him. 1 *Bulst.* 219; *Treat. of Eq.* 60.

(81) Devise to *the right heirs of husband and wife*, is a devise to such person as answers the description of heir to both, namely, *a child of both*; and if no preceding estate be given to the father and mother, such child shall take as a purchaser. *Roe* v. *Quartley and Wife*, 1 *Durnf. & East's Rep.* 630.

Lit. Sect. 31. 9 H. 6. 25. 27 H. 8. 27.

* If lands be devised to *I. S.* and his heirs male, or his heirs female, without saying "of his body;" by this devise *I. S.* hath an estate tail; [for the law will supply the want of words of procreation.] But if such a limitation be by deed, it is a fee simple, [for want of words of procreation.]

*P. 441. Deed.

Hil. 22 Jac. B. R. Daniel's case.

If one have two sons, and devise *Whiteacre* to his eldest son and his heirs, and *Blackacre* to his youngest son, [or to a stranger,] and his heirs, and if either of them die without issue, then that the other shall be his heir; by this devise either [*read*, each] of them hath an estate tail [by way of cross-remainder, by reason of the limitation over,] and no fee simple.

Adjudged M. 9 Jac. Wallop's case.

If one have land in Kent in *W. S.* and *T.* and have one male child and a daughter, and his brother hath three children, *B. C.* and *D.* and he devise his land thus: *Item*, I give my land in Kent to my male child and his heirs, and if he die without heirs of his body, that the land in *W.* shall go to *B.* and his heirs. *Item*, I will my land in *S.* to *C.* and his heirs, and my land in in *T.* to *D.* and his heirs; in this case, and by this devise, the male child of the devisor hath an estate tail in all the lands; [*viz.* an estate in tail made in the lands first devised, and an estate in tail general in the lands secondly devised;] and after his death without heirs (of his body), [*viz.* heirs inheritable to his respective estates tail,] it shall remain according to the will: so that if one devise his land to his eldest son and his heirs, and if he die without heirs of his body, that it shall remain to his youngest son, [or a stranger,] and his heirs; by this devise, the eldest son, [by reason of the words of limitation over,] hath an estate tail, and the youngest son the fee simple. [So if there be a devise to one and his heirs, and if he should die without heirs, then to another who is inheritable to the first devisee and his heirs, by this devise the first devisee hath an estate tail; the word heirs in the first devise must be confined to heirs of the body, since he cannot die without heirs general while the other devisee or his heirs [shall] be living. But if the second devisee was not inheritable to the former devisee, *i. e.* if the second devise were to a mere stranger, or to a charity, or even to a person of the half-blood, then the first devise would pass the fee

depending on a fee. The cases are collected in *Prest. Estates, ch. Tail.*]

If one devise his land to his son *W.* and if he marry and have any issue male begotten of the body of his wife, then that issue to have it; and if he have no issue male, then to others in remainder; by this devise, it seems *W.* hath, [to answer the general intention,] an estate tail to him and the issue male begotten on the body of his wife. [But a context may give to the issue an estate as purchasers.] Co. 9. 127.

If one devise *Whiteacre* to *I. S.* and the heirs of his body, and then after saith thus, and I will that *I. D.* shall have *Blackacre* in the same manner that *I. S.* hath *Whiteacre*; by this devise, [and by force of the words of reference,] *I. D.* hath an estate tail in *Blackacre*, as *I. S.* hath in *Whiteacre*. *Et sic de similibus.* And if one devise *Whiteacre* to *I. S.* and then say; *item*, *Blackacre* to *I. S.* and the heirs of his body; by this devise he hath an estate tail in both acres. [*Fenny* v. *Eustace*, 4 *Mau. & Selw.* 58; and cases there cited on the word *item*, also *&c.*] Perk. Sect. 561. 20 H. 6. 36. Tr. 30 Eliz.

If one devise his land to his wife for years, the remainder to his younger son and his heirs, and if each of his two sons die without issue, &c. that it shall remain to his daughter and her heirs, and the younger son die without issue, in the lifetime of the father, and after the father dieth; it seemeth by this devise the elder son shall have the land in tail. [*Tenny* v. *Agar*, 12 *East*, 253, supports this doctrine, and even extends it, for in that case the daughter took an estate tail, though she was not the heir.] Dyer, 122.

If one devise his land to his wife for life, and after to his son, and if his son die without issue, (or having no son) then that it shall go to another; by this devise the son hath an estate tail to him and the heirs male of his body, [by implication; and in the first instance he hath an estate in tail general, and in the other instance, an estate in tail male.] Adjudged Trin. 7 Jac. C. B. Robinson's case.

*P. 442. * If lands be given to a man and woman unmarried, [and who may lawfully intermarry, *Prest. Est. ch. Tail*;] and the heirs of their two bodies, or to the husband of *A.* and wife of *B.* and the Co. super Lit. 20. 26. Plow. 35.

heirs of their two bodies; by these devises are made estates in [special] tail. [If they may not lawfully intermarry, they have a joint freehold and several inheritances in general tail.]

Dyer, 333. If a man devise *Whiteacre* to his three brothers, [House.] and *Blackacre* to *C.* his brother, so as he pay 10 *l.* to *I. S.* and otherwise that it shall remain to the house, provided that the same lands be not sold, but go unto the next of name and blood that are males, if it may be; it seems that by this devise *C.* hath an estate [in] tail [male] in *Blackacre*, and that if he die without issue [male,] it shall go to three other brothers and their heirs male in tail, one after another; and that *Whiteacre* also is so entailed in every of their parts. For the words "shall remain to the house" shall be construed to the most worthy of the family, and the words "that are males" shall be construed in the future tense.

Adjudged 14 Eliz. C. B. and Trin. 9 Jac. B. R. If land be devised to *I. S.* and the heirs of his body, and that if he die, [without heirs of his body will be intended,] that it shall remain to *I. D.* by this devise *I. S.* hath an estate tail, and the latter words do not qualify the former, but *I. D.* must attend, [*i. e.* wait for] his [*I. S.*'s] death without heirs of his body before he shall have the land.

Dyer, 171. If land be devised to *I. S.* and the heirs male of his body, and if it happen that he die without heir of his body, that it shall go to *H.* and his heirs; by this devise *I. S.* hath an estate to him and the heirs male of his body, and the subsequent words do not alter nor enlarge the estate; [for an express estate shall not be enlarged by implication, unless that construction be necessary to give effect to the intention.]

Co. super Lit. 26. If land be devised to *I. S.* and *E.* his wife, and to the heirs of the body of the survivor of them; by this devise the survivor shall have a general estate tail; [but this gift in tail is contingent until the survivor be ascertained. But in gifts, by way of cross-remainder, the word *survivor* is frequently construed merely as *other*.]

Ibid. If land be devised to *I. S.* and the heirs he shall have by *A.* his wife; by this devise *I. S.* hath a fee tail, and not a fee simple as he hath in case of such a limitation by deed. [A gift in these terms would, it is apprehended, pass an estate tail in a deed as well as in a will. 2 *Prest. Estates*, 74.] Deed.

heirs of the body of such a woman begotten; by this devise *I. S.* hath an estate tail; and begotten shall be intended begotten by him. [By the text, the heirs of the body of the wife would be purchasers, *eo nomine.*] Co. supra 22.

If one devise land to his son and his heirs, and that if his son die within the age of twenty-one years or without issue, that the land shall remain over; and the son dieth within age having issue: in this case, and by this devise, the son hath an estate tail, and "or" in this place shall be taken for "and." [According to this case, the remainder-man was to have the lands at all events upon a failure of issue of the former devisee; and in that view of the case, the word *and* is improperly substituted for the word *or*; for if the word *and* be substituted, the words of introduction mark a particular event, as the contingency on which the limitation over is to give an interest; and unless the first devisee die under the age of twenty-one, the limitation cannot operate; and this is in general the allowed construction of such a limitation, so that the first taker hath a fee subject to an executory devise. If he had an estate tail, the gift to him might be defeated by his death under twenty-one, though he left issue. There is a large class of cases on this point, involving the question, whether the words *or* or *and* shall be read in their proper sense, or the word *or* shall be read as the conjunctive *and*, and the word *and* as the disjunctive *or*.] Adjudged M. 37, 38 Eliz. Sale [read, Sawle] v. Gerrard.

Deed. If land be devised to a man and his wife, and to one heir of their body, and the heir of the body of that heir; by this devise an estate tail is made in a will as well as in a deed; [and this is a limited or qualified estate tail for two degrees only. *Prest. Estates, ch. Tail.*] Co. super Lit. 22.

If a man devise his land thus: I give *Whiteacre* to *A.* my son and his heirs, *Blackacre* to *B.* my son and his heirs, and *Greenacre* to *C.* my son and his heirs, provided that if all my said sons die without issue of their bodies, that then all my said lands shall * go to *M.* my wife and her heirs; by this devise they have all of them estates in tail of their land, and as it seems cross-remainders to either of them of the land of each other. [The words of gift to the sons and their heirs, were, by M. 18 Jac. B. R. Gilbert's case.

*P. 443.

reason of the words limiting the remainder, held to pass an estate tail only, to comply with the intention which the testator had expressed, that the wife should take when the issue of the three sons should fail; and the language of this will required the implication of cross-remainders.]

Co. 9. 128. If one devise his land thus: I give my land in *Dale* to *I. S.* and if he die without issue male of his body, that then it shall remain over to *I. D.*; by this devise *I. S.* hath [by implication] an estate [in] tail [male.]

Lit. Sect. 43. Bro. Devise, 38. Done, 44. If a man hath issue three sons, and devise his land thus, *viz.* one part to two of his sons in tail, and another part to his third son in tail, and that neither of them shall sell his part, but that each of them shall be heir to the other; in this case, and by this devise, each of them hath an estate tail, and if one of them die without issue, his part shall not revert to the eldest, but shall remain to the other son, for it is an implied remainder. [As there were three sons, the words of limitation in remainder were held to pass an estate tail only, to comply with the intention the testator had expressed, of giving an estate which would not confer the power of unlimited alienation.]

Co. super Lit. 26. If there be husband and wife, and they have issue a son and a daughter, and the husband die, and land is devised to the wife and the heirs of her late husband on her body begotten; in this case, and by this devise, the wife hath only an estate for life, the son an estate in tail, [by purchase,] which on his death, without issue, may descend to the daughter, or her issue, as heir under the same intail, [*Prest. Est. ch. Tail.*] And so also the daughter in case he die without issue (82): [and the daughter will take by descent.]

Co. super Lit. 147. 84, 85. If one devise to *I. S.* that if he and his heirs of his body be not paid 20 *l.* rent yearly, he and they shall distrain, &c. by this devise *I. S.* hath [by implication] an estate tail of this rent. But if the devise be that if *I. S.* be not paid 20 *l.* yearly, he shall distrain, &c. by this devise *I. S.* hath only an estate for life. So if one devise a rent of 10 *l.* out of his land to be paid quarterly, and say not

For life.

(82) See more amply what words give an estate tail, in *Bac. Abr. Devises* (D.); *Com. Dig. Devise* (N. 5.); *Vin. Abr. Devise* (N. a.); 1 *Atk.* 429; *Eq. Ca. Abr. Devises* (D.); *Morgan et Ux.* v. *Griffiths*, *Cowp.* 234.

estate for life.

If one devise his land thus: I give my land in *Dale* to *I. S.* for his life, or to *I. S.* (without any more words), or to *I. S.* and his heir in the singular number, or *I. S.* and his children, and *I. S.* hath children at the time of the devise; the devisee will have an estate tail, if there be a limitation over, showing an intention to entail, *Hodges* v. *Middleton*, *Dougl. Rep.* 431; or to *I. S.* and his successors (*I. S.* being a natural person); [in this instance *I. S.* would take the fee, 2 *Prest. Est.* 74; by all these and such like devises *I. S.* hath only an estate for life in the thing devised (83.) But if the testator have only a term of years in the land whereof the devise is made, and devise this land to *I. S.* and doth not say for what time; it seems that by this devise the whole term is devised, unless the intent doth appear to be otherwise, [as where the devise is expressly confined to the period of a life, &c.] And if a man devise land (whereof he is seised in fee) to *I. S.* paying 10*l.* to *I. D.*; by this devise, albeit there be no estate expressed, yet *I. S.* hath a fee simple of the land, in respect of the payment of the money. But if the intent of the testator appear to be that *I. S.* shall have the land but for his life, *contra*; for there the consideration will not alter the estate expressed upon the gift. [2 *Prest. Est.* 232.]

Fitz. Devise, 16. Co. 6. 16. Pert. Sect. 577.

Mich. 13 Ja. B. R. Dyer, sect. 397.

See before. Lit. Bro. Sect. 406. 125.

Deed. If land be devised thus: I give my land in *Dale* to *I. S.* and his assigns, (without more words); by this devise is held to be given no more but an estate for life, by construction upon a will as it is *P. 444. * upon a deed. And yet in the *New Terms of the Law*, tit. *Devise*, the contrary is affirmed (84). *Ideo quære.* [On this point no doubt now exists.]

Co. super Lit. 9. 4. 29.

If one devise thus: I will that *I. S.* shall have and occupy my land in *Dale*, and say not how

Pasch. 9 Jac. Newman's case.

---

(83) Cases upon the question, whether estate for life or in fee, where words of inheritance are not inserted in the devise, see *Right* v. *Sidebotham*, *Dougl.* 734; *Roe* v. *Blacket*, *Cowp.* 235; where the court said, "In order to make a devise of lands, *without any limitation* added, a fee, such an *intention* must appear as is sufficient to satisfy the conscience of the court in pronouncing it such; if it be barely problematical, the rule of law must take place." The word "*estates*" in a will, is equivalent to the word "*estate*," and will carry the fee, unless coupled with other words which show a different intention. *Fletcher* v. *Smiton*, 2 *Durnf. & East's Rep.* 656.

(84) And see accordingly in *Swinb.* 250, and 4 *Burn's Ecc. Law*, 122.

Dyer, 341. his life. But if I devise that *I. S* my land, and say no more; by hath no estate at all, but power land only. [*Query.*]

Co. super Lit. 21. If a man have a son and a dau and lands are devised to the da heirs female of the body of the devise the daughter hath only an e for there is no[t any] such person heir. [But if the son should die i the daughter without issue, the answering the description of hei body, would take an estate tail addition to her life estate; and th would merge in the estate tail, if b vested in her at one and the same

Co. 1. 66. If one devise his land thus: I *Dale* to *I. S.* for his life, and af right heir of *I. S.* in the singular his right heirs for ever; by this de only an estate for life; [and the next in the line of succession to hi estate in fee.] So if one devise l life, and after to the next heir male the heirs male of the body of such by this devise *I. S.* hath an estat But if it be thus: I give my land i for his life, and after to the heirs, heirs of *I. S.*; by these devises, *I.* simple of the land; and if it be t and after to the heirs male of *I. S.* *I. S.* hath an estate tail. [In the proposed, the epithet *next* is applie as a designation of that person. In t the subsequent devise passed an esta of the rule in *Shelley's case*, a most i The learning of a *Fearne*, a *Butle grave*, (names which will be long r those who cherish a love of professio have been employed most usefully this rule and its exceptions. Mr. V Treatise on Descents, has simplif and the labours of the present edi applied to give a succinct view of mode to render the distinctions m

[redacted]

rule. See 1 *Prest. Est.* 203, (85).]

(85) It hath been said to be a general rule, that whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then executes in the ancestor, and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates. *Fearne on Cont. Rem.* 25, 3d edit. See accordingly *Papillion* v. *Voyce*, 2 *P. Wms.* 472. Whenever the ancestor takes an estate for life, and after a limitation is made to his right heirs, they shall not be purchasers. The *intention, though in express words*, will not *control the operation of law upon the words expressed.* As where an ancestor has an estate for life given to him *expressly*, a limitation after to his heirs, or to the heirs male of his body, puts the inheritance in himself; otherwise, perhaps, of heir male only, in the singular number, if, especially, there be words of limitation after it. *Treat. of Eq.* 60. In the case of *Perrin* v. *Blake*, decided in B. R. Hil. Term, 10 Geo. 3, there was the following devise. "Should "my wife be ensient with child, at any time hereafter, and it be a female, I give and be- "queath unto her the sum of 2,000 *l.* &c.; and if it be a male, I give and bequeath my "estate real and personal equally to be divided between the said infant and my son *John* "*Williams*, when the said infant shall attain the age of twenty-one. *Item*, It is my intent "and meaning *that none of my children should sell or dispose of my estate for longer time than* "*his life*, and to *that intent* I give, devise, and bequeath all the rest and residue of my estate "to my son *John Williams* and the said infant for and during the *term of their natural lives*, "the remainder to my brother-in-law *I. G.* and his heirs for and during the lives of my son "*John Williams* and the said infant, the remainder *to the heirs of the body of my said sons* "*John Williams* and the said infant lawfully begotten or to be begotten, the remainder to "my daughters," &c. No other son was born, and the question was, what estate *John Williams* took under this will? whether for life or in tail? This case was twice solemnly argued, and the court determined that *John Williams* took only an estate for life. Lord *Mansfield* the Chief Justice, Mr. Justice *Aston*, and Mr. Justice *Willes* were of that opinion; and Mr. Justice *Yates* held that he took an estate tail. From this judgment of the court of King's Bench a writ of error was brought in the Exchequer-chamber, where the decision of the court of King's Bench was reversed on the opinions of Chief Baron *Parker*, the Barons *Perrott* and *Adams*, and Justices *Gould*, *Blackstone*, and *Nares*, against the opinions of Sir *William De Grey* Chief Justice of the Common Pleas, and Baron *Smythe*. By this reversal the judges appear to have been nearly equal (in number;) five being of opinion that it was an estate for life only, and seven that it was an estate tail. From this reversal an appeal was lodged in the House of Lords, but it was withdrawn upon a compromise. As a similar case may frequently arise in *wills*, it is matter of regret that the general question arising in *Perrin* v. *Blake* was not finally decided by the appeal to the court of dernier resort. Those who incline to think that the devisee took an estate tail, may find that construction supported by a number of arguments in *Fearne's Essay on Cont. Rem.*; and for a further state of the case, see 4 *Burr.* 2579. Mr. Justice *Blackstone*, in his argument in *Perrin* v. *Blake*, in *Hargr. Tracts*, 502, mentions the cases of *Whiting* v. *Wilkins*, 1 *Bulst.* 219; *Rundle* v. *Healy*, *Cart.* 170, and *Broughton* v. *Langley*, to show that the rule in *Shelley's case* is applied to wills as well as deeds; and adds, that that rule is in *Co. Lit.* 376. In *Shelley's case*, and in *Moore*, 720, the Earl of *Bedford's case* extended to *all conveyances*; and concludes, "that devises of lands (which differ totally from testaments of chattels) are "held in all our books, and particularly in *Windham* v. *Chetwynd*, 1 *Burr.* 429, to be a *species* "*of conveyance*; and this is the reason why lands purchased after the execution of it cannot "pass by such a devise."

after their decease, (or the remainder) to their children; by this devise, whether they have or have not children at the time, *I. S.* and *E.* his wife have estates for their lives only. [The children shall take by purchase or descent, and consequently the parents will take for life or in tail, as the context or general intention may require.]

Curia, 7 Ja. Co. B.

If one devise a moiety of his land to his wife for life, and the other moiety to his second son, and after by another clause doth devise it all to his son after the death of his wife; by this devise the son hath only an estate for life after the wife's death, and no more. [This conclusion would not be readily adopted at this day. It annuls the first gift to the son, while a sounder interpretation is, that the son is to have one moiety in the life of the wife, and both moieties after her death. See *Wolfe* v. *Alcock*, 1 *Barn. & Ald.* 137.]

Bro. Devise, 48. 52. Lit. Sect. 107. 13 H. 7. 13. New Terms of the Law, tit. Devise. Plow. 158. 414. 521.

If one devise his land to *I. S.* in fee after the death of *I. B.* (being his son and heir apparent;) by this devise *I. B.* hath an estate for life by implication, and, until the devise take effect, the law gives it to him by descent. [This, it is apprehended, is a mistake. The law is understood to be, that an estate for life arises to the heir by implication; not that the devise to *I. S.* is suspended till the death of the heir. The consequence is, the heir hath an estate for life, with remainder in fee to *I. S.* But if the devise be to take effect after the death of a stranger, the gift will, according to the general current of the authorities, operate by executory devise, and the fee will descend in the meantime to the heir at law. 1 *Prest. Estates*, 142. 182; *Prest. Est. ch. Life.* So an estate tail may arise to the heir by implication, by reason of a gift to another person on the failure of his issue generally, or issue of a particular description. *Walter* v. *Drew*, 1 *Comyns*, 372; *Wealthy* v. *Bosville*, *Cas. Temp. Hard.* 258. So an estate tail may arise by implication, to two persons in succession, when one of them is the heir; and the limitation over shows an intention that a third person should take, on the failure of their respective issue. *Tenny* v. *Agar*, 12 *East*, 253; *Gardiner* v. *Sheldon*, *Vaugh.* 259, *dubit.*; 2 *Prest. Abst.* 127. In some cases, the words referrible to a failure of

They have either been treated as transgressing the rule against perpetuities, or providing for a failure of issue at the death of the testator. *Lanesborough* v. *Fox, Cas. Temp. Talb.* 262; *Merrick* v. *Banks*, in Ch. 1821.] And so also it seems the law is where one doth devise his land to *I. S.* after the death of his wife; that by this devise the wife hath an estate for life by implication (86). And therefore if a man devise thus: I give my goods to my wife, and that, after her decease, my son and heir shall have the house where the goods are; it is held by this devise, that the wife hath an estate for life in the house by implication; for a man is bound to provide for his own wife. But if a man devise his land to *I. S.* after the death of *I. W.* (a stranger to the devisor); it seems that by this devise *I. W.* hath no estate at all by implication, and that this doth but set forth when the estate of *I. S.* shall begin, and that the intent of the testator is, that his heir shall have it until that time. [In *Davies* v. *Speed, Cro. Eliz.* 439; 1 *Prest. Estates*, 231, the wife took an estate for life by implication, although the devise was to the second son, and not to the heir.]

If one devise land thus: I give my land in *Dale* to *I. S.* to the intent * that, with the profits thereof, he shall bring up a child; or to the intent, that with the profits thereof, he shall pay to *A.* 10*l.* or to the intent that he shall, out of the profits thereof, pay yearly 10*l.*; by these devises *I. S.* hath only an estate for life, albeit the payments to be made be greater than the rent of the land; and therefore, it is not like to the case before, where a sum of money is to be paid presently. [*Query*, if the devises will not, in some of these cases, be *pour autre vie*] (87).

Co. 6. 16. 3. 39 Bro. Estates, 78.

*P. 445.

If *A.* devise his land thus: I give my land to

Dyer, 357.

(86) A devise of lands to the heir after the death of the wife, by a necessary implication, gives an estate for life to the wife, because the heir was not to take till after her death; but if the devise be to a stranger after the death of the wife, *that* gives no estate for life to the wife by implication; but the estate during her life shall descend, and go to the heir at law. 2 *Vern.* 572. See further in *Bac. Abr. Devises* (G.); *Com. Dig. Devise* (N. 12.) As to estate for life by *implication*, or by way of *resulting* use, see *Fearne*, 42.

(87) For where there is a devise of lands, without any words of limitation, and they are charged with a gross sum, a court of law infers an estate in fee by necessary implication but that implication never arises where an express estate for life or in tail is given in terms *Per* Lord *Mansfield*, in *Doe* v. *Fyldes, Cowp.* 841.

Alice, my cousin, in fee simple,
to *W.* her son (who is her heir ap
devise she hath an estate for life f
der to her son for his life, the r
heirs of *A.* in fee simple. And s
when the devise is to any other a
[The estate for life to the son ope
exception.]

Dyer, 371. If my father be tenant for li
remainder to me in fee, and I de
my wife, rendering for her natural
right heir of my father; by this
hath an estate for life after the dea
[This case, as not passing a fee,
peculiar circumstances.] (88).

Co. 3. 20. If one devise his land unto his
his son shall come unto twenty-one y
profits to be employed towards the
his will, and when he shall come to
that his son and his heirs shall h
devise the executors shall have it unt
one years of age, and if he die be
until the time he should have been tw
of age, if he had lived so long; a
this case shall be taken for "should
gift to the executors be for the bene
then the chattel interest would det
death during minority. *Mansfiel*
1 *Eq. Ca. Abr.* 195; *Prest. Est.* c
A late case, *Dudley* v. *Freeman*, arg
Chancellor in May 1821, and stan
ment, will probably afford some i
tinctions on this subject.]

Co. super Lit. 42. If one devise his land to his exe
payment of his debts, and until his c
by this devise the executors have but
an incertain interest (89), and they e

---

(88) See the excellent systematic distribution of the di
estates for life, in tail, or in fee, such as, "if he die with
word "estate or land, &c." "heir, or each other's heir, &c
(R. a.) to (Z. a.) vol. 8, p. 218 to 243.

(89) Being neither an estate for life, years, or at will; for
it for their lives, then by their death their estate should ce
being a *chattel*, it shall go to the executors of executors, for
Co. *Lit.* 42, a. But if *such estate* be made by *grant or conv*
law will adjudge it an estate of freehold; a more favourabl
a will, in point of interest or estate, to satisfy the will of the
than of a grant or conveyance in his life. See 10 *Rep.* 96, a.

cutors shall hold it until the debts be paid and no longer. [*Prest. Est. ch. Years.* In some cases of devises to trustees and their heirs for similar purposes, it has been held that the trustees had a chattel interest; *Goodtitle* v. *Whitby*, 1 *Burr.* 228; and in other cases, by a departure from principle, that the trustees had a determinable fee. 3 *Prest. Abstr.* 239. The distinction will be examined in *Prest. Essay on Estates, ch. Years*, &c.]

If one devise his land to *I. S.* and the heirs male of his body for the term of fifty years; it seems that, by this devise, *I. S.* hath but a lease for so many years, if the heirs male of his body shall so long continue, and that, for want of issue male, the term of years shall end (90): and in this case, the executor or administrator, not the heirs male of *I. S.* shall have it after his death. [The real question in this case is, whether there be or be not an estate tail? If there be not an estate tail, why, in the creation of the estate of a chattel quality, should not the qualifications prevail? If there be a chattel interest, the executors, and not the heirs male, must take. But on the bequest and settlement of terms of years already in existence, and of chattels, children, &c. may in some cases be purchasers by the names of heirs of the body, heirs male of the body, &c. *Peacock* v. *Spooner*, 2 *Vern.* 43. 195. Words of superadded limitation, as to heirs, &c. and their executors, &c. will in general produce this effect.]

Co. 10. in Leonard Lovie's case, 87. 46.

Executors.

Fourthly, in respect of other matters.

If one devise his land thus: I give to *I. S.* and *I. D.* and their heirs, my land in *Dale* equally; or my land in *Dale*, to be equally divided; by these devises *I. S.* and *I. D.* shall have and hold the land, not as joint-tenants, but as tenants in common, so that the heir and not the survivor shall have his part that first dieth: and yet in case of such a limitation by deed, it is otherwise. [Even in

Adjudged Lowen v. Cone, Mich. 37. 38 Eliz. Co. B. Dyer, 25. Bro. Sect. 133. Lit. 283. Perk. Sect. 170. Dyer, 350.

(90) In *Burgis* v. *Burgis*, 1 *Mod.* 115, Lord Keeper denied the opinion of Lord *Coke* in *Leonard Lovie's case*, which saith, that in case of a lease *settled* to one and the heirs male of his body, when he dies the estate is determined; for *Finch* said it should go to his executors. And in the Duke of *Norfolk's case*, 3 *Chan. Ca.* 30, Lord *Nottingham* said, it was Lord *Coke's* error in *Lovie's case*, to say, that if a term be *devised* to one and the heirs male of his body, it shall go to him or his executors, no longer than he has heirs male of his body, it having been resolved otherwise in *Leventhorp* and *Ashley's case*, 11 Car. B. R. *Roll. Abr.* tit. *Devise*, fo. 611, for these words are not the limitation of the time, but an absolute disposition of the term. See accordingly and further as to the limitation of a chattel, in *Fearne on Cont. Rem.* 342, and note 5, (referred to before) to 13th edit. *Co. Lit.* 20, a.

a limitation under a conveyance to
" equally to be divided " will sev
Rigden v. *Vallier*, 2 *Ves.* 257. I
ance at the common law, or in a su
holds, which receives the same cc
common law conveyance, the like
sever the tenancy; at least such h
the more prevailing opinion. 1

Dyer, 326. 3 *Prest. Abstr.* 49; 1 *Watk. Cop*
if one devise his land to *I. S.* and
heirs (without more words;) it
this is understood as settled] that
they shall take and hold as joint-ten
if one devise land to *I. S.* and *I. L*
of either of their bodies lawfully
seems * that by this devise *I. S.* a
take and hold as tenants in comm
joint-tenants; [*i. e.* they have the fre
tenants, with several inheritances,
the limitation being in tail, and t
either, *viz.* to their respective issues.
be made to two persons who may
marry, and the heirs of their two bo
a joint estate tail; and if they be act
they have an estate by entireties.

Pasch. 9 Jac. Newman's case. 131; *Ibid. on Est. ch. Tail.*] And s
his land to *I. S.* and *I. D.* thus: I
and *I. D.* shall have my lands in *Da*
them indifferently to them and their h

Hil. 13 Ja. B. R. adjudged Blandford's case. If one be possessed of a term of y
and devise the same to his wife during
and if she die within the years, then
his two sons, if they have no issue
they or either of them have issue ma

[1 Inst. 388, a.] it shall go to the use of those issues m
die, and the two sons die without iss
of their wives being privily with ch
which after his death is born; in this
this devise, this issue male shall have i
learning of executory bequests,] as s
born; [for a child *en ventre sa mere* i

Co. 10. 46. Lampet's case. Perk. Sect. 558, 559. as a child born.]
If one be possessed of a term of y
devise it to another and his heirs, or his

(91) See very fully as to what words create a joint-tenancy
their different operation when contained in a deed or in a wil
&c. (F.); *Com. Dig. Chancery* (3 V. 4.); *Vin. Abr. Joint-tenan*

[redacted]

Heir.

by this devise the executors or administrators, not the heirs of the legatee, shall have it; [for in general, and with some few exceptions, chattel interests are transmissible to executors, and not to heirs.] And therefore, if lessee for years of land devise all his interest therein to his wife if she live so long, and after her death, if any part of the term be to come, devise the same to *I. S.* his son, and the heirs of his body; in this case, and by this devise, the executors and administrators of *I. S.* not his heirs, shall have it, at least, so long as he hath any heirs of his body; [it is now settled that *I. S.* will have the residue of the term, being a term already *in esse*, absolutely (92);] and yet if one possessed of a term of years, devise it to *I. S.* and after his death that the heir of *I. S.* shall have it; in this case, *I. S.* shall have so many years of the term as he shall live, and the heir of *I. S.* [as a purchaser,] and the executor of that heir, shall have the residue of the term. [In some cases the words "heirs, &c." will be words of limitation, and not of designation or purchase. The cases are collected by Mr. *Powell*, on *Fearne*, on Executory Devises.]

If one give 10*l.* to the children of *I. S.* [as a class, and not by name,] and at the time of the devise *I. S.* hath four children, and after, before the death of the testator, he happen to have two more; in this case, and by this devise, the two children he hath afterwards shall have no part of the 10*l.* but those four he had before shall have it all. [The rule is now altered. As the gift is to the children as a class of persons, it is a gift to the children living at the testator's death. A like gift, after a life interest to the parent, would be to all the children who came *in esse* during the life of the parent, *viz.* the children living at the testator's death and all subsequent-born children. 1 *Bro. Cha. Cas.* 386; 2 *Fonbl. Eq.* 351. In all cases of bequests to children, it is proper to define who shall take; *viz.* children *born* and *to be born*, children *already* born, children living at a definite period.] Swinb. 316

(92) The *vesting* of an interest *in terms for years* or in *personal chattels*, which in *realty* would be an estate tail, bars the issue, and all the subsequent limitations, as effectually as fine and recovery of estates tail within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pour autre vie*. As to the limitation of chattels real, see *Hargr.* note 5, to *Co. Lit.* 20, a.

Swinb. 316. If one give 10 *l.* to his parish church, and, at the time of the will made, he live in one parish, and after he doth remove into another parish, and die there; by this devise the parish where he lived before, and not where he died, shall have this 10 *l.* [A will is always to be construed in reference to the time when it is made, unless a different construction be imposed by the testator.]

Dyer, 19. 164. If one devise a third part of all his goods and chattels; by this devise, some say, doth pass and is given no more but a clear third part, after debts and legacies paid; [this is the better opinion;] but it seems a third part of the whole is hereby devised, out of which the debts must first be paid by law (93). Secondly, in respect of the things.

Plow. 343. Swinb. 318. If one devise to another all his goods and chattels, or all his plate, [or his library, or his leases, or all his leasehold estates, or his flock of sheep, or all his pictures and paintings;] or all of any other thing in general, [being a general gift;] by this devise doth pass and is given, not only all the testator hath of that thing at the time of the making of the will, but also all he hath at the time of his death; and not only what he hath in possession, but also what he hath not in * possession: but if one devise all his goods, or all his plate, &c. in such a place, or in the occupation of *I. S.*; by this devise none other will pass but what are in that place, or in the occupation of *I. S.* [But, though it be a specific legacy, it is a generic gift, including the property in its state as found at the death of the testator. The general rules on this subject are collected in 2 *Fonb. Equity*, 334.] *P. 447.

By the opinion of divers lawyers. If one have a term of years of a portion of tithes in *Dale*, and have a term of years of land in *Dale*; and he devise all his lands and tenements in *Dale*, [not having any freehold lands there,] and all his estate therein to *I. S.*; by this devise the portion of tithes doth not pass, for it is neither land, nor tenement; [7 *Taunt.* 352; 2 *Bos. & Pull.* 580;] but by devise of all his hereditaments, perhaps it may pass. *Sed quære.* [And yet tithes are a tenement within the statute *de donis*, so as to be entailable. Tithes.

(93) See fully enumerated the cases as to what words carry what personal estate and chattels real, *Vin. Abr. Devise* (Q. b.)

Goods and chattels.

If one devise to *I. S.* all his goods and chattels; by this devise doth pass and is given all his estate, active and passive, [*i. e.* live and dead,] (except land of inheritance and freehold estates, and such things as depend thereon,) as leases for years, wardships by tenure *in capite*, or by knight's service (94), gold, silver, plate, household stuff, cattle, corn, debts, and the like; and if one devise to *I. S.* all his goods, or all his chattels, by either of these is devised as much as by both of them (95). [2 *Fonb. Eq.* 335.] Portman v. Willis, Pasche, 36 Eliz. Co. B. Co. super Lit. 118. Swinb. pt. 7. c. 10.

Moveables.

If one devise to *I. S.* all his moveables; by this devise doth pass all his personal goods, both quick and dead, which either move themselves, as horses, sheep, and the like; or may be moved by another, as plate, household stuff, corn in the garners and barns, or in the sheaf, &c.; also all bonds and especialties. [Emblements, or corn growing, will pass by the description of moveables. *Toller's Executors*, 157.] And by a devise of immoveables do pass leases, rents, grass, and the like, but not any of those things that do pass by the devise of moveables; but debts will not pass by either of these devises. Swinb. 305, 306. 205. Agreed, Hil. 9 Car. C. B.

Household stuff.

If one devise to another all his household stuff; hereby do pass his plate, coaches, tables, stools, forms, beds, vessels of wood, brass, pewter, earth, and the like; but not his apparel, books, weapons, tools for artificers, cattle, victuals, corn, plowgeer, and the like. [Plate passes, in all cases, under the denomination of household furniture, when it is used for that purpose; but plate belonging to a man, as a silversmith, or in the course of his trade, will not pass as part of the household furniture.] Swinb. 313. pt. 7, c. 10.

[Utensils.]

By a devise of all utensils, it is agreed that plate and jewels do not pass. Dyer, 89.

Election.

If a man devise to *I. S.* one of his horses, or a horse; by this devise *I. S.* shall have the election, if there be more than one, which horse he will have; but if the devise be thus, I will that my executor shall deliver to *I. S.* one of my horses; Swinb. 302.

(94) A guardian by knight's service might have devised the ward of the body and land; so of a guardian in socage; but a special guardian, appointed pursuant to the statute of 12 Car. 2, c. 24, cannot transfer the custody of the ward, by deed or will, to any other. *Vaugh.* 179; *Bac. Abr. Devises* (B.)

(95) See the case of *Masters* v. *Sir Harcourt Masters*, 1 *P. Wms.* 421, and *Cox's* notes thereto.

in this case the executor hath the election, and he may deliver which of them he will. [It is a general rule, that the person who is to do the first act hath a right to make his election, unless the right to elect be fixed by the party, or the testator.]

Swinb. 94. If one devise thus: I give to *I. S.* my corn growing in such a ground this next year, or the lambs of my flock this next year; by these devises the legatee shall have no more but what doth grow that year: but if he devise so many quarters of corn, or so many lambs; in these cases so much must be paid howsoever. [In one case, there is a devise of the thing itself specifically; in the other case, a devise of quantity. Cases of this sort frequently turn on very minute criticisms.]

Co. 4. 66. Plow. 520. Co. 7. 23. If one have a lease for years of land, and devise it to *I. S.* for life; by this devise the whole term is devised, and *I. S.* the devisee, shall have the whole term, if he live so long; and yet *I. S.* shall not have * an estate for life by this devise: and so also it seems the law is upon a grant by deed after this manner. [It is impossible for a man to have an estate for life, which is a freehold interest, under a title depending on a term for years; and if lands held for years are granted to a man for life, he will have all the term determinable nevertheless on his death. *Butt's case*, 7 *Rep.* 23; 2 *Prest. Abstr.* 4. And, in executory bequests for life, the first taker has the whole term at law, and the person who claims under the limitation over has only a possibility.] And if a man possessed of a term of years of land devise his term, or his lease, or the land itself, in either of these cases the whole term doth pass. [2 *Prest. Abstr.* 2. 4.]

Thirdly, in respect of the time.

*P. 448.

Deed.

Dyer, 307.

Pasch. 14 Jac. B. R. Gough and Hayward's case. If a man be possessed of two houses for years, and devise them to his wife for her life, if she live sole; the remainder to *I. S.*; and if she marry then that she shall have one of them during the rest of the term; (and then addeth these words,) and also, I will that she shall have 20*l.* a year out of my other lands; in this case, and by this devise, it seems the annuity shall continue during the term. *Sed quære*, for the judges were divided in this point. [It is most reasonable to conclude, that the substituted interest should be co-extensive with the original interest.]

If a legacy be given, and no time is set for the payment or doing of it, if it be simple, it must be paid and done presently, [*viz.* at the end of a year from the testator's death; but] if it be conditional, and upon a condition precedent, it must be paid or done at the time [when] the condition is first extant, [*i. e.* performed;] and if there be a time set for the payment or doing of it, it must be paid or done at the time appointed (96). Plow. 540. Swinb. 354.

9. Devise of lands to executors or others to sell; or that executors or others shall sell or otherwise dispose them; how this shall be taken, and what sale and disposition shall be good or not.

Devise of lands to executors to sell, to pay debts (97), legacies, &c. are some of them after one manner, and some of them after another (98); for sometimes the devise is thus, I will that my executors, or that *A. B.* and *C.* my executors shall sell my land (99); and sometimes the devise is thus, I give my land to my executors to be sold, or to the end that they shall sell it (100); in the first case, the executors have only an authority and no interest; and therefore in that case the land doth descend in the interim to the heir of the devisor, [3 *Ves.* jun. 513,] and he shall [at law, though not in equity,] have the profits of the land until it be sold (101); and if it be never sold, he shall ever have the profits of it; and in this case, they may sell it when they will, if they be not hastened thereunto by order of [some] court [of equity;] and when they do sell, they must all join Co. super Lit. 236. 112, 113. 15 H. 7. 12. Dyer, 177. 219. Kelw. 107, 108. Perk. Sect. 543. 542. Lit. Bro. Sect. 371. Kelw. 40. 45.

(96) By the civil law, executors have a year's time, from the death of the testator, to pay legacies: and, in conformity to the civil law, the same rule hath been taken up, and is now followed, in the Court of Chancery. *God. Orp. Leg.* 272; 2 *Salk.* 415. See fully at what time legacies are to be paid, and from what time they shall carry interest, in *Bac. Abr. Legacies* (K.); *Com. Dig. Chancery* (3 Y. 9.); 4 *Burn's Ecc. Law*, 308; *Eq. Ca. Abr. Legacies* (D.) and (F.)

(97) Devise of real estate to sell and pay debts, and add surplus to personal estate, discharges the personal estate. *Webb* v. *Jones, Brown*, 60, Mich. 1786.

(98) Where a man devises his estate for payment of his debts, a court of equity says, (and a court of law, in a case properly before them, would say the same,) all debts barred by the statute of limitations shall come in and share the benefit of the devise, because they are *due* in *conscience*; therefore, though barred by law, they shall be held to be revived and charged by the bequest. *Per* Lord *Mansfield*, in *Freeman* v. *Fenton*, *Cowp.* 548.

(99) See *Lancaster* v. *Thornton*, in point, 2 *Burr.* 1027, and *Vin. Abr. Devise* (Q. 3.); *Yates* v. *Compton*, 2 *P. Wms.* 308.

(100) See fully in the notes to the 13th edit. of *Co. Lit.* 112, 113, as to the power surviving.

(101) See the note to *Co. Lit.* 112, a. referred to in note 7, p. 450; and see the case in *Bro. Rep.* 137; and *query*, whether Mr. *H.* or Lord *T.* are correct, and whether Lord *Coke* is not so; for the text is true, that *in a power to sell* the executors hath an authority and *no interest*, and that the estate *descends till the sale*, and this idea is correct and consistent with that of Lord *Coke*, *the vendee is in by the devisor*, upon which Lord *Thurlow* comments with severity; for it seems the *descent is broken* by the *execution of the power, and not till then.*

in the sale, by the common law, or otherwise the sale had not been good; [the cases and distinctions are collected in *Sugd. Pow.* 162;] and therefore if one or more of them, [when the executors are named, 2 *P. Wms.* 626,] had died before the sale, they that had survived, or their executors, could never have sold it by this authority (1); [unless the authority be extended to the survivors, &c.;] so likewise if any of the executors had refused the charge of the will, the land could not have been sold by the rest, unless the words of the will had been that his executors or some of them should sell it; for in that case, some of them even by the common law itself might [by reason of the express authority] have sold, and now also by the statute of 21 Hen. 8, c. 4, some of them may sell it without the rest (2): as if one give his land to *A.* for life, and that after his decease it shall be sold by his executors, and make four executors, and one of them die during the life of *A.* and then *A.* dieth; in this case, the other three executors may sell: so if one give his land in tail, and that if the donee die without issue, that the land shall be sold by his sons-in-law; and he hath then five sons-in-law, and one of them die in the lifetime of * the donee, and after the *P. 449. donee die without issue; in this case, the other four, [even by the rules of the common law, independently of the statute,] may sell the land, and the sale made thereof is good: and yet if the words of the will be, that it shall be sold by *A. B.* and *C.* his executors, or his sons-in-law, [by name;] in this case, if one of them die, it cannot be sold by the rest. [This difference arises from the nomination of the executors, as distinguished from an authority to a class of persons.] But in the last case before, where the devise is, I give my land to my executors to be sold, &c. the executors have an interest in the land, and an authority about the

(1) See accordingly the doctrine of Lord *Thurlow*, in *Newton* v. *Bennet and others*, in *Bro. Rep.* 137. If a devise be to several to sell, the survivors can sell the estate; but if it is a dry power, the death of one extinguishes it. [Too general.]

(2) That excellent statute enacts, that where part of the executors named in any will, whereby lands are directed to be sold by the executors thereof, do refuse to take the administration and charge of the will, and the rest of the executors do accept and take upon them the charge of the will, that all bargains and sales of such lands so directed to be sold, made by the executors accepting, shall be as effectual as if the executors so refusing had joined.

land also; and therefore, in this case, the descent is prevented, and the executors shall keep it till the sale (3); neither [when they have an authority only] will any disseisin, fine, recovery, or feoffment by the heir, [or an escheat, *Bro. Abr. Devise*, pl. 10,] prejudice their interest, but that they may sell it when they will. [This observation applies to mere authorities. When there is a devise to the executors, there may be a disseisin; and, if there be a disseisin, the executors cannot sell, so as to pass the land, till they have restored the seisin;] but they must sell in time convenient, or otherwise the heir may enter and put them out by a condition in law, that is annexed to the interest; [this doctrine cannot in modern times be relied on;] or perhaps the heir may tender to them the worth of the land, and if they refuse to accept it, he may enter upon them, and oust them. [In equity, unless he be completely disinherited, he may prevent a sale, by paying the charge; and may, by an injunction, if it is apprehended, prevent the sale, on offering to bring the money into court:]

Assets. and it seems in this case, the mesne profits until the sale are no assets, [they belong to the *cestuis que* trust;] but the money made upon the sale shall be [equitable] assets in their hand: and in this case, [of a devise,] albeit one or more of the executors die or refuse, yet the rest, [as having the entirety, by survivorship or refusal,] may sell it, even by the common law itself, and so also by construction upon the same statute, for the estate surviveth. But it seems they may not sell to him that doth refuse; [why not?] neither may they in either case transfer their power to sell to any other, nor keep the land themselves, and pay so much of their own money as the land is worth. [On the doctrine of sale by trustees to themselves, or one of them, see *Fox* v. *Mackreth*, 2 *Bro. C. C.* 400. On the application of purchase-money, after release, by one of several trustees, see *Crewe* v. *Dicken*, 4 *Ves.* 97. On the rule, that *delegatus non potest delegare*, see *Combe's case*, 9 *Rep.* 75; the authority may be communicated under an express power of delegation. What shall be a devise

(3) In *Cordell's case*, *Cro. Eliz.* 315, devise *for payment of legacies* and debts, and afterwards to *E. C.* for life, &c. held to be no freehold, but only a term for years, although it cannot be said for any certain number of years.

113, a. 236, b.; 1 *Cha. Ca.* 196;

Perk. Sect. 547. Dyer, 371. 26. If one deviseth by his will, that sold to pay his debts, and say n this case, it shall be sold by his ex *Sowersby* v. *Lacy*, before *Leach*, in 1819, the devise was in these and bequeath all that tenement and to me, situate at Holmpton afore seventy-two acres, or thereabouts, named children, the same to be trustees and executors of this my proper to dispose of it; and the out of the said lands and tenemen and severally divided among my children;" and the Vice Chancellor was an authority in the executors t they might give effectual discharges of the infant children. As a gener the Vice Chancellor was disposed t as the executors had a right to divi they could give a good discharge shares of the adult children. But will not have any authority, unle terms they are authorized to sell, or purpose to be performed by them, the implication that they are to sell. *Wiltshire, per Leach*, Vice Chance 1819.] And if one devise all his lan acre, which he doth appoint to pay l this devise his executors or the survi may sell it: but if one say by his wi shall have *tam gubernationem pueror quam* the disposing, letting, and se lands; by this devise *I. S.* hath not to him to sell the land, [but only to possession of them.]

Dyer, 219. If one devise that his land shall be s death of his wife by his executors, wit of *I. S.* and make his wife and a s executors and die, and after *I. S.* die; i the land cannot be sold, for the author mined; [since no assent of *I. S.* can b But if the will authorize the executors

(4) A devise of all my estate, real and personal, for paymen *Cha. Ca.* 136. 187. 262; *Gilb. Dev.* 24. See the case of *Newt* cordingly.

Moore, 61.]

If one devise that his executors shall sell the land, and, with the money coming or made of it, shall pay such and such legacies or sums of money in particular, to such and such persons by name; this is not a legacy for which a suit lieth in a court christian; but for this, every one that is to have portion, may have account [in equity] against the executors after the sale; [and the *cestuis que* trust may, by a bill in equity, enforce a sale] (5). Dyer, 151, 152.

If one give lands to another, to give them again to the children of the testator, or to dispose them at the will of the devisees to some of the children of the devisor; in these cases, the devisees * must dispose it accordingly, and cannot give to any other: and if one gives land to others, to the intent that, with the profits thereof, they shall educate children, or pay such sums of money; or, &c.; in this case, the devisees must do accordingly, or they may be compelled thereunto [in equity.] Trin. 8 Car. B. R. *P. 450. Co. 6. 16.

And in all cases of devises of lands to executors to sell, it is wisdom to make it certain; *i. e.* that the executors or the survivor of them, or such or so many of them as take upon them the probate of the will (if his meaning be so), shall sell it (6). And it is better to give an authority than an estate, Co. super Lit. 112, 113.

---

(5) Money arising from the sale is *equitable* and not *legal* assets; and therefore, in *Newton* v. *Bennet*, *Bro.* 135, Lord *Bathurst* decreed a sale, and that if any of the creditors should be satisfied any part of his debts out of the personal estate, such creditor should not receive any thing out of the money, to arise by sale of the real estate, till the other creditors were paid up equally with him. On a re-hearing, on a petition by a specialty creditor, this decree was affirmed by Lord *Thurlow*, who says, there must be a mistake in the case in 1 *Atk.* 420, for it was always held that an estate, devised to an executor to sell, was *equitable* assets. The reason seems to be, that the executor, as devisee, is a *trustee*. And Lord *Camden*, in *Silk* v. *Prince*, (a note of which is at length in *Bro.* 139,) says, *there is no case where the assets are legal, except where the executor takes in character of executor.*

(6) In the case of *Vick* v. *Edwards*, 3 *P. Wms.* 372, *A.* devised lands to *B.* and *C.* and the survivor of them, and the heirs of such survivor, in trust to sell. The estate was decreed to be sold, and it being referred to the master to see, whether the parties could make a good title, the master reported, that the parties could not make a good title, there being no fee simple in the trustees, for that the remainder in fee could not be vested in the survivor, and it was uncertain which of the two trustees would be the survivor. But exceptions being taken to the master's report, the Lord Chancellor held, that the trustees joining in a fine of the premises would pass a good title to the purchaser by estoppel. See the case and the reporter's *query* thereon. It is said, an authority to executors, and to the executors of the executors, cannot be exercised by the surviving executor, or by the executor of one and the administrator of the other. *Moore*, 61. A power to be exercised with the consent of four or their heirs, must be exercised with the consent of the survivors, and of the heirs of those who are dead. *Mansell* v. *Mansell*, *Wilm.* 36. [See *Ex parte Harrison*, 3 *Anstr.* [illegible]; 3 *Prest. Abstr.* 236. It is impossible to support the case of *Vick* v. *Edwards* on the ground

profits of the land until the sale; and if he do so, then [at law, though not in equity,] it is necessary that he appoint that the mesne profits, until the sale, shall be assets in their hands; for otherwise it shall not be so (7). [The modern practice (except as to copyholds) is uniformly to devise the lands. But in copyholds, it is most advisable to give an authority only, as a means of saving the fine on admission [of the executors.] The will should proceed to authorize the executors to take the mesne profits, and give the authority in terms to provide against death, refusal to act, &c.]

Dyer, 33. 348. 126. Co. super Lit. 236. See Condition.

10. *Devise upon condition, and what words in a will shall be construed in the sense of a condition, and what not.*

The same words that in a deed will make a condition, and the thing granted thereby to be conditional, will make a condition in a will, and the thing [*viz.* estate] given thereby to be conditional. And therefore these words, *provided*, *on condition*, *so that*, *if*, and the like, will make a condition in a will. So that if one devise land to *I. S. on condition*, or *so that*, or *if*, or *provided* that he do bring up his eldest son, or pay his wife 20*l.* a year for her life, or the like; by these devises, the estate is made conditional. Also other words, that being used in a deed will not make a condition, yet being used in a will [may, when the intention requires it, make a condition, and the estate made by the devise to be conditional. [Frequently these expressions would be deemed to create a charge in equity,

---

alleged. But the prevailing opinion is, that the trustees had the fee from the nature of the trust, as a means of enabling them to perform the same. *Fearne*, 523.] See *Floyd* v. *Cary*, 2 *Freem.* 218; *Dom. Proc.* 1697; Mr. *Fearne's* observations on the case of *Vick* v. *Edwards*, in the 3d edit. of his *Essay on Cont. Rem.* 284; and 1 *Ves.* 1.

(7) This subject is fully discussed by the learned editor of *Co. Lit.* in note 2, to fol. 113, a. wherein he observes, "What Lord *Coke* advances touching the effect of a will, devising that "executors shall sell land, is open to a variety of observation. He first supposes that such "a devise passes no *interest* or estate to the executors, but merely a *power* or *authority*; "and thence he infers, that, like naked authorities, it will not survive. But these positions "seem at least controvertible, having been expressly contradicted by decisions since Lord "*Coke's* time: and though both should be admitted to be true in point of *law*, they would "not avail in a court of *equity*; as this jurisdiction, notwithstanding the extinction of the "power at law, would compel its execution in favour of those for whose benefit the power "was given." See further as to sales of land by executors, in *Vin. Abr. Devise* (K. e.) to (S. e.); 4 *Burn's Ecc. Law*, 301. See this subject in *Newton* v. *Bennet*, in *Bro. Rep.* 135. In commenting on Lord *Coke*, one ought to be especially careful, and to consider that when he wrote it was upon principles of common law only, and founded on feudal tenures: whereas, since his time, the jurisdiction of the courts of equity has become so extended, and equitable doctrine so inseparably interwoven as it were with legal discussion, that few lawyers of this day are competent truly to read and fairly to comment on that invaluable production, the original Comment on that excellent treatise of Tenures by *Littleton*.

man devise his land to his executors to be sold; or devise his land to them, or others, to pay 20*l.* to *I. S.* or paying 20*l.* to *I. S.*; in these cases, and by these devises, the estates are made conditional; and of these conditions regularly the heir, and not a stranger, shall take advantage. [But though a stranger cannot take advantage of a condition, there may be a conditional limitation in his favour; and, under such a limitation, he may be entitled.] So as if one devise land to another, and his heirs, provided that he pay 10*l.* to *I. S.* otherwise that the land shall remain to *I. D.* and his heirs; in this case, if the devisee do not pay the money, *I. D.* shall not take advantage of it, nor have the land according to the devise, but the heir of the devisor shall enter and have the land, and put out the devisee. [This case is over-ruled. It is now clear, that this limitation over is good by executory devise; and see *Mark* v. *Mark*, 10 *Mod.* 420; and 2 *Prest. Abs.* 124.] And if one devise his land to *I. S.* for life, on condition to pay 20*l.* to *I. D.* and after to *I. D.* in tail; in this case, if *I. S.* do not pay the 20*l.* it seems the heir shall enter and hold the land during the life of *I. S.* and that *I. D.* shall not have it till then. [The limitation over is either a destruction of the condition, or if there be proper words, the estate for life will remain to the next devisee. So, by apt words, the heir may take for the intermediate time, but taking for life, he will take as devisee, and not as heir.]

Dyer, 33. 36. 126. 128.

And in cases of devises of goods or chattels, other words will make a devise conditional in divers cases; as, "when," as, I give to *I. S.* 10*l.* when he shall be married, [or when he shall attain twenty-one; but a legacy to *I. S. to be paid* when he shall attain twenty-one, is a vested legacy. So a legacy given at the age of twenty-one is contingent; otherwise of a legacy to be paid at twenty-one. So a legacy, to pay the interest to *A.* till twenty-one, and then to pay him the legacy at twenty-one, is a contingent legacy; the age being of the substance of the gift.] And "whiles," as, I give to *I. S.* 20*l.* whiles he shall abide with my children, which is as much as if he abide with my children; [*query*, if this be not an annuity;] and "which," as, I give him 20*l.* which shall

Swinb. 136.

lute, as, my son being dead, I
And of all these conditions, regu
and no other shall take advant
he be executor beneficially, he
for the residuary legatee or nex
the condition, [annexed to the su
as distinguished from a condition
perfect gift,] be such, for the ma
of it, as is impossible, unlawful,
perhaps, these words may not i
nor the thing devised conditional
the whole sentence void. Whe
part 4, *sect.* 5, at large (8).

Fitz. tit. Assize, 97. If one devise his land to his
apparent [*read*, presumptive,] in
devise is void: yet if, in this case
devisor be privily with child of a
after his death; now is the devi
for now she is not heir to her
a nice case, and seems well found
for cases of this sort depend on
and not on the intention. The
that the person who is heir at
made a purchaser by a devise of
as would descend to him. The gi
inception. Even though there be
in fee, to be defeated by executory
will take by descent. *Doe* v. *Tim*
Ald. 531. While *Scott* v. *Scott*, *Amb*
and seems more consistent with pri
the will be to one of several coheir
coheirs as tenants in common, or
or to the person who is the heir f
estate, for life or in tail, he will, t
such gift, take by purchase. Thou
a particular estate by purchase, he
ultimate fee by descent. And thou
one of several persons, being cohe
person be at the death of the testato
he will, it is apprehended, take by
better title. Mr. *Watkins*'s excell
Descents should be consulted on thi

Plow. 344. If a woman, that hath a husba
land by will during the coverture,

(8) See further what words make a condition in a will,
inserted in wills, in *Vin. Abr. Devise* (D. c.); *Com. Dig. Dev*

and approve it; in this case, and by this means, the devise is become good: but if she make and publish it during the coverture, and after her husband die and she become sole; this accident, without any more, will not make the devise good. The same law is of the devise of goods and chattels, [unless the woman act under an authority, or separate estate.]

If an infant within age devise his lands or goods and publish his will, and after he comes to be of full age he doth publish and approve it again; in this case, and by this means, the devise is become good: but if the infant live to be of full age, and do not publish and approve it, *contra*. Plow. 344.

If a legacy of goods or chattels be given on condition to a man incapable, and, before the condition is extant, he doth become capable; in this case, and by this means, the devise is become good. [But if a gift be void in its inception, as tending to a perpetuity, as to the children of *A.* who shall attain twenty-five, the gift will not become good in event. *Leake* v. *Robinson*, 2 *Meriv.* 389.] See before, at *numb.* 6, more of this matter. Swinb. 340.

12. ***Where a devise, good in its inception, shall or may become void by matter*** ex post facto, *or not*.

A devise that hath a good beginning, is sometimes avoided and overthrown by subsequent matter in the same will, and sometimes by subsequent matter in another will, and sometimes by some other accident *ex post facto*. For if a man make a subsequent or latter devise, either in the same or in another will, so contrary and repugnant to the former, that both cannot stand together, this [subsequent devise] doth overthrow the former; and, therefore, if a man do give *Whiteacre* to *I. S.* in fee, or his white horse to *I. S.*, and after, by the same or another will, doth give *Whiteacre* to *I. D.* in fee, or his white horse to *I. D.*; these latter devises do overthrow the former; *cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.* [The more prevailing opinion is, that the two devisees shall be joint-tenants when the gifts are in the same instrument.] And as a latter will doth overthrow the former, so the latter part of a will, [if inconsistent with the former part of the instrument,] doth overthrow the former part of the same will: but if the devises be such as they may stand both together, and are not directly repugnant, nor do fight one against another, there the latter shall Lit. 168. Co. super Lit. 112. Plow. 540, 541. Co. 8. 94. 6. 33.

By a subsequent repugnant will.

See before. received. As if one devise his land to *I. S.* and his heirs, and * after by the same will devise a rent out of the same land to *I. D.* and his heirs, or *e contra*. So if one devise *Whiteacre* to *A.* for life, and afterwards give the same acre to *B.* in fee; in this case, the one may have it for his life, and the other may have the fee simple afterwards. [And so if the fee be devised in the first place, and the estate for life afterwards, the devise of the estate for life will operate merely as an exception.] *P. 452.

Plow. 545. Perk. Sect. 569. Lit. 453. Kitchin, 127. Dyer, 317. 350.

By a waving of the estate devised.

If one devise his land to his son and heir in fee simple; or devise it to a stranger for years, [life, or in tail,] the remainder to his son and heir in fee simple; and the heir, after the death of the devisor, doth (as he may) wave the estate given him by the devise, and claim the land by descent; in this case, and by this means, [indeed even against his will, p. 451,] the devise is become void. But if the devise be to the son and heir in tail, the remainder to a stranger, there he cannot wave the devise and take it in any other manner, [to the prejudice of the devisee in remainder. He may wave the devise, and by that means accelerate the fee of the remainder-man.] And so if a man have only two daughters, (who are his heir,) and he devise his land to them; or have gavelkind land, and devise it to all his sons; they may not wave these devises and take by descent; for by devise they shall take as joint-tenants, who otherwise by descent shall take as parceners. [It should seem, they, all agreeing, may wave the devise and take by descent, as their better title.]

Lit. Bro. Sect. 482. Perk. Sect. 569. Dyer, 61. Co. 9. 140. Plow. 543, 544.

If one devise his land to another in fee simple, fee tail, for life, or years, and the devisee after the death of the testator doth refuse and wave the estate devised to him; in this case, and by this means, the devise is, [as to him,] become void. [And, by the refusal of a particular estate, the remainder, will be accelerated; and an intended remainder may be converted into an executory devise.] And it seems a verbal waver is sufficient in this case. [The general practice is, to execute a deed of disclaimer, as distinguished from a release. *Crewe* v. *Dicken*, 4 *Ves.* 97.] So if one give goods or chattels to another, and the devisee refuse it; by this means the devise is become void, and any waver or refusal will suffice in this case:

take a thing devised to him: [3 *Prest. Abstr.* 104.]

If a woman sole devise her lands or goods by will, and after take a husband and die during the coverture; by this means the devise is become void. And yet if she survive her husband, and die unmarried, now is the devise become good again. [This point is not law, unless she republish her will. *Forse* v. *Hembling*, 4 *Rep.* 60.] Plow. 348.

If one devise his land to *I. S.* and his heirs, and afterwards *I. S.* die, living the testator; by this means the devise is become void. [So of a devise to a man and the heirs of his body; or to a man for life, remainder to the heirs of his body, when the heirs are to take by limitation. *Ambrose* v. *Hodgson*, 1 *Dougl. Rep.* 337.] And in this case no verbal declaration of the testator, that the heirs of *I. S.* shall have it, will help; [nor will a republication make the heirs take as purchasers, though the limitation be to them by a distinct and divided clause, 2 *Mod.* 313;] for albeit a devise of land in writing may be revoked by a verbal subsequent declaration (9); or by any act crossing or controlling that devise, yet a devise becoming void by that means cannot be made good by any such verbal declaration subsequent to the same countermand. [See the section of the 29 Car. 2, which regulates the mode of republication.] So if one give any goods or chattels to *I. S.* and he die before the testator; in this case, and by this means, the devise is become void, and the executor of *I. S.* shall not have it. [But by special words a legacy may be given to the executors, as substitutes or new legatees; but in that case the executors should be named to take, in the event of the death of the testator; and by special direction, as part of the assets of the first legatee. 1 *P. Wms.* 84. A simple gift to a man and his executors will lapse by the death of the legatee in the lifetime of the testator.] And yet if a devise be of land to *A.* for life, the remainder to *B.* in tail, and *A.* die before the testator; it seems the devise of the remainder doth continue good notwithstanding (10). [There

Plow. 6o. 346. 344. 341.

See infra at numb. 14.

Perk. Sect. 567, 568.

(9) But see the 6th section of the statute 29 Car. 2, c. 3, which makes a written revocation necessary, mentioned before in the note to p. 410.

(10) So in like manner if the remainder be to *B.* in fee. *Vin. Abr. Devise* (W. c.) cites 96; and if the devise had been to *A.* and the heirs of his body, remainder to *B.*

is not any doubt on this point, will take effect by acceleratio dead.]

Plow. 344. And if one devise land or g *I. S.* and afterwards her husba marry with another man, and t dieth; this is a good devise, not change of husband,] and not av these accidents.

Per Just. Jones, M. 9. Jac. Co. B. If one devise a term that he h the remainder to such persons as of *Whiteacre* at the death of albeit in its beginning it be good, die before *A.* it seems now to be that will take by way of execut take as an immediate purchaser, and known at the time of the dea [The rule is not correctly expresse the same persons to have been the death of the testator, who were the death of *A.*; what objection right? If the persons are chang time, this change may be a groun of the devise, since it may be cons those persons only who should ans tion after the death of the testator.

Swinb. 356. If I give to *I. S.* 20 *l.* if he mar and she die before he marry her; i by this means, the legacy is become the bequest is on a condition prec condition subsequent become impos will be absolute by the failure of th

If I give a debt owing to me to wards I receive or release the debt; vise is become void (11). [Where t for by the testator, and received, thi some cases, is an ademption at law but where the debt is paid by the

---

and the heirs of his body, and *A.* dies in testator's lifetime goes over to *B. Cro. Eliz.* 423; S. P. *Hodgson* v. *Ambrose*, *Wms.* 397; *Fearne*, 124; and S. P. in *White* v. *White*, *Dou*

(11) Testatrix gave her grand-daughter by will 40 *l.* out of she allowing her part of the charge of recovering the same and recovered the rent. On a bill brought by the grand-dau the testatrix receiving in the debt, though upon her own suit *legacy*. *Ford* v. *Fleming*, 2 *P. Wms.* 469, and the case th deemed ademption, in *Bac. Abr. Legacies* (C.); *Vin. Abr.* 1,000 *l.* East India Stock is specific, and adeemed by testator *burner* v. *Macguire*, *Bro.* 108, Mich. 26 Geo. 3.

to be paid. The learning of ademption should be studied: it contains considerable nicety, and a variety of distinctions.]

If a man make a will and give legacies, and appoint one or more his executor or executors, and he or they, after his death, all refuse to take upon them the administration; yet in this case the legacies remain good, and are not become void; and in this case, the course is to grant the administration of the goods to him to whom it doth belong, and to annex the will to the administration, and then the administrator is to perform the will as the executor ought to do; [and he is denominated the administrator with the will annexed. But a legacy to an executor fails, by his refusing to prove the will: but if he act in the execution of the will, and die before he has proved the will, and without renouncing the probate, then the legacy will be supported. But a legacy to the wife of an executor will be good, though the husband refuse probate. If the legatee of a sum of money, charged on lands by way of portion, die before the day limited for payment of the legacy; in such case, as against *hæres natus*, or devisee *hæres factus*, though not as against the executor, if liable to the payment, the legacy shall cease. *Paulett* v. *Paulett*, 1 *Vern.* 204; 3 *Atk.* 112; 1 *Atk.* 510; *Van* v. *Clarke*, 1 *Lord Raym.* 508; *Hall* v. *Terry*, 1 *Atk.* 502; *Carter* v. *Bletsoe*, *Prec. in Chan.* 267. It is properly confined to the day of payment: for if the day of payment happen in the lifetime of the legatee, the interest becomes vested, and is transmissible; and the death of the legatee, before the actual receipt of the legacy, will not make any difference. And in case the real and personal estate are both liable to the payment of a legacy, given so as to vest *in præsenti*, though the payment of it be deferred to a future day, the personal representative of the legatee, dying before the time appointed for the payment of his legacy, will, as against the executor of the testator who bequeathed the legacy, be entitled to receive the full amount of the legacy, or so much thereof as the personal estate will extend to pay; though, as against the owner of the real estate, the death of the legatee, before the day of payment, will be an absolute discharge

Lit. Bro. Sect. 300.

Duke of Chandos v. *Talbot*, 2 *P. Wms.* 601. And if the payment of the legacy be postponed for the convenience of the fund, and not in respect of the person of the legatee, the legacy may be payable even out of real estate, notwithstanding the death of the legatee before the time of payment.]

It is held also that a legacy of goods or chattels may become void by the injurious dealing of the legatee against the testator after the legacy given: whereof read *Swinb. part* 7, *sect.* 22.

Swinb. 357. And when the thing devised is dead, or spoiled, [*i. e.* ceases to exist;] howsoever by this means the devise is become void, yet it looseth its effect, and is as if it were void. See more *supra*, at *numb.* 5.

Swinb. 350. 355, 356. In all these cases, when the disposition of the legacy is pure, and no time is set for the performing of it; or there is a set time for the doing of it, and the legatee die before the time; and [also] where the disposition of the legacy is conditional, and a time set for the doing of it, if the legatee live till that time, or the condition be performed; in all these cases, the executor or administrator of the legatee shall have the legacy, and the same remedy to recover it, that the legatee himself had. But if the legatee die before the condition be performed, *contra*. And yet, if in that case, the testator's mind shall appear to be that the executor or administrator of the legatee shall have it; or the condition be to be performed by another, and there be no default in the legatee; or if the disposition be modal; or the legacy, that was at first upon condition, be afterwards repeated without condition; or it be referred to a condition to be afterwards set down, and none is set down; in these cases, the legacy is not lost by the death of the legatee, but shall go to his executor or administrator: as for example; If one devise 20*l.* to

13. *Where a legacy shall go to the executor, when the legatee doth die before he doth receive it; and where not.*

Bro. Devise, 27. 46. Swinb. 350. 355. Dyer, 59. Swinb. 358. 356. Plow. 345. **W. S.* to be paid within four years after the death of the testator, and the legatee die before the four years expired; in this case the executor or administrator, after the four years, shall recover the legacy. If one give to *W. S.* 20*l.* when he cometh to twenty-one years of age, [or at his age of twenty-one years,] and he die before he come to the age of twenty-one years; in this case his

*P. 454.

executor shall not have the legacy; [for the attainment of the age is of the substance of the gift. 1 *Rop. Leg.* 216; 1 *Atk.* 504; 3 *Atk.* 102; 2 *Ventr.* 342; 3 *Atk.* 102, *per Fortescue*, Master of the Rolls.] But if the devise be thus, I give to *W. S.* 20*l.* [being the gift,] and I will that it shall be paid him at his age of twenty-one years, [being a distinct clause regulating the time of payment,] and he die before he come to the age of twenty-one years; in this case his executor shall recover the legacy (12). So if one give to *I. S.* 20*l.* when he shall be married, and he die before marriage; in this case his executor shall not have it; [for marriage is a term in the gift.] But if one devise thus, I give to *W. S.* 20*l.* towards his marriage, and he die unmarried; [or for an apprentice fee, and he die before he is bound an apprentice;] in this case the executor of *W. S.* shall have and recover the legacy. So if one do give to *W. S.* 20*l.* when the executor of the testator shall die; in this case, if *W. S.* die before the executor, the executor or administrator of *W. S.* shall not have the legacy. [If a legacy be given generally at marriage or at twenty-one, then the vesting and time of payment are the same, and the legacy shall not vest till marriage or twenty-one, (*per* Lord *Hardwicke*, 3 *Atk.* 102), unless the testator also direct that the legatee shall have interest for his legacy. See 3 *Ventr.* 342; *Prec. in Cha.* 318, and *query*. And in *Garbut* v. *Hilton*, 1 *Atk.* 381, a legacy of 200*l.* was given to Jane Garbut, provided she married with the consent and approbation of her father and mother, or the survivor of them, she in the lifetime of her father and mother, and before marriage, sued for the legacy, and it was held, that the words provided, &c. were a condition precedent, and that the daughters application was too early.] If one devise goods or chattels to *I. S.* and *I. S.* die before the testator, the executor or administrator of *I. S.* shall not, [unless the

(12) This is a *vested* legacy, because given to him, though the payment postponed; being *debitum in præsenti*, though *solvendum in futuro*: whereas in the foregoing instance the legacy does not vest, because it is only given to him on his attaining age, and in the meantime the property rests in the executor of the testator. See fully as to the vesting or lapsing of legacies, where the legatee dies before payment, in 2 *Bac. Abr.* 478, and [1 *Atk.* 418.] And see the case of *Hoath* v. *Hoath*, *Bro. Rep.* 4, Mich. 26 Geo. 3, where *the direction to apply the interest* in the meantime, is *held* to *destroy the distinctions* above, and *vest* a *legacy* given to one on his attaining twenty-one years.

executor, &c. be substituted ? place of the first legatee,] have [*Ante*, 452.]

Plow. 519, 520. 543. Co. 10. 47. a. 37. 8. 96. Dyer, 277. 367. Perk. Sect. 574. 573. 575. [Com. Dig. Administration, (C.) 5, 6. Dyer, 331. Moore, 98. 1 Str. 69. Cro. Eliz. 347. 1 Leo. 215. 1 Lev. 95. 1 Roll. Abr. 619.]

When any chattel, real or pe an executor by a will, the exec tion given him by the law to hav one right or in the other, *viz.* a legatee: and by his special entry, thing, or some special declaratio to be [*i. e.* may be] made. And do enter generally (as most do), any declaration which way, or b will have it, (as most executors us be said to have it, and the law w him, as executor, and not as leg any subsequent words or deeds his mind to be otherwise, he shall l *ab initio*; and yet if once he do is proper to an executor, this is to the legacy *ab initio*; and after cannot take as legatee, but must t [This is too general: he may hol executor, and afterwards assent t hold as legatee.] And if one exe to whom a term of years of land is the same alone, and the rest intern the profits thereof, albeit he make n is said this is [presumably] a good d election to have it as legatee. But if be given to the wife of *I. S.* and *I. S.* tor and he enter generally, and after r ment and never speaks of this term; t ration of his election to have it as l shall the term be so deemed in him, tor. [And if he had elected in favo he could not dispose of the term by l under the doctrine of election.] But

(13) And if one gives a legacy to a man, his executors, in such case, the legatee dies in the lifetime of the testator, t yet the legacy is lost; for the words "executors, adminis being but surplusage, *et expressio eorum*, &c. and they are, by to take in succession, and by way of representation, as an hei of an inheritance. *Elliot* v. *Davenport*, 1 *P. Wms.* 84. In th might be so penned, as that, though the legatee died in the l cutors should have the legacy; but then it ought to appear in words, that this was the testator's intention. See fully, as to n *Eq. Ca. Abr. Legacies* (B.); *Vin. Abr. Devise* (X. c.) &c.; Dig. *Chancery* (3 Y. 13.)

hath power to tak
he cannot take as
their debts; but
a legacy, if ther
said to be asset
for the satisfac
[But if he se
assets; and t
queathed, yet
the sale or r
mortgage be
for money
right of th
gagee has
to lead to

*P. 455. * If a
cies paic
goods a
and m
is said
execu

15. *Ascent. Quid.* W
the e
fecti
hav
ger
ins
ex
w
c

(14)
legatee.
cutor a
to him
legate
takin
legat

Mr. *Powell* in his edition of *Sw*
vol. 1, p. 33; and 1 *Rop. Leg.* 2

Co. super Lit. 111. Perk. Sect. 576. 578, 579. Swinb. 134, 135.

This agreement of the execut
tor is not needful in the case o
[whether held for an estate of freeho
except so far as estates *pour autr*
lands, may vest in executors or
and an assent or assignment ma
because though they are given by t
is not duly attested;] for if a m
land in fee simple, and deviseth
fee simple, fee tail, for term of
in these cases, the devisee may
land devised without any leave o
or administrator: and in truth, in t
freehold or estate is said to be in the
his entry, [*i. e.* if the devise be imm
vents the descent of the inheritance
and, therefore, if [there be an imme
a vested estate, as contra-distinguishe
cutory devise,] and the heir enter fir
may enter upon him, and put him
maintain an ejectment. But the heir g
species of disseisin; and his seisin w
fine, to operate by nonclaim. So a
intended devisee under a gift, which
void, would be an abatement. And
be barred by a fine, with proclamations
2 *Prest. Abstr.* 297.] And in case
devised by the custom of a place, if
first and keep the devisee out, the
have a writ of *ex gravi querela* aga
his relief: and this writ is incident to
[but not to a devise under the statute l
a devisee enter first into the land
him, and then the heir of the deviso
him, [this is an actual disseisin,] then
may take his remedy at the commo
other cases, [and may maintain an e
assise, &c. or any other appropriate l

he executors are charged to pay debts before legacies; and
) pay legacies, he shall pay the value thereof out of his own
ise sufficient to pay debts. *Bac. Law Tracts*, 163. The exec
im the legatee to refund. And as an assent is but a perfecting
e has once given it, revoke the same; neither can it be given on
restriction whatsoever. *Maul.* 136; *Cro. Jac.* 614; 2 *Ventr.* 3
ms that the money lay ready, it is an *assent* and admission of
exp. 293.

executor, or administrator, is not to intermeddle. But regularly a devisee cannot, nor may not, [*omit*, not,] have or take any chattel real or personal devised to him, without the agreement or delivery of the executor or administrator. And by this assent, if the devise be good, (for otherwise an assent will not make it good) the devise is perfected, and the legacy executed. And yet if the legatee have the thing devised in his own hands; or if there be a special clause in the will giving him authority to take it himself; or it be a legacy to good and godly uses; or the thing given be like to perish on the ground, being corn or the like, and there be assets besides to pay all the debts; in these cases perhaps, [*i. e.* it has sometimes been supposed, though without sufficient reason,] the assent of the executor or administrator may not be necessary, but the legatee may take the thing devised without his agreement (15). And if a legacy be given to one of the executors themselves, he may take it without any assent of his co-executors, and that, [*i. e.* even] before administration also if he will. [Thus acting as executor.]

Perk. Sect. 570 Co. super Lit. 211. Plow. 525. 20 Edw. 4. 9.

Swin. 359. Bro. tit. Devise, 6. 30.

Perk. Sect. 572.

If there be many executors, the assent of any one of them is sufficient * (16); and if there be but one, and he be dead, the assent of his executor, [provided he be the executor of the first testator,] is sufficient; or if he die intestate, the assent of the administrator *de bonis non administratis* of the first testator is sufficient; or the legatee himself in this case, where the executor dieth intestate, or where he doth refuse to take upon him the administration, may take administration himself, and by public declaration assent to his own legacy. And if a man be executor and legatee both, he may assent to and take the legacy, and yet wave the executorship, [it is apprehended not,] and this assent is good. And therefore if the legatee of a term of years be made executor, and he enter, and claim, and occupy the land by force of the devise, and die before probate of the will, the executor of the legatee, and not the ordinary, shall

*P. 456.

Dyer, 372. 367.

(15) If testator *bequeath goods in the hands of I. S. to I. S.* yet the property is not transferred to *I. S.* without the executor's assent, though the executor has sufficient for payment of the debts without them, and therefore executors may at the common law recover the thing or damages against the legatee. *Went. Off. Ex.* 221; 4 *Burn's Ecc. Law*, 301, 3d edit.

(16) See accordingly, *Went. Off. Ex.* 223.

have this term; and yet it seems t
not do this in prejudice of a credit
of his debt. [The assent of the exe
bate will be good; and therefore it
to be clear, that the term vested in
even before probate; but by assenti
he acted as executor, and could no
nounce. The different cases are th

Co. 4. 28. Any agreement in word or dee
make an assent, and execute a devi
tors take heed therefore; for if
[generally, and without any qualifica
that the legatee of a term of year
take the profits thereof, and that
only, or say to the legatee, "God
it;" or, "I intend you shall have
the devise," or the like: this is a
execute the legacy. And if the
that the legatee and a stranger toget
the profits of the land, or the thing
is a good assent [in favour of the leg
See Attornment. as to the stranger.] And it seems th
verbal agreement will amount to a
Per 2 Justices, M. 37, 38 El. B. R. may make an assent to a legacy. If
executor agree to the legacy upon
Co. 4. 28. and conditions, this is agreed to be
absolute assent to the legacy (17).

Plow. 540. If a term of years be given to th
testator, during the minority of his
the intent that she with the profits
breed up his children, the remainder
term to the same eldest son, and
executrix, and she enter generally, but
breed the children of the testator; i
[unless there be reason for a contrary
it seems that this education of the c
be taken for an assent against her to ve
Plow, 516. Perk. Sect. 574. in the eldest son. And if a man po
term of years give it to his wife, if she
and after her decease the remainder
I. S. and make his wife executrix, an
claiming to have it only for her life, th
to *I. S.* according to the devise; in thi
is a good assent for the execution of t
of the term in *I. S.*; [for her claim

(17) Accordingly, *God. Orp. Leg.* 144

land during life, is evidence of assent to hold as legatee.] And if a term be devised to *A.* for life, the remainder to *B.* and the executor assent to the devise of *A.*; in this case, this is a good assent to the devise of *B.* and shall execute the same also, whether the executor have assets or not: [but equity would follow the assets into the hands of the legatee, at least while they remained in specie] (18). So if a man, possessed of a term of twenty years, devise it to one for ten years, and after to another for the remnant of the term, [thus giving him an actual estate, as distinguished from an executory bequest;] or if the devise be to one for so * many years of the term as he shall live, and after to another for the rest of the time, [being an executory bequest;] in all these cases an assent to the first devisee is an assent to the second also. And so also it seems is the law of a chattel personal, when the occupation thereof is first devised to one, and then the thing to another. And if one that hath a term of years give it to his wife for her life, the remainder to his son, and make her executrix, and she enter, claiming by force of the devise, and not as executrix; in this case, this is a good assent to execute the devise to him in remainder.

Co. 8. 95. 4. 66. 10. 47. Perk. Sect. 574.

*P. 457.

37 H. 6. 30. Plow. 519. 543. Co. 3. 96. 10. 47.

If one be possessed of a term of years of land, and he devise it to one of his executors alone for part of the time, and the remainder of the time after to a stranger; and that executor alone, albeit he enter generally, doth occupy the land himself, [as legatee, (for that is the fact to be tried,)] and the other executors do not intermeddle therewith; in this case, it seems, this is a good assent to execute the legacy to him in remainder for the rest of the term. And yet if one give goods to one of his executors for life, and after to a stranger for life, and this executor alone get the goods into his own hands, and occupy them alone all his lifetime; it seems this occupation, without some assent, will not execute the gift in the second legatee.

Perk. Sect. 574. 575. Fits. Devise, 6.

If one, possessed of a lease for years, devise it to his executors, and devise a rent out of it to *I. S.* and the executors pay the rent; this is a good

Plow. 540. 544. Co. 8. 96. Plow. 541, 542.

(18) Resolved in *Manning's case*, 8 *Co.* 96, a. that after the executor has assented to the first devise, it is not in the power of the first devisee to bar him who has the future devise, for he cannot transfer more to another than he has himself.

assent to the whole legacy. But if he devise a rent or common, out of it, for certain years to *I. S.* and after devise the term to *I. D.* and the executor doth agree that *I. S.* shall put in his cattle, or doth pay the rent to *I. S.* (which is a good assent to the legacy of *I. S.*;) this is no assent nor execution of the legacy of *I. D.* [*query*,] and yet perhaps if he devise a rent at first to *I. D.* for part of the term, and another rent to *I. S.* for the residue of the term afterwards; in this case, it seems that an assent to the first [legatee] is not sufficient to perfect the devise of the second legatee. [Why not?] And yet if a termor devise the occupation or profits of his land to *I. S.* for ten years of his term, and after devise the land itself to *I. D.* for the rest of the term; in this case, if the executor assent to the legacy of *I. S.*; this will be a good assent to and execution of the legacy of *I. D.* (19).

Co. 10. 52. If one, possessed of a term, devise it to *I. S.* for life, the remainder to *I. W.* and make *I. S.* his executor, and *I. S.* take a release from *I. W.* of all his right to the land; this is an implicit [implied] assent to the legacy of *I. W.* [So a grant from the legatee to the executor before assent, amounts to an assent by the executor and a grant by the legatee. *Carter* v. *Lowe, Owen*, 56.]

Old N. B. 80. 37 H. 6. 30. If a man devise the occupation of a book or any other chattel personal to *I. S.* or that *I. S.* shall have the occupation of any such like thing during his life, and that after his decease it shall go to *I. D.* for ever, and the executor deliver the thing to *I. S.*; it seems this is a good execution of the legacy to the second devisee *I. D.*; and * therefore after the death of *I. S.* he may seise the goods and hold them according to the devise (20), [or maintain detinue, trover, &c.] *P. 458.

Perk. Sect. 576, 577, 578, 579. Co. super Lit. 111. If lands or any rent, or other profit to be taken out of lands, [be] devised to a man in fee simple, fee tail, for life, or years; in these cases the devisee may enter into, and have and take the thing

17. *How a devisee may attain the thing devised; and what remedy he shall have to recover it, or damages for it.*

(19) There is no difference between a devise of land, or devise of *occupation* or *profits*; the law will construe the words to satisfy the intent. 8 *Co.* 95, b.

(20) See more amply as to the doctrine of assent to a legacy, by whom, and in what manner, it may be made, and in what cases it is necessary, *Vin. Abr. Devise* (A. a.) to E. a. 3.); *Com. Dig. Administration* (C. 5.) *Chancery* (3 G. 4.); *Bac. Abr. Legacies* (L.), *Executors, &c.* (L.); 2 *Bl. Com.* 512; and *Powell's Swinburne*, vol. 1, p. 33.

devised, without the leave or agreement of the executor and administrator: and so he may, whether there be any executor made or not, and whether the will be proved or not, for the ordinary and the executor have nothing to do with these things; [except estates *pour autre vie*, devolving to executors or administrators, and given by a will not duly attested. *Ripley* v. *Waterworth*, 7 *Ves.* 425.] And if the devisee in any such case be [after actual seisin] disturbed in the having or taking of such things, he may have the same remedy as men have in other cases. [Before actual seisin his remedy is by entry, ejectment, &c.; but, if there be a prior tenant for life, &c. he may, by reason of the seisin in law, maintain those real actions which are proper to his case, as intrusion, formedon, &c.] And where the land is devised by custom, if the heir enter before the devisee, the devisee may be relieved by a writ called *Ex gravi querela*; but if the devisee enter first, and then the heir enter upon him, the devisee may have his remedy at the common law, [founded on the actual seisin.]

If lands are given thus: I will that my executors shall sell my land, and with the money made thereof shall pay 10*l.* to my daughter *A.* and 10*l.* to my daughter *B.*; in this case, and for this gift, *A.* and *B.* may either sue the executors in a court of equity, or have an action of account against them in a court of common law. [No action will lie unless there be an express promise to ground the action.] Trin. 9 Jac. Lovet's case. Dyer, 151, 152.

If lessee for years devise his term to executors for life, the remainder over to *I. S.* for the rest of the term, and the executor entereth and doth assent to the legacy and die, and the executor of the executor doth take the profits of the land, and keep out the second legatee; in this case, it seems, he may have an account [in equity] against the executor of the executor of the profits of the land. [At this day an action for the use and occupation of the land, according to an opinion of *Dunning*, afterwards Lord *Ashburton*.] But if one devise his land to his son and his heirs (except 20*l.* a year for seven years, to be employed as followeth,) and doth appoint his son (being his executor also) to pay that money to his daughters for portions; in this case, the daughters may not have an account at the Dyer, 277. Trin. 9 Jac. Lovet's case.

common law, but they may sue the executors in the spiritual court, or in a court of equity; and if the executor be dead, they may sue his executor. [The spiritual court has not any jurisdiction as to legacies to be paid out of lands of inheritance; the only remedy is in equity.]

Dyer, 348. If one devise a rent out of his land, and do charge the land with a distress, the devisee may make use of that remedy and distrain for the rent: but unless power be given him by the will to distrain, he may not distrain for it. [The law is now altered in this respect by the 4 Geo. 2, c. 28, giving the remedy by distress for rent-secks, &c.]

Plow. 346. If one be possessed of a term of years of land, and devise it to his wife, to the end that she with the profits thereof shall breed up his children; in this case this is no legacy to them; and therefore, it seems, they have no remedy but in Chancery, or some other court of equity, against her, if she refuse to do it. [*Nolan* v. *Nelligan*, 1 *Bro. C. C.* 489.]

Fitz. Devise, 6. Plow. 540. Perk. Sect. 574. 483. 20 Ed. 4. 9. Swinb. 135. And in cases of devises of goods and chattels, as leases for years, rents out of such leases, and the like, the legatee cannot take the * thing devised before he have the assent of the executor or administrator thereunto; and, therefore, if in these cases the executor or administrator refuse, or agree, to perform and deliver the legacy, the legatee may sue him in the spiritual court, or in some court of equity, to compel him thereunto: but a legatee may not sue for a legacy in any of the courts of common law (21), neither may he sue the executor or administrator in the spiritual court for the legacy, until the will be proved; but he may by suit there [in that court] compel him to prove the will, or to refuse the administration; and in these courts, and by these means, the devisee may recover his legacy against an executor or administrator, if he have assets to pay the debts of the testator, for otherwise a legacy is not recoverable at all; but in case where the executor or admini- *P. 459.

(21) Although the temporal courts do not directly take cognizance of legacies, so as to allow of an action for the recovery of them, yet may the executor make himself liable to an action at common law, as by his promise of payment, whereon an *assumpsit* will lie. *Sid.* 45; *Sir T. Raym.* 23. A devisee may maintain an action at *common law* against a terre-tenant, or a legacy devised out of land; for where a statute, as the statute of Wills, gives a right, he party, by consequence, shall have an action at law to recover that right. *Holt*, Ch. J.; *Salk.* 415; [2 *Lord Raym.* 934; *Ewer* v. *Jones*, *Com. Rep.* 137. It is now settled that n action founded on an implied promise will not lie for a legacy.]

strator hath once agreed to the legacy, so as it is executed, it is then so vested in the legatee, and he hath such a property therein, that he may enter into, or seise and take the thing devised as his own, and if any man keep or take it from him, he may have relief, as in other cases; [namely, ejectment for lands; trespass, trover or detinue, in respect of goods, &c.]

If another doth claim by deed of gift, the goods a legatee doth sue for; this may be tried in the ecclesiastical court. [*Query:* it is apprehended the validity of the gift must be tried at the common law.] 37 H. 6. 9.

If a debt, obligation, or any such like thing in action be devised to another, the devisee hath no means to recover it but by a suit in the spiritual court, or in some court of equity, to compel the executor to sue for it himself, or to make the legatee a letter of attorney, to sue for it in the executor's name; for the legatee cannot sue for it in his own name, unless he be made executor as to that debt, &c. (which is the best course in these cases); and yet if the legatee have the bond of especialty in his hands, he may [after assent] deliver it up or cancel it. Perk. Sect. 527.

If a man devise a term of years of land to *I. S.* and make another his executor, and the executor, having enough besides to pay the debts, doth sell this term; in this case, albeit the sale be good, and *I. S.* have no remedy nor means to recover the term, yet he may sue the executor for it, and recover the worth of it in damages in a court of equity (22). [And if the purchaser be privy to any fraud, or attempt to defeat the legatee, equity will follow the term itself, as where the purchaser is apprized that all the debts are paid, &c. &c.] Plow. 543. 545. And of this opinion were Sir John Walter, and Sir John Bridgman, upon deliberate advice.

And now, having done with the first part of a testament, *viz.* a Devise, we come to that which doth concern the second part, *viz.* an Executor.

---

(22) The cognisance of a legacy properly belongs to the spiritual court, for such bequests were not good at common law, the rule being *post mortem tunc tua non sunt*. But this must be understood where a legacy is devised generally, for if it is payable out of the land or out of the profits of the land, an action on the case lies at common law, as at this day, but the usual remedy is in Chancery. 3 *Salk.* 223. See further in what court, and in what manner, legacies are recoverable, in *Bac. Abr. Legacies* (M.); *Com. Dig. Chancery* (3 Y. 3.); 4 *Burn's Ecc. Law*, 301; *Vin. Abr. Devise* (W. d.); *Eq. Ca. Abr. Legacies* (I.) And in what cases, in what manner, and after what rate they shall carry interest, 2 *Bl. Com.* 513; 1 *Wms.* 26.

See before at numb. 4, part 1.

Any person that may make a testament, and devise his goods and chattels, may make an executor. [a] And a woman that hath a husband, as to the goods and chattels she hath as executrix to another, and as to her own goods and things in action, *viz.* debts due unto her upon obligations, and especialties made to her alone before or after her marriage, may, [with the licence of her husband, *Swinb. part* 2, § 9,] make an executor. [b] And he that may make an executor, may make either one, two, three, or more, his executors at his pleasure. And he may, if he will, make one man * his executor for one year, and another man his executor for another year; or one man his executor until such a time, and then another his executor (23): as one may make *A.* and *B.* his executors, and that *B.* shall not meddle during the life of *A.* And a man may make one man executor for one part of his estate, and another man his executor for the other part of his estate (24); or one may make one man executor as to part of his estate, and die intestate as to the residue of his estate (25): also a man may appoint one to be his executor, if he will accept it; and if he refuse, that another shall be his executor. And lastly, a man may make another his executor upon condition (26), *viz.* so as he give bond to such and such men to perform his will, or the like (27): and all these [and the like] nominations and appointments of executors are good.

18. *What person may make or appoint an executor, and what not, and how.*

[a] Fitz. Executor, 28.

[b] Swinb. 187. Dyer, 4. Bro. Executors, 55. 10 H. 8. 8. Lit. Bro. Sect. 180. 3 H. 6, 7. Swinb. 200. 193.

*P. 460.

See at numb. 4, part. 2. Numb. 7. Swinb. 222. Fitz. Executors, 47. 87. Devise, 3.

Any person that may be a legatee, and take by the devise of goods and chattels, may be an executor; and therefore it is said, that any person or persons, male or female, of the clergy or laity, children or strangers, friends or enemies, married

19. *What person may be made or appointed an executor, and what not, and by what name.*

(23) A man may name one person executor, and upon a particular contingency appoint another. *Per* Lord *Hardwicke*, in *Carter* v. *Carter*, 3 *Atk.* 181. See further as to the appointment of a temporary executor, in *God.* 77; *Went.* 10.

(24) See accordingly *Went.* 12; *God.* 78. But though several executors are appointed with separate and distinct powers, yet the will is but one will, and needs only one probate. *Went.* 13.

(25) By the common law; though it is otherwise by the civil law. *Went.* 127.

(26) Any word in a will, that suspends the assignation of an executor in expectation of some future event, makes the estate *conditional*; but if the condition be contrary to the former part of the will, it is void; as if *A.* makes two executors, provided that one shall not administer. *Went.* 10; *God.* 40; *Infra*, 462, *contra.* But if a proviso that one shall not meddle during the other's life, is good; and by this they shall be executors successively, and not jointly. *Went.* 13.

(27) And in such case he must perform the condition before he is complete executor. *Went.* 11.

or unmarried, creditor or debtor, bond or free, may be an executor. [a] And that a bastard, an excommunicate, or an outlawed person, may be as able and as absolute an executor as any other. [b] And an infant or child *in utero matris* may be an executor; but he cannot meddle with the administration of the goods until he be of the age of seventeen years; [and an infant is now restrained by the statute of 38 Geo. 3, c. 87, from administering till he attains the age of twenty-one years;] and therefore the ordinary must grant the administration unto some other until that time, in trust and for the benefit of the infant. [c] And a woman that hath a husband may be an executrix to any other person. [d] Also a woman may be executrix to her own husband, and the husband may be executor to his own wife, and by this means he may recover all the debts due to her upon obligations, recognizances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage: all which the husband shall not have but by executorship or administration of her goods and chattels; [and, as to property which comes to his hands as executor or administrator, he is liable to the debts of his wife.] And all these persons that may be executors, may be executors by that name as they may be devisees: and yet if there be two of one name, and the testator make one of that name his executor, and doth not say, neither can it be discerned, [*i. e.* collected from the context, or proved by extrinsic evidence,] which of them he doth intend; in this case, neither of them shall be executor, [and the appointment is void for uncertainty.]

[a] Fitz. Executor, 11. 88. Nonability, 18. Bro. Non-ability, 38.

[b] Co. 6. 67.

Husband and wife.

[c] Fitz. Executor, 24.

[d] Ibid. Bro. Consultation.

See before at numb. 7. Swinb. 292.

But it is said, that an heretic, apostate, traitor, felon, recusant convict, sodomite, libeller, bastard begotten in incest, or a notorious usurer, cannot be an executor: and that if a man be for any of these causes incapable at the time of the death of the testator, when the executor is to take upon him the executorship, that he is for ever incapable: but it hath been held by the common law, that a person attaint may be an executor (28). [And many of the other characters would not at this

Swinb. 222, 223. Co. 9. 39

Bro. Non-ability, 18. Fitz. Excommengement, 13.

(28) See more amply what persons may be appointed executors, in 4 *Burn's Ecc. Law*, 109; *Executors and Administrators* (A.); *Vin. Abr. Executors* (H. b.) (Q. b.); *Administration* (B. 2.)

Swinb. pt. 4, sect. 17, 18, 19. Dyer, 4. 19 H. 8. 8. 21 H. 6. 6. Fitz. Executor, 43. Bro. Executors, 98. 73. Fitz. Executors, 113. 121. Brief, 999.

day be excluded by the ecclesiastical court from the executorship.

*P. 461.

20. *By what words a man may be made an executor, and what words in a testament shall make a man full executor, or not, but a coadjutor or supervisor; and who shall be an executor by such words.*

* The most apt and proper words, whereby to constitute an executor, are, I make *I. S.* my executor; or, I make *I. S.* the executor of my will, &c. [And it is frequently proper to add executor in trust, so as to deprive him of all beneficial interest.] But an executor may be constituted by other words equivalent, or by implication: and therefore if a man say in his will, I will that *I. S.* shall be my general administrator; or I will that *I. S.* shall administer all my goods; or I will that *I. S.* shall dispose all my goods and chattels; or I commit all my goods to *I. S.*; or I commit all my goods to the disposition of *I. S.*; or I make *I. S.* lord of all my goods; or I make *I. S.* legatary of all my goods [*query*]; or I leave all my goods to *I. S.* [*query*]; or I give all my goods to *I. S.* [*query*] and make no other executor; in all these cases, *I. S.* by intendment of law is made executor of all the goods and chattels of the deceased; so if a man say, of all my goods I make *I. S.* and say no more, but omit the word "executor," by these words *I. S.* is made executor; [for the word "executor" would be supplied by construction:] so if one say, I will that *I. S.* shall dispose of all the goods that are in his hands, by these words *I. S.* as to those goods is made executor: so if I deliver goods to *I. S.* to keep until my death, and then to distribute *ad pios usus*, or for my soul, hereby *I. S.* is made executor of those goods. So if one say, I will that *I. S.* shall be my executor, if *I. D.* will not; by this *I. D.* is made executor in the first place by implication, and if he refuse, then *I. S.* shall be executor. But if a man make *A.* and *B.* his executors, and say, I will that *I. S.* shall be a coadjutor, or helper to *A.* and *B.* *ad distribuendum* or *ad administrandum bona mea*; or I will that *I. S.* shall be surveyor, or supervisor of my will; in these cases, and by these words, *I. S.* is not made executor with *A.* and *B.* [And, in the case of real estate devised upon trust, the title will not be accepted without the concurrence of these supervisors.] And yet if he say, I will that *I. S.* shall have administration of my goods; or be executor with *A.* and *B.*; or be administrator with *A.* and *B.*; in these cases, and by these words, *I. S.* is made

joint executor with *A.* and *B.* And if one, supposing *I. S.* to be dead, say, I will that *I. D.* shall be my executor, because *I. S.* is dead; in this case, and by these words, *I. S.* if he be living is [by implication] made executor first; and if he refuse, [*query*, as the will provides only for death,] *I. D.* shall be executor: if one make *A. B.* and *C.* his executors, and then saith afterwards, and I will that *B.* shall administer my goods alone, or that *B.* only shall administer my goods; it seems, in these cases, *B.* only is made executor, and that *A.* and *C.* are not made joint executors with him (29). [Page 460, n. 26, is *contra*. The executor of an executor who has proved, or the executor of a surviving executor who has proved, will become executor of the first executor, unless he, prior to probate, renounce the first executorship. But if there be several executors, and some prove, and the executor who has not proved, or who has even renounced, be the survivor, this surviving executor may prove, and continue and communicate to his executor the representation. But if he, being the survivor, renounce, then letters of administration *de bonis non* must be granted.] 3 H. 6. 6. 7.

21. *Where and in what case an administration is grantable, or not; and to whom it doth belong to grant it, and to whom it must be granted.*

In all cases where a man hath any goods or chattels to administer, and he doth die a natural or civil death, [*i. e.* was professed in a religious house,] and dieth intestate either in deed, *i. e.* doth make no will at all, nor appoint any executor; or in law, *i. e.* that doth make one or more his executor or executors, and he or they, so appointed, is or are such persons as are not in being, or if they be in being, is or are so incertainly named, that it cannot be discerned whom the testator doth intend; or, if he is or they be well named, he is or they are all incapable by * reason of some legal impediment; or if otherwise they be capable, they do all die before the will be proved; or if they live, if [*viz.* and] being cited to come in before the ordinary to prove the will, they either refuse to appear, or, if they do appear, they refuse to prove the will, and to take upon them the administration of the goods and chattels of the deceased; in all these cases, the ordinary may and ought to grant Co. 9. 39. Plow. 276. Doct. & Stud. 76. 132. Dyer, 256. 4 H. 7. 13.

*P. 462.

(29) See further by what words, and in what manner, a man may be appointed executor, in *Went. Off. Ex.* 8; *God. Orp. Leg.* 82; *Bac. Abr. Executors, &c.* (C. 1.); *Com. Dig. Administration* (B. 1.)

the administration of all the goods and chattels of the deceased to him that of right it doth belong unto, according to his discretion; [namely, to the person beneficially interested, as to the residuary legatee, widow, next of kin, &c.] And if a man make a will, and, after the death of the testator, the executor prove it, and then die intestate, the ordinary must grant the administration of the goods of the first testator, not administered in the hands of the executor, to some competent person or persons according to his discretion (30); [but if there be several executors, and one or more prove, and others renounce, and afterwards survive, the survivors must again renounce before letters of administration *de bonis non* may be granted. 1 *Prest. Abstr.* 186.] But where a man hath no goods and chattels to administer, *i. e.* either he hath none, or, if he have they are none of his, or if they are, there is an executor named, *in rerum natura*, capable, and well named, and he doth accept, or at least hath not refused, the executorship; in these cases, the administration ought not to be granted; or if it be granted, it will be void or voidable at the least; [it is actually void.] And where an administration is grantable, it is to be granted by, and had from the ordinary of the diocese where the party, whose goods are to be administered, lived at the time of his death; for regularly he that shall have the probate of a will, in case where a man doth make a will, shall have the granting of the administration of his goods and chattels, in case he die intestate; and therefore if all the goods and chattels of the party deceased be within the same diocese wherein the intestate lived and died, the ordinary of that diocese, or his lawful deputy, or commissary, or the archdeacon of the diocese, or his deputy or official (as the custom of the country is), or the dean and chapter in time of vacation of the bishopric, shall grant the administration, and the administration be had from him; but if there be *bona notabilia* in the case, *viz.* if the party deceased have goods or chattels of the value of 5*l.* or upwards, lying and being at the time of his decease in divers dioceses;

Stat. 31 Ed. 3. c. 11. 21 H. 8. c. 5. Fitz. Administration, 7. Lit. Bro. Sect. 276. See infra, numb.

Co. 5. 29. 30. Dyer, 305. F. N. B. 120. Plow. 277. 281. Co. 6. 18, 19. Dyer, 339.

Bona notabilia.

(30) If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. 1 *Sid.* 281; 1 *Vent.* 219.

in this case, the archbishop or metropolitan of the diocese wherein the party died, or, *sede vacante*, the dean and chapter being guardian of the spiritualties, and not the ordinary of the particular diocese, shall grant the administration; and it must be had from him: for if the ordinary of the particular diocese grant it when it ought to be granted by the metropolitan, the administration is void, not only as to the goods that lie within the other diocese, but also as to the goods lying within the same diocese. And so is it also, if it be granted by the ordinary of another particular diocese, as if *A.* die within the diocese of Lincoln, the king being indebted to him at the time of his death, and the administration of his goods and *P. 463. *chattels is granted by the bishop of London (31); this administration is void. And if the metropolitan do grant an administration, when it ought to be granted by the ordinary of the particular diocese, the administration is [not void, but is only, voidable by sentence of the same court out of which it is granted. If one die in Ireland, and have nothing but an especialty for money, and that especialty doth lie in England, the ordinary of the diocese, within which that place is where the especialty doth lie, shall commit the administration; and if the ordinary of another diocese grant it, the administration is void. And therefore the case was, a merchant in Ireland was bound in an obligation of 40*l.* to one *I. S.* in London, and the obligation was made in Ireland, but remained always in London, and the merchant died intestate in the county of Bedford in England, and a bishop of Ireland did commit the administration to one, and the archbishop of Canterbury did commit it to the wife of the intestate who had the obligation; in this case, the last administration was adjudged good; and it was there held, that the administration shall be granted by the ordinary of the place, where the especialty doth lie at the time of the death of the intestate, and not by the ordinary of the place where the debt began (32). [See

See infra, at numb.

Dyer, 305.

(31) *Bona notabilia*, 10*l.* in London. See the note to p. 499, *post*.

(32) By statute 4 Anne, c. 16, s. 26, probate of wills and administrations shall be in the ordinary of the diocese (for persons working in the king's dock yards) where the dock yards are situate, and their wages shall not be deemed *bona notabilia*. See further as to *bona notabilia*, in *Bac. Abr. Executors* (E. 3.)

Toller's Executors, that the bish jurisdiction when the testator or any part, however remote from *Exec.* 391, 402. As to *bona no* ing points are material: Simple follow the person of the debtor, that place in which he resided at his debts are assets at the place whe lodged when the testator dies. whether by deed or without deed, place where the lands are situate. assets in two jurisdictions of c bishop is to grant the adminis within two bishopricks belonging to politan, then the metropolitan is the administration. When the as the jurisdictions of two metropol right of granting administration is by the situation of the assets in without any regard to the situatio betwecn the two provinces; *i. e.* the must, as to each metropolitan, a jurisdictions in his province, be manner as if no assets existed wi province. On this subject, and the connected with representation, rea *cutors*; *Com. Dig. Administration, E* in cases where the administration by the ordinary and others as before, having power to grant it, may not gr they please; but as they are boun and cannot refuse so to do, so are and appointed to whom they shall it is appointed by a special law, that shall depute the next friends of th administer his goods if they desire administration is to be committed t or next of blood, or both, to the i where there be divers in equal degree, sue for it, the ordinary may accept refuse some of them, and commit th tion to the rest only; and if some sue for it, he may grant it to them a now the law and course is to grant th tion to the nearest of kin to the deceas the husband or wife; [stat. 29 Car. 2,

Stat. 31 Ed. 3. c. 11. 21. H. 8. c. 5. Lit. Bro. sect. 393. 415. Fitz. Excommengement, 13. Co. 9. 39, 40. 3. 40. Dyer, 339. 1 H. 7. 14.

if there be none such, 2. to the children, sons or daughters; and, if there be none such, 3. to the parents, father or mother; and, if there be none such, 4. to the brothers or sisters of the whole blood; and, if there be none such, 5. to the brothers or sisters of the half blood (33); and, if there be none such, 6. to the next of kin, uncles, &c. (34). And if these come in time and desire the administration, the ordinary may and must grant it to them, and cannot grant it to any other if they be capable of it, as most men are; and if divers of these in equal degree desire it, the ordinary may grant to which of them he pleaseth, [whether of the whole or half blood;] howsoever, in this case, it seems most just and equal to grant it to them all, unless he have
*P. 464. some * special reason to admit some and exclude the rest. And if none of these that are next of kin shall desire it, but suffer the time to slip; in this case the ordinary may grant it to whatsoever stranger he please (35). And yet then perhaps the next of kin may by suit get the same administration revoked, and a new administration granted to him. See *infra*, at *numb.* 41 (36).

22. *How an administration may be granted, and*

An administration may and must be granted in writing under seal, for by word of mouth it may

Dyer, 294. Fitz. Administrator, 5.

(33) The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood; and the ordinary may grant administration to the sister of the half or the brother of the whole blood, at his own discretion. 2 *Black. Com.* 505; *Aleyn.* 36; *Styl.* 74. See also *West. Sy. Ex.* 130, last edit.; *God. Orp. Leg.* 261.

(34) Grandfathers, *Prec. Canc.* 527; 1 *P. Wms.* 41; uncles or nephews, *Atk.* 455 (the females of each class respectively); and lastly, cousins, 2 *Bl. Com.* 505.

(35) Or may grant him letters *ad colligendum bona defuncti*, which neither make him executor nor administrator; his business being only to keep the goods in his safe custody, and to act for the benefit of those who are entitled to the property of the deceased. 2 *Bl. Com.* 505; *post*, 459. But if a *bastard*, who has no kindred, being *nullius filius*, or any one else that has no kindred, *dies intestate, and without wife or child*, it was formerly held that the ordinary might seize his goods, and dispose of them *in pios usus*; *Salk.* 37; though now the usual course is for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown. 3 *P. Wms.* 33.

(36) See more amply what persons are entitled to take out administration, and how they are to be preferred, in *God. Orp. Leg.* 259; *stat.* 22 & 23 *Car.* 2, *c.* 10; 29 *Car.* 2, *c.* 3; *Bac. Abr. Executors*, &c. (F.); 4 *Burn's Ecc. Law*, 221, 3d edit.; *Com. Dig. Administrator* (B. 6.) And in what order and proportions administrators are to make distribution of intestates effects, see the *stat.* 22 & 23 *Car.* 2, *c.* 10; 29 *Car.* 2, *c.* 3, § 25; 1 *Ja.* 2, *c.* 17; 14 *Geo.* 2, *c.* 20, § 9. For a full and explicit description of these four statutes, and the cases determined thereunder, see 2 *Bl. Com.* 515; *Richardson's Law of Wills*, 421, 2d edit.; *God. Orp. Leg.* 254; 4 *Burn's Ecc. Law*, 324, 3d edit.; 1 *Wood's Conv.* 148; *Eq. Ca. Abr.* tit. *Executors*, &c. (E.) A clear summary of distribution in *Gilb. Ten.* 9.

34 H. 6. 14. Plow. 279.

not be granted; and it may be granted as well upon condition as absolute; and it may be granted as well for a part of the estate as for the whole: and therefore, if a man have goods in two provinces, and he make a will of his goods in one of the provinces, and die intestate for the goods in the other province, an administration may be granted for the goods in this province. Also an administration may be granted during, or until a certain time, or continually; and therefore, if a man make a will, and appoint an executor for seven years, after the seven years ended, the ordinary may and must grant an administration of the goods, [unless some other executor be appointed.] So if one do appoint another to be his executor, [at the end of] a year after his death, the ordinary may and must grant the administration for that year, until the power of the executor doth take place; and all these administrations are good (37).

what shall be said a good administration, or not.

tat. 25 Ed. 3. 4. 5. 9. low. 286. 4 H. 6. 14.

If an executor die after he hath proved the will [in a court of competent jurisdiction,] and he hath made a testament, and appointed an executor therein; in this case, this executor also shall be executor to the first testator, as he is to the second, and he shall have all the benefit, and be subject to all the charge that the first executor had and was subject unto; and yet the goods of one testator shall not be subject to the debts of the other; but each of the testator's goods shall be subject to the payment of his own debts only. [But the second executor may, before he proves the second will, renounce the executorship of the first testator; and in that case, and from that time, the first testator will be considered as dead intestate. Suppose effects in two jurisdictions, and an executor to prove the will in one of them, *exempli gratia*, York, and afterwards to die, having appointed an executor, will the second executor be the executor of the first testator, as to the effects in the other jurisdiction? It is apprehended not, and that there must, in that jurisdiction, be an administration to the first testator. And if an executor die before probate, but after such an intermeddling with the

23. *Who shall administer after the death of an executor or administrator, and who not; and how an executor of an executor shall charge and be charged.*

(37) See further in what manner administration must be granted in *Bac. Abr. Executors* (G.); *Com. Dig. Administrator* (B. 7.)

estate of the testator, as would have made him liable, yet the executor of the executor will not be the representative of the first testator.] [a] And if in this case, the executor of the executor take upon him the administration of the goods of the first testator; he cannot refuse the administration of the goods of the latter: but he may take upon him the latter, and [by renunciation prior to the probate of the second will,] refuse the former. But if the executor refuse to administer to the first testator before the ordinary, or die before the probate of the will, and he hath made a testament and appointed an executor therein; in these cases, it seems the executor [as such] of the executor shall not administer the goods of the first testator, but the ordinary must grant the administration thereof: and yet if all the residue of the goods of the first testator be given by the testament to the first executor after the debts be paid; in this case, albeit he die before probate of the will, yet his executor shall [*read*, though he shall not] be executor also to the first testator, or else [*read*, yet] he shall have the administration of his goods and chattels granted unto him. [This is the practice: and in all cases of such intestacy, the residuary legatee is entitled to the administration; for this is a case not within the statute, regulating the grants of letters of administration. Immediately on the death of the testator, the testamentary disposition in favour of the executor, becomes a vested interest, and is transmissible to his representative. The death of the executor before or after probate, will not make any difference in this respect; nor will the difference of giving or not giving a legacy to the executor, vary the right of the executor of the executor to probate or execution of the will of the first testator. The residuary bequest may entitle him to preference, when it shall be considered to whom administration shall be granted; but the circumstance of the disposition, with the concurring circumstances of an appointment to the executorship of the will of the executor who dies before probate, will not of itself entitle the executor of the executor to be the executor of the first testator:] and therefore, if *A.* make his will, and give legacies to *B.* and *D.* and give all the rest of his goods and * chattels, after

[a] Trin. 17 Jac. Co. B. Wolfall Heiden's case.

Dyer, 371.

Adjudged in Hil. 9 Car. in Dean's case.

*P. 465.

debts and legacies paid, to *C.* his wife, and make her his sole executrix, and she die before probate of the will, or any election made, [knowing or] not knowing of the will, and *E.* sue out an administration of the goods of *A.* and pay the legacies to *B.* and *D.* and *F.* sue out an administration of the goods of *C.*; in this case, the administrator of *C.* and not of *A.* shall have the goods; for the law doth [ad]judge them in *C.* after the debts and legacies paid, without any election; [but the administrator of *C.* cannot claim these goods, as such administrator, till there has been an assent to the bequest by the administrator of the testator.]

Bro Executor, 117. 26 H. 8. 7. Co. 1. 96. Dyer, 372. Terms of the Law, tit. Administration.

If an [*read,* a sole] executor, after he hath proved the testator's will, die intestate; in this case, the administration of the goods of the first testator not administered in the hands of the executor must be granted to whom the ordinary shall think fit: and if the ordinary please, he may grant the administration, *de bonis non administratis* of the first deceased, and of the goods of the second deceased, to one and the same person: and herein the administrator must take care that his administration have special words for the granting of an administration of the goods of the first testator, not administered; for howsoever some hold that, by the general administration, the administrator shall have not only the goods of the executor, but the goods of his testator also, yet it seems this is not taken to be law at this day. [Certainly not.]

Fitz. Administrator, 9.

Dyer, 160.

If there be two executors made, and one of them doth refuse before the ordinary, and the other doth prove the will, and make a will himself and appoint an executor and then die; in this case, it seems the executor of the executor that did prove the will, alone shall have the disposition of all the estate, and be executor to the first testator; and that the surviving executor shall not meddle therewith, for that his election by the death of his companion is gone. [The distinctions, to express them briefly, are, though the surviving executor renounce the executorship, the executor of the proving executor will not, as such, be entitled to represent the first testator.] And if one make two executors, and one of them doth make an executor and die, and the other that doth survive hath accepted the executorship; in this case, the

t. Bro. sect. 9. o. Executor, 9. 99. r. Executor, . 113. er, 187.

surviving executor shall have the sole disposing of the estate, and the executor of the deceased executor shall not intermeddle therewith: and if therefore the surviving executor die intestate, [or renounce after he has become the survivor,] an administration *de bonis non administratis* of the first testator shall be granted; and if the executor of the deceased executor have any of the estate [in specie] in his hands, the surviving executor may take or recover it from him; [though, in general, relief is sought in equity for an account:] and if two be made executors, and one of them is incapable; in this case, he that is capable shall administer alone.

If one that is administrator of another man's goods do make his will and make an executor and die; or do die intestate, and the administration of his goods granted to somebody; in the first of these cases the executor, and in the last the administrator, unless he be made, [*i. e.* appointed by the ordinary,] administrator of these goods also, shall not * meddle with the goods of the first deceased: but the administration of the goods of the first deceased in the hands of the administrator not administered, must be granted again. And hence it is, that if the administrator of my goods have [*i. e.* recover] a judgment for a debt due to me, and he die before execution, and make an executor, or die intestate, that, in this case, his executor or administrator shall never have execution of this judgment. [In each case there must be letters of administration of my effects remaining unadministered.] And the same law is of the administrator of my executor in this case.

Dyer, 372. 112. Co. 5. 9.

*P. 466.

24. Where an executor or administrator may accept or refuse the executorship or administration, and how; and where he may be executor after he hath refused, or not; and what act or intermeddling with the goods of the dead shall be said an administration, and what not.

An executor or administrator may accept or refuse the executorship or the administration at his pleasure; and therefore he may at any time before he hath intermeddled with the estate as executor or administrator, refuse it; and if he be sued by any as executor or administrator, he may plead, *ne unques executor*, *i. e.* he was never executor or administrator, and did never administer; and if it be true, he shall by this means avoid the suit; for a man shall not be compelled to take such a charge upon him whether he will or no. If therefore there be many executors, or an administration be granted unto many: and one of the executors

Co. 9. 37. 37 H. 6. 27. 28. 30 H. 6. 1.

prove the will in the name o
accept the administration in th
rest, yet the rest may refuse to a
in any suit against them that they
or administrators. But as an [*rea*
or an administrator, after he
refused the executorship or ad
never after intermeddle therewith
once legally accepted thereof (th
any thing as executor or administ
is proper only for an executor
to do, [as releasing debts, &c
after refuse it. [But acts of ch
viding the funeral, &c. will not be
termeddling.] And his acceptan
case, will make him chargeable w
be in the case before, of an exe
accept of the last executorship,
first. [See the statute of 38 Geo
provides for granting administrati
ticular cases where there is an exe
absence, &c.]

Co. 9. 37. Fitz. Administration, 6. 11. Bro. Administration, 32. Executors, 117. Co. 5. 28. Perk. Sect. 486. Dyer, 160. 21 Edw. 23.

If the executors, being cited
prove their will, appear before th
[all of them] refuse to administe
the will, they cannot afterwards a
meddle with it. But herein this
be observed; that where there be
named and made, and, they being
them only do appear and refuse t
rest of the executors being then li
some or one of the rest of the exec
will, or take upon him the execu
case, and notwithstanding this ref
do refuse may afterwards at any
[*omit*, at least] during the life tim
executors that did accept it, [or af
the acting executors,] accept ther
meddle therewith as far forth as eit
[After the death of the acting exec
administration cannot be granted,
viving executors, or the surviving
have renounced letters of probate.
fore, in this case, howsoever the exe
shall not be charged in any suit a
executors for any thing due from
but they may by their plea avoi

*P. 467. executors accepting cannot sue for any * thing due to the testator, nor be sued for any thing due from the testator, but they must sue and be sued in the names of themselves and their co-executors that do refuse also. And if there be three executors, and two of them prove the will, and the third refuse; yet this third executor alone may release any debt due to the testator. But if there be but one executor made, and he alone, or if there be many made, and they do altogether refuse before the ordinary to take upon him or them the administration; in this case, [the authority of the executors is at an end, and] the testator is so far forth said to be dead intestate; and thereupon therefore the ordinary may grant the administration of the goods of the deceased, and then the executor or executors can never after accept thereof, or intermeddle therewith. And if one or more of the executors refuse, and the rest accept, if he or they which accept die before he or they that refused accept; it seems, in this case, they can never afterwards accept it, but the administration must be granted. [This point is over-ruled. 1 *Prest. Abstr.* 186. There must be a renunciation by the surviving executors after the death of the proving executors before administration can be granted.]

See the cases before.

If one be sued as executor or administrator, and he plead to the suit *ne unques executor*, *i. e.* he was never executor or administrator, if he have not in truth intermeddled before; this plea is a refusal of the executorship or administration, and therefore he can never afterwards accept or intermeddle with the executorship or administration (38). [This point is not, it is apprehended, law. A refusal must, to be effectual, be before the ordinary.]

[Acts which are not intermeddling.]

Every intermeddling with the goods of the deceased, or with the office and work of an executor, shall not be said to be such an administration as to amount unto an acceptance of the executorship or administration, and so to make a man chargeable as executor or administrator. And therefore if a man that is an executor or administrator do only lay up and preserve the goods of the deceased; or command another to take away the goods of the

Co. 9. 37. 5. 34. Dyer, 105. Kelw. 63. Bro. Administrator, 35. 36. Fitz. Administrator, 7. Bro. Executor, 165. 32 H. 6. 6. Dyer, 138.

(38) What evidence may be given upon this plea, see *Buller's N. P.* 143.

deceased from one that hath them in his keeping; or see the deceased buried in a decent manner, and for that purpose use, and (if need be) sell, some of his goods to do it; or make an inventory of the goods and chattels of the deceased; or prove the testator's will [in the names of some of the executors or an administrator,] with his own money; or take his own goods lying amongst the goods of the deceased; or take and use some of the goods of the deceased only by mistake, or as a trespasser, or by the delivery of another; or take and dispose any of the goods of the deceased, when the executor or administrator doth challenge them as his own, and in his own right; or if he redeem any of the goods of the deceased with his own money when they are pledged to the full value, and the day of redemption is past; as neither of these acts will make a stranger an executor of his own wrong; so neither will they amount to an acceptance of the executorship, and make the executor or administrator chargeable as executor or administrator (39). But if a man that is an executor or administrator shall sue by that name for any debt due to the deceased; or being sued * by that name for any debt or duty due from the deceased, shall imparl to the suit, or plead any other plea besides *ne unques executor*; or shall take into his hands the goods of the deceased, and convert them to his own use, and alter the property by sale, gift, or otherwise, and all this as the goods of the deceased; (and so it shall be intended against him if he do not declare the contrary, that he doth take and use them as his own, &c.); or if he deliver the goods of the deceased to creditors or legataries, [*i. e.* legatees,] in satisfaction of their debts or legacies; or receive any debt due to the deceased, and give a release for the same; or release any debt due to him before it be paid; or pay any debt due from the deceased, except it be with his own money; any or either of these acts will amount unto an acceptance of the executorship; and therefore, after an executor or administrator hath done any such act, he can never

Executor of his own wrong

*P. 468.

(39) See fully what act or degree of intermeddling will make any one an executor *de son tort*, what remedy may be had against him, and what acts of his shall be valid, in *Went. Off. Ex.* 172; *Swinb.* 337; *God. Orp. Leg.* 90; *Bac. Abr. Executors*, &c. (B. 3.) and *post*, numb. 33; [*Toller's Executors*, 39. 107. 245. 474.]

after refuse the executorship or administration; [*i. e.* he may be compelled to prove, &c.; and creditors and legatees may sue him, and he cannot defend himself, by a plea of *ne unques executor*.]

If a woman sole be made an executrix to another, and she marry a husband before she intermeddle with the estate, and then her husband doth administer; this is such an acceptance as will bind her, and she can never afterwards refuse it. Bro. Executs, 147.

qg. What things an executor or administrator shall have by virtue of his executorship or administration, and what not.

First, in respect of the nature of the thing.

The executor or administrator shall have, by virtue of his executorship or administration, all the chattels real and personal of the testator, as well those that are in possession, as leases for years of land, [and of] rent, common, or the like, grants of next advowsons, and presentations, wardships of heirs by reason of tenures *in capite*, or knight's service, corn growing, [and not devised,] and [corn] cut (40); [as against the heir, and those in remainder or reversion, the executor is entitled to emblements; but as against a devisee, he is not entitled to them, unless they are specifically given, or reserved as part of the personal estate;] trees, [being severed in the lifetime of the testator, or being a chattel in him by grant;] and grass cut and severed, cattle, money, plate, household stuff, and the like; as also those that are in action, as [debts,] right and interest of executions upon judgments, statutes, obligations, causes of action, and the like; he shall have also all other things that are of the nature of chattels (41): [and now he shall have freehold leases, unless they be devised, or unless the heirs be named as special occupants: and they are devisable by a will, attested by three witnesses. 29 Car. 2, c. 3. And though the will be not so attested, a gift by will would in effect be a declaration of trust for the Co. super Lit. 209. 388. Perk. Sect. 60. Plow. 293. Doct. & Stud. 39. 76. Perk. Sect. 833. Co. 4. 65. 63. 7. 17. Kelw. 118.

(40) Corn, though growing, and things of the same kind, produced by labour and cultivation, as hops, saffron, hemp, &c. belong to the executor; yet roots of all kinds, as parsnips, turnips, &c. belong to the heir. The general rule of distinction, therefore, as to what increase belongs to the heir, and what to the executor, seems to be, that every thing belongs to the executor which he can get at and gather without digging up the earth or breaking the soil: but *Went.* 63, makes an exception of artichokes. [*Toller's Exec.* 196.]

(41) All the personal estate of the testator belongs to the executors, and is assets in their hands for payment of his debts and legacies. The civil law distinguishes *chattels real*, as leases for years, mortgages, &c. by the name of immoveable goods; and *chattels personal*, as household goods, money, cattle, &c. by the name of moveable goods. *Went.* 52; *God.* 180. *Moveable* goods are again divided into *things animate*, as horses, cows, sheep, fowls, &c.; and *things inanimate*, as money, household stuff, implements and utensils, hay, carts, ploughs, coaches, &c. *God.* 120; *Dyer*, 283; *Went.* 53.

devisee, binding on the executors and administrators. *Ripley* v. *Waterworth*, 7 *Ves.* 425.]

[a] Co. super Lit. 79. Dyer, 140. 283. Dyer, 24. Bro. Executor, 143.

[a] And therefore the executor or administrator shall have the two years of the heir female that is in ward, [abolished by the statute law;] a relief or an advowson, [*i. e.* a presentation,] that is fallen; and yet if a bishop [as such] have title to present by the vacation of a church, and then he die; in this case the king, and not the executor or administrator of the bishop, shall present. And if the lord have a greater estate in the seigniory than for life or years, [*i. e.* an estate of freehold or inheritance, which continues after his death;] it is said the executor or administrator shall not have the relief. And the executor or administrator of the lord shall have fines assessed upon the tenants upon their admittances in the lord's time.

[b] Stat. 32 H. 8. c. 37. Co. 4. 48. Dyer, 575.

[b] And if I make a feoffment in fee, gift in tail, or lease for life, rendering rent, and the rent is behind, and then I die; in this case, the arrearages of rent due to me in my lifetime shall go to my executor or administrator in the nature of a chattel; [and the remedy by distress ceased at the common law: but by the statute law, (32 Hen. 8, c. 37,) the executors may distrain. *Buller's Nisi Prius*, 56.] So if a rent be granted out of land to me in fee simple, fee tail, for life, or years, and it be not paid to me in my lifetime; these arrearages shall go to my executor or administrator, and not to any * other.

*P. 469.

[c] F N.B. 120. I.

[c] And so also if a parson have an annuity in fee in the right of his church, and it be behind, and the parson die; in this case, the executor or administrator, not the successor of the parson, shall have the arrearages. [But in corporations aggregate, the arrearages will belong to the successors; or, more correctly speaking, to the corporation; since the corporation is always the same body.]

Dyer, 275.

And if I be seised of land and possessed of a stock of cattle, and let it to another for years, and he covenant [with me and my wife] by the lease to pay me and my wife, our heirs and assigns, 100*l.* by the year, during the term; in this case, after my death and my wife's, surviving me, her executor or administrator, and not my heir, shall have this payment. [Though lands, as well as personalty, are comprehended in the lease; yet it was considered, and decided, that this annual sum was not a rent, but a sum in gross; and, therefore, not incident to

the reversion expectant on the lease; and consequently, it belonged by contract to the survivor.]

[a] And if one seised of land in fee, make a feoffment of it to me, excepting the trees, and after grant me the trees for years; or if he make me a lease of the land first for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the land: in both these cases, I have the trees in the nature of a chattel, and if I die, my executor or administrator shall have them. [But, by special grant, there may be an inheritance in trees. *Bowle's case*, 11 *Rep.* 80.]

[a] Co. 4. 63.

[b] And if a man grant to me the next presentation to the church of *D.*; in this case, if I die, my executor or administrator shall have it as a chattel.

[b] Dyer, 283. 34 H. 6. 27.

[c] And my wife shall have so much of her wearing apparel, as is necessary and convenient for one in her estate and condition; and therefore that shall not go to my executor. But so much of her wearing apparel as she hath superfluous, and more than necessary for her, shall go to my executor or administrator after my death, [so far as it may be wanted for payment of debts] (42).

[c] See supra, at numb. 7.

[d] And the charters and evidences, that do concern any of my chattels which my executor or administrator is to have, shall go with the same chattels. So also any charters whatsoever, if they be pledged to me for money, shall go to my executor or administrator until the money be paid. [*Toller's Executors*, 231.] But otherwise those deeds and evidences, that do belong to the heir as incident to the inheritance, shall not go to my executor or administrator after my death. [The same rule in favour of the reversioner, &c. applies to deeds concerning lands, in which the deceased has a particular estate.] But matters of trust, and such things as are personal, as offices of trust, wardships by reason of a tenure in socage, or

[d] Bro. Chattles, 12.

(42) The wife, after the death of her husband, shall have convenient apparel for her body, not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. 4 *Burn's Ecc. Law*, 246, which cites 1 *Roll. Abr.* 911; *Law of Test.* 383. *Bona paraphernalia* are not devisable by the husband from the wife, (but *query*, if the husband may not dispose of his wife's paraphernalia, after *her death*, by his will,) any more than heir-looms from the heir; so that the right of the wife to the *bona paraphernalia* is to be preferred to that of a legatee. *Per* Lord Chancellor *Macclesfield*, in *Tipping* v. *Tipping*, 1 *P. Wms.* 729. See more amply what things are included in the *bona paraphernalia*, and how far the widow is justified in retaining, or enabled to recover them, *Com. Dig. Baron and Feme* (F. 3.); *Bac. Abr. Executors* (H. 4.); 2 *Black. Com.* 436; 1 *Wood*, 136; *God. Orp. Leg.* 130; *Vin. Abr. Executors* (Z. 5.); [*Northey* v. *Northey*, [illegible] 77; *Toller's Executors*, 229.]

jure naturæ, or the like, shall not go to the executor or administrator after the death of him that hath them (43). So an executor or administrator shall not have the grass and trees growing on the ground, no more than the soil or ground itself whereon they grow. [It is now settled, that the executors shall have hops, &c. &c.; and, it should seem, all annual crops. So also, it seems, clover of the first year. The right to sainfoin is more questionable.] So an executor or administrator shall not have the incidents of a house, [being real estate,] as glass, doors, wainscot, and the like, no more than the house itself; nor pales, walls, staulks, fish in ponds, deer, or conies in parks, pigeons in pigeon-houses, or the like (44). [The doctrine respecting fixtures, as it applies, 1st, between heirs, or devisees and executors; 2dly, between lessors and lessees, (with the difference between fixtures for agricultural purposes, and for the convenience of trade); and, 3dly, between those who have particular estates, and those who have estates in remainder and reversion, belong to this division. A general view of the law may be collected from Lord *Ellenborough*'s judgment in *Elwes* v. *Maw*, 3 *East*, 38; 3 *Thomas's Co. Litt.* 234, n. 3.]

Flow. 293. Co. 3. 39. 9. 99. Kelw. 118. See before at numb. 7.

Co. 10. 87. Lit. Sect. 740. Fits. Accompt, 56. F. N. B. 110.

Secondly, in respect of the case.

If a lease for years of land be granted to me and my heirs, or to me and my successors, and I die; my executor or administrator, and not my heir, shall have this term. The same law is, if a wardship, or the next advowson of a church, be granted unto me and my heirs; or if a covenant or an obligation be made to me and my heirs: for in all these cases this is still a chattel in * me, that shall go to my executor or administrator, and he only shall take advantage of it. And if my heir or successor happen to get the deed, the executor or administrator may recover it from him [by an action of detinue, or the value in damages in an action of

*P. 470.

(43) If a guardian in *chivalry or knight's service* died, the ward went to the executor; for being an interest by reason of tenure, did not determine by the guardian's death, and therefore went as a chattel to the executor: but if a guardian in *socage* died, the ward went neither to the heir nor executor; for if the infant was fourteen years old, he might choose his guardian; if under that age, the next of kin to whom the inheritance could not come, was to be guardian. *Went.* 52. A guardianship, pursuant to stat. 12 Car. 2, cannot be assigned; neither shall it go to executors or administrators, being a personal trust. *Vaugh.* 130.

(44) Where the testator had the inheritance, or but an estate for life in the pond, park, warren, &c.; for in that case they are not chattels, but go to the heir with the inheritance; but if the testator were but a termor, they go to the executor as accessary chattels, following the estate of their principal, *viz.* the pond, park, &c. *Went.* 53.

trover.] And if a lease be made to me for twenty years, without naming my executors or administrators or assigns in the lease; in this case, if I die, my executor or administrator notwithstanding shall have it during the term. [a] And if a lease for years be made to a bishop and his successors, and he die; his executor or administrator, not his successor, shall have it; [for a sole corporation cannot, except in some instances, as in the case of the chamberlain of London, have a personal chattel in succession.] [b] And if a man be possessed of a term of years of land, and grant it by deed, or give it by will, to me and my heirs, or to me and my heirs male, [or heirs male of my body;] or devise it by will to *A.* for life, the remainder to me and my heirs; in these cases, I shall have these terms of years as chattels, and after my death my executor or administrator shall have them. [But by special words, or by a gift in the first instance to *heirs*, heirs male, &c. the persons who are heirs, heirs male, &c. or sons or heirs of the body, or children, &c. according to the intention as collected from the context, may be purchasers under these denominations. See *Fearne's Cont. Rem.* 461.] [c] And if a man grant a rent out of his land to me and my heirs for twenty years, and I die; my executor or administrator, not my heir, shall have this rent. [d] And if a rent be granted to me, my heirs and executors, during the life of *I. S.* and for one half year after, and I die; in this case, [because, in point of law, there are two distinct estates, one a freehold, and the other a leasehold, 3 *Prest. Convey.* 166,] the half year's rent shall go to my executor or administrator, and not to my heir. [The Liverpool leases for lives and years are of the like description.] And if I be seised of land in fee, and make a lease for years of it, rendering rent, and then devise this rent to a stranger, and the devisee die; in this case, his executor or administrator shall have it, [the rent; for the rent is a chattel in him:] And if the lessee for life make a lease for years absolutely, [being a lease for years determinable on the death of the tenant for life; but which lease may be rendered absolute by confirmation;] this in law is a lease for so many years if the life so long live, and shall go to the executor or administrator after his death. [And where an estate *pour autre vie* was limited to a man, his heirs, exe-

[a] New Terms of the Law, tit. Assigns.

[b] Co. super Lit. 46.

Co. 8. 95. 10. 87. Plow. 524.

[c] Lit. Sect. 470.

[d] M. 7 Jac. Co. B. Wat's case. Lit. Sect. 730.

Dyer, 4.

Co. 7. 12.

cutors, &c. the heirs were preferred. 4 *Term Rep.* 229.]

Bro. Executors, 145. 97. Fitz. Executors, 111. If I have a box, chest, or trunk, wherein my writings that do concern my inheritance do lie, and the same is open, and not sealed or locked; in this case my executor shall have it: but if it be locked or sealed, *contra:* for then it shall go to him that is to have the writings, as incident thereunto. And yet if there be any money, plate, or any other such like thing in the chest also, my executor shall have that thing.

Co. 4. 63. 22 H. 7. 16. The incidents of a house, [held for an estate of inheritance, &c.] as glass-windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables dormant, furnaces of lead and brass, and fats [*read*, vats] in a brew and die house standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house, (though fastened to no wall,) a copper, or lead fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house, albeit the executor or administrator have, [in his own right,] a lease for years of the house, and by that means hath the house also. [This rule is still applied as between the heir and executor, or the executor and a devisee; but as between lord and tenant, and a tenant of a particular estate and a remainder-man, the rule of the common law is greatly relaxed. 12 *Mod.* 520, and *supra*, 470.] But if the glass be from the windows, or there be wainscot loose, or doors more * than are used that are not hanging, or the like: these things shall go to the executor or administrator. [But a millstone, taken from the mill for a particular purpose, still remains part of the mill, and will belong to the heir. *Toller's Exec.* 196.] *P. 471.

Co. 5. 96. Fitz. Executor, 8. If I make a feoffment to *I. S.* of land, on condition that if he pay me, my heirs or assigns, or my heirs, executors or administrators, 100*l.* such a day, that the feoffment shall be void, and I die before the time of payment; in this case, if this money be paid at the day, my executor or administrator, and not my heir, shall have it. [In all cases of mortgages and sales, the money will be part of the personalty, and belong to the personal

representatives. By express contract, and declared intention, the money may belong to the heir, as a substitute for the estate in the land.]

If one be seised in fee of lands whereon there are trees growing, and he make a feoffment of the land to me, excepting the trees, [as a chattel in him,] and afterwards he doth sell me the trees for ever, and after I die; in this case, my executor or administrator shall not have these trees, as they shall in case where the feoffor doth grant them to me for years; [for, by the purchase, they are re-annexed in right to the soil.] And if I be seised of land in fee, and I make a lease for life or years of it, excepting the trees, and afterwards I die; in this case, my executor or administrator shall not have these trees, but they shall go in both cases with the land, [as annexed to the reversion.] Co. 4. 63. 11. 48.

If a lease be made for life, or years, of land, whereon a house is standing, or timber is growing, and the house is prostrate, or the timber is cut or fallen down (by whomsoever or what means soever it be;) the materials of this house, and this timber, is now become a chattel; and therefore, if the lease be without impeachment of waste, it shall go to the lessee, and after his death to his executor or administrator; but if the lease be otherwise, [*i. e.* subject to impeachment for waste,] it shall go to the lessor, [*viz.* reversioner for the time being having the inheritance,] and after his death, [provided he had an interest in the trees, &c. as a chattel distinct from the land,] to his executor or administrator. But if the timber be cut for reparations only, or the lessee will employ the materials of the house to build it again, and the lease do continue, it may be so employed, and then, [on account of the right of the lessee,] the executor or administrator of the lessor [or reversioner, or after his death, his personal representative,] may not take it. Co. 4. 63. 11. 81. 84.

If one be seised in fee simple of ground whereon trees do grow, and he sell me these trees for money, and afterwards I die before they be cut; in this case, my executor or administrator shall have and may cut them. [But there may be an inheritance in trees; and therefore, if they be granted to a man and his heirs, the heirs shall have such trees as may be standing at the death of his ancestor.] Co. 11. 50. Perk. Sect. 58.

If the king's tenant by knight's service *in capite* be seised of a manor whereunto an advowson is Co. super lib. 388.

appendant, and the church become void, and the tenant dieth, his heir within age; in this case, the king, and not the executor or administrator of the tenant, shall have the presentation. And yet if in this case the land be held of a common person, the executor or administrator, and not the guardian, shall have it, [the presentation.]

Dyer, 316. Doct. and Stud. 35. Perk. sect. 59.

In all cases regularly where a man doth sow land, whereof and wherein he hath such an estate as may perhaps continue until the corn be ripe, if he that doth sow it die before it be cut and severed, his executor or administrator shall have it: as if the husband sow the land whereof he hath an estate in fee simple, fee tail, for life, * or for a certain number of years, in the right of his wife, and die ere it be ripe; in this case, the executor or administrator of the husband, and not the wife, shall have it. And if one that holdeth land for the life of *I. S.* sow the land, and *I. S.* die ere it be ripe and cut, the executor or administrator of the tenant [occupier] shall have this corn. And if tenant in tail, or in dower, sow the land they do so hold, and die ere it be cut, the executor or administrator, not the issue in tail, nor the heir, or him in reversion, shall have it. [As between the heir and executor, or the executor and the issue, the emblements belong to the executor; but, as between an executor and a devisee, the emblements belong to the devisee, unless they are expressly bequeathed. The statute law gives to the executors, &c. of tenant for life, and by construction to the executor of the incumbent of churches, and to tenants in tail who die without issue, a right to rent for that proportion of the current period of the year, &c. in which they die, provided the lease determine by the death; but if the tenancy continue by virtue of a power, or as a tenancy to a reversioner or remainder-man, then there will not be any apportionment of rent.] So if the husband make a feoffment in fee to the use of himself for life, and after of his wife, &c. and he sow the land, and after die, his executor or administrator, not his wife, shall have the corn. But if a feoffment be made to the use of the husband and wife together in fee, or for life, [so that they are tenants by entireties,] and the husband sow the land; in this case, the wife, not the executor or

[Emblements.]

*P. 472.

administrator of the husband, shall have the corn. [The like point is law as between husband and wife, or other persons being joint-tenants. But see 1 *Roll. Abr. Emblements*, 16; 1 *Inst.* 65, *et quære.*] So if lessee for years certain sow the land a little before the end of his term, and the term end before it be cut; in this case, he that is to have the land, not the executor or administrator of the lessee for years, shall have the corn (45.) [The criterion is, that the estate is determinable on an event, and it is not certain at what time the event may happen. In all cases of estates to determine at a certain and definite period, as at Michaelmas, the right to have the growing crops will cease at the end of the term. They must be severed within the term to entitle the lessee, unless there be a custom or a contract giving a right to sever a growing crop after the term.]

If there be tenant for life, the remainder in fee of a tenancy, and the lord grant his seigniory for life, and after he in remainder in fee of the tenancy die, his heir within age, and after the lord die, and after the tenant for life die; in this case the heir, and not the executor or administrator of the lord, shall have the wardship, [in right of his reversion.] Co. 2. 93.

If one be seised of land in fee, and make a lease for years rendering rent at Michaelmas, or within ten days after, and the lessor happen to die during the term after Michaelmas, and before the ten days expired; in this case the heir of the lessor, and not his executor or administrator, shall have the last half year's rent due [for it is not severed from the reversion] at Michaelmas, [but is due only at the end of the ten days. So if the reversioner die before twelve o'clock at night of the rent day, the rent will belong to the heir, not to the executor. *Combe's case*, 9 *Rep.* 75.] Hil. 7 Jac. B. R. per Curiam.

If one grant a rent in fee, and grant withal, that if the rent be behind the grantor shall forfeit 20*s.* *nomine pœnæ* to the grantee and his heirs, and the rent is behind, and the grantee die; in this case his executor or administrator, not his heir, shall have this money that is forfeit already, [*i. e.* in the F. N. B. 130. Fitz. Covenants, 17. Dyer, 24.

(45) See before, as to the doctrine of emblements, in fo. 244 and 431, and the references in the notes thereunto respectively. Upon entry for forfeitures *in copyholds*, the lord shall have the emblements. *Gilb. Ten.* 250.

life of the testator.] So if one make a feoffment in fee of land, and the feoffee doth covenant to do divers things to the feoffor, * *et quoties defectus fuerit, &c.* that he shall forfeit to him and his heirs 5 *l.* and the feoffee doth fail and break his covenant divers ways, and the feoffor dieth; in this case his executor or administrator, not his heir, shall have and recover all the forfeitures that are past [in the time of the testator. In general damages, by reason of a covenant broken in the lifetime of the deceased, will belong to the executor, &c.; but a cause of action, in respect of the estate, title, &c. will belong to the heir, though the covenant was broken in the lifetime of the testator. *Kingdon* v. *Nottle*, 1 *Mau. & Sel.* 355.]

Co. 4. 65. Perk. Sect. 58. Co. super Lit. 46.

If a bishop, parson, vicar, master of an hospital, or any body politic, be possessed of any goods or chattels in their own right, and die, these shall go to the executor or administrator, and not to the successor, of such a person. And albeit such things be granted to * them and their successors, yet their executors and administrators, and not their successors, shall have it. But if a corporation aggregate, as dean and chapter, mayor or commonalty, and the like, have any goods or chattels in right of their corporation, and any of the heads or members thereof die, the executors or administrators of such person shall not have them; but they shall continue in succession with the corporation. [See *supra*, 469.]

*P. 473.

Co. 6. 8a. Dyer, 201.

An executor or administrator shall have the benefit of a pardon granted to the deceased, and shall have advantage of any error in any outlawry against the deceased, [in a personal action,] and have restitution of the goods forfeit thereupon.

Husband and wife.

Co. super Lit. 351. Plow. 294. 192.

The executor or administrator of a woman that hath a husband, shall have, by right of his executorship or administration, all actions, rights, and titles to any chattels, and possibilities, and things of that nature, which the wife had before the marriage, and which fell to her [before or] during the marriage; for these things the husband shall not have by the intermarriage after his wife's death, as he shall have all the rest of her goods and chattels: except [*read*, but] he [may] have them as executor or administrator to her, as [*read*, and] he may be

[such executor or administrator.] And if such a woman have any goods or chattels as executrix to another, her executor or administrator, [more correctly, the executor or administrator *de bonis non* of the testator,] not her husband, shall have these also; for she hath these goods in another's, and not in her own right. [But a term of years, or the trust of a term of years, will belong to the surviving husband, as such; but if the wife survive, then the term, or trust of the term, will belong to her. 1 *Inst.* 351, a.; 1 *Prest. Abstr.* 343.]

If I have any goods or chattels in joint-tenancy with another, as if a lease be made of lands to me and another for years, or a horse or other chattel personal, [or a legacy or *chose en action*,] be given or granted to me and another; in these cases if I die, my executor or administrator shall not have any part of these goods or chattels; but the other surviving joint-tenant shall have them all. But otherwise it is of the goods and chattels that I and another have in common. And therefore if I and another have goods and chattels in that nature as before, [*viz.* as joint-tenants;] and he, or I, grant that which doth belong unto us thereof unto a stranger; in this case the stranger, and him of us two that hath kept his part, are tenants in common of the things; and therefore, if either of us die, the part of him that dieth in the goods and chattels shall go to his executor or administrator, and not to the other tenant in common. Lit. sect. 281. Perk. sect. 525. Lit. sect. 320, 321.

If I have a judgment for land in a real or mixt action, and for damages recovered in the same suit, and I die; in this case my executor or administrator, not my heir, shall sue execution for and recover the damages, but not for the land; [for the heir, or heir in tail, &c. shall have execution for the land. *Shelley's case*, 1 *Rep.* 90.] So if I recover damages against another for the detaining of my charters, and die, my executor or administrator shall recover the damages, but the heir shall have the charters; and the heir must sue his *scire facias* for the charters, ere the executor can sue for the damages. Also if I recover any debt or damage in any personal action, my executor * or administrator shall recover and have this. See more *infra*, at *numb.* 39. Fitz. Executors, 53. 84. 117.

*P. 474.

Co. 6. 18. 9. 38. 5. 27. Plow. 280. 9 Ed. 4. 47. 36 H. 6. 7. Fitz. Administrator, 2. 6.

26. What an executor may do by virtue of his executorship; and the power of an executor, administrator, or ordinary.

The power and interest which the executor hath is wholly by the will. And hence it is, that an executor, whether he be absolute or conditional, while he is executor, may do any thing as executor, (except only, sue for debts and duties due to the testator,) as well before the probate of the will, as he may do after; for before the probate he may enter into and seise the goods and chattels whatsoever they be, or give power to another so to do; and if any of them be taken or kept from him, he may have an action of trespass, or a replevin to recover them; [and even before probate, in these cases, because the actions are founded on his own possession,] he may give or sell any of the goods or chattels; he may pay any of the debts due from, and receive or release any debts due to, the deceased (46). But it is otherwise in the case of an administration, [*read*, administrator;] for inasmuch as his power and interest is given to him wholly by the administration, therefore he can do nothing until the administration be granted. And yet in this case, as to the goods taken away, [after the death of the intestate, and] before the administration, the administration shall have such a relation as to give the administrator an action for them. But otherwise, [*i. e.* in other respects,] after the administration is granted, the interest and power of the administrator is equal to and with the power and interest

(46) See more amply what acts an executor may do before proving the will, and how far such acts are valid, in case the executor afterwards dies before probate, in *Went. Off. Ex.* 34; *God. Orp. Leg.* 144; *Bac. Abr. Executors, &c.* (E. 4.); *Vin. Abr. Executors* (A. a.); *Com. Dig. Administration* (B. 9.) *Went.* 36, says, An executor cannot *maintain* a suit or action of debt, or the like, before proving the will; because in the action he must show forth the will proved under the seal of the ordinary: and so likewise in trespass, where testator was entitled to the action. But it is clearly agreed that an executor may, before probate, *commence* an action in right of the testator; but he cannot *declare*, for without producing his letters testamentary he cannot assert his right in court; but as soon as he has them, the impediment is removed *ab initio*. 1 *Salk.* 302; *Raym.* 481; *Roll. Abr.* 917; 3 *Lev.* 57. *But a distinction must be made if the* action *is by original writ*, for therein the cause of action is set forth, and therefore *such action cannot be commenced before probate*; but in an action by bill, the *bill* (or declaration,) and not the process, is considered as the commencement of the action. In the case of *Mitchell* v. *Smart*, 3 *Atk.* 606, Lord *Hardwicke* says, An executor may at law bring an action before probate, but cannot declare till the will is actually proved; and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate. Accordingly it is laid down in *Mitford's Treatise*, 138, that where an executor does not appear by his bill to have proved the will of his testator, (1 *P. Wms.* 172,) or appears to have proved it in an improper (3 *P. Wms.* 371,) or insufficient court (1 *P. Wms.* 766,) as he does not show a complete title to sue as executor, a demurrer will hold.

of the executor; [and one of several administrators, as well as one of several executors, may assign a term, or release, &c.] And yet it is otherwise of the power and interest of the ordinary; for howsoever it seems by the ancient common law he might seise, preserve, give, grant, and dispose the goods of the intestate to pious uses, yet might he not sue for the goods or debts due to the intestate, no more than he might be sued for any debt due from the intestate; and at this day he may only keep and preserve the goods of the deceased until administration be granted; and sue him, in the court of the ordinary, that doth detain the goods from him; and perhaps may sue him that shall take the goods out of his possession; for he may not sell or give the goods of the deceased, nor receive or release any debts; for in case where there is an executor made that is capable, &c. [t]he [ordinary] is not to meddle at all with the estate until the executor refuse; and where there is no executor, or that the party is dead intestate, the ordinary is presently to commit the administration to the nearest of the kindred, [the widow, or residuary legatee, according to circumstances;] which when he hath done, his power is at an end: for it is doubted of some, whether he may repeal an administration without cause, or not; but it hath been clearly held by all, that he may not dispose of the estate afterwards, [after administration granted;] and that he hath not power to enforce the administrator to give portions to children out of the estate; and that if he do go about it, either before or after the granting of the letters of administration, the administrator may have a prohibition. And accordingly divers have been granted; and yet, notwithstanding, it seems this course is usual, and prohibitions not often granted at this day. [When the administrator is compellable to distribute, the ordinary may enforce administration, and may take a bond to ensure due administration; but courts of equity have concurrent jurisdiction to enforce a due administration of assets, and have drawn to themselves the greater part of the business of administering assets.] *P. 475. * An executor or administrator may, after the death of the deceased, enter into the house where the deceased lived, and where he died, and where the goods are, and take

Co. 8. 135. 4. 29. Dyer, 255. Westm. 2. c. 19. 31 Ed. 3. c. 11.

Hil. 13 Ja. Co. B. Hemslow's case. Trin. 3 Jac. Co. B. Davis's case. Hil. 2 Car. Co. 9. Potherlic's case. Lit. sect. 69. Plow. 281. Bro. Executor, 129.

them away, and justify it; but he must do it within convenient and reasonable time, as within thirty days after his death, or thereabouts, and in a quiet and fair manner, when the door is open, &c. [m] He may keep any of the goods of the deceased, so as he pay or lay out as much [*i. e.* the value] of his own money in and about the administration of the same estate. [n] He may, if he wants money to discharge funerals, or pay debts, sell any of the chattels real or personal whereof the deceased died possessed; and that albeit the thing in particular be devised: as if a man be possessed of a term of years *inter alia*, and devise the same term to *I. S.*; the executor or administrator, notwithstanding this devise, may at any time before assent given to the legacy, if he have not assets to pay the debts, sell this term, and the legatee is remediless; [hence it is, that an executor may, prior to assent, make a good title to chattels real specifically bequeathed, and without the concurrence of the legatee, and whether there be or be not assets.] And so he may do also, albeit there be enough besides to pay the debts, and he have no need; but then in this case the legatee shall have some relief in a court of equity against the executor or administrator for damages, but the sale [unless fraudulent] is unavoidable; [for a *bona fide* purchaser is not bound to see that there are not any other assets.] An executor or administrator may retain so much of the estate as to satisfy his own debt first, if any be due unto him; [*i. e.* as against all other creditors in equal degree; but where two executors are creditors in equal degree, one cannot retain as against the other; nor can an executor retain against a creditor of a higher degree.] And if he have enough to pay all the debts and legacies, he may pay them in what order he will, without danger to himself, or wrong to creditors or legataries, [legatees.] And if he hath not enough, he may pay them in what order he will, but not without danger to himself. But if any thing be due to himself, he may, [as against creditors in equal degree,] pay that first of all; and for others that are in equal degree, he may pay which of them he will first. [But equitable assets must be distributed among the creditors, *pari passu*; and if some creditors have received part of their debts,

[m] Dyer, 2.

[n] Plow. 543. 544.

Plow. 184. 543. Co. 5. 28.

the other creditors must, in the first place, be put on an equal footing with them.] And for the legataries, [*read*, legatees,] he may prefer which of them he will, or pay one of them his whole legacy, and pay another a part of his, or not pay him any part of his legacy, if there be no assets to do it. [General legatees must be paid *pro rata*; the executor cannot pay one, in exclusion of the other.] The addition to Justice Doddridge's Treatise, 93. Kelw. 62. But an executor or administrator may not sell any thing that is given in special to a legatee, to pay another legacy given to another legatee; nor compel a creditor or legatee to take some of the goods of the deceased for his debt or legacy, whether he will or no; nor devise the goods he hath as executor or as administrator; [nor can these goods be taken in execution for his debt, 4 *Term Rep.* 621;] neither can executors or administrators make division of the goods amongst them. 27 H. 8. 22. Plow. 525.

Infant. An infant that is an executor, after the time he is capable, [and now, in consequence of the statute of 38 Geo. 3, c. 87, he is not capable of administering until he has attained the age of twenty-one years,] hath as much power as another executor of full age; for he may sell the goods, receive debts, and make releases for the monies he doth receive, assent to a legacy when debts are paid, sue, and be sued, as another executor. And he is only disabled to do any thing to hurt himself; and therefore if he release a debt before he receive it, the release is void; and if he assent to a legacy before the debts are paid, the assent is void; and if he do any other * act which would be a wasting of the goods in an executor that is of full age, it shall not bind him. And it seems, that howsoever an infant executor after seventeen years of age may sell any of the chattels personal he hath as executor, yet that after his age of seventeen years, and before he is twenty-one years of age, he cannot sell a lease for years he hath in the right of his executorship, but that such sale is void. [This proposition was very questionable: there is not any principle on which this point could be supported.] Co. 5. 28. *P. 476. And so was it held by Justice Hutton at Serum Assizes, 21 Jac.

Woman covert. A woman covert that hath a husband, and is an executrix, may do any lawful act as another executor may do; but she may not do any thing to prejudice her husband: as release a debt before it Bro. Executor, 178. 152. Fitz. Executor, 55. Co. 5. 28.

be paid, assent to or deliver a legacy before the debts be paid, or the like; and yet the husband himself may do so, [subject to his liabilities for a *devastavit*] (47).

Co. 8. 133.

27. *The office, duty, and charge of executor or administrator, and of the ordinary.*

The office and duty in general of an executor or administrator is, to dispose all the estate of the deceased wherewith he hath to do. 1. Truly, not to convert any of it to his own use, but to the use and best advantage of the deceased; nor to labour by any undue practice or means to hinder any creditor of his debt. 2. Lawfully, to pay debts and legacies in that order the law prescribeth. 3. Diligently, *quia negligentia semper habet comitem infortunium*; but more particularly, the first duty and care of an executor or administrator, after he hath taken upon him the charge of the administration of the goods and chattels of the deceased, after the goods are laid up, is to see the body of the deceased laudably interred according to his rank and quality (48); wherein let the executor or administrator take this caution by the way, not to exceed in funeral pomp, especially if it be so that the estate will scarcely reach to pay the debts; for let his expences be what they will, the judges (who in this [case] are to determine what shall be allowed) will allow what they please, and they are pleased in such cases to allow but a small matter; and whatsoever the executor or administrator doth lay out more, he must bear out of his own estate, if he have not enough besides to pay the debts. [See *Buller's Nisi Prius*, 143. The practice is to allow 5*l.* as against creditors of an insolvent estate.]

Doct. and Stud. 75. Plow. 543. Kelw. 64.

First, in the funerals.

(47) According to the civil law, *she* (a feme covert) may take upon her the probate of the will, without the assent of the husband, she being deemed (when appointed executrix) a feme sole. *Went.* 202; *God.* 110. But by our law, a feme covert cannot take upon herself the office of executorship without the consent of her husband. *And.* 117; *Went.* 203. See further *Bac. Abr. Executors*, &c. (A. 8.)

(48) Funeral expences, according to the quality of the deceased, are to be allowed before any debt or duty whatsoever; for that is *opus pium et charitativum.* [*Toll. Exec.* 245;] *Supp. to Went.* 30. The Court of Chancery allowed 600 *l.* as a reasonable sum for the funeral expences of a man of great estate and reputation in his country, and who was buried there; but if he had been buried elsewhere, it seems his funeral might have been more private, and the court would not have allowed so much. *Offley* v. *Offley, Prec. Canc.* 27. It is said, that in strictness no funeral expences are allowable against a creditor, except for coffin, bell, parson, clerk and bearers fees, but not for pall or ornaments. 1 *Salk.* 296, pl. 3; *Bull. N. P.* 143. *Holt*, Ch. J. said 10*l.* was enough for the funeral of one in debt. *Comb.* 342; see further 3 *Vin. Abr.* 563, pl. 5. *Query*, if the comparative value of money in *Holt's* time ought not to be considered.

Secondly, in making an inventory.

The second duty and care must be to make an inventory, *i. e.* a schedule containing a true and perfect description of all the goods and chattels of the deceased at the time of his death: as of his wares, merchandizes, emblements, and the like, with their appraisement and value, and of none else, and of all debts due to him and from him. And this must be, [or rather ought to be,] made by and before two of the creditors or legataries [legatees] of the deceased, (if there be any such and they will do it,) and two others, or in case they refuse, by and before two other men of the honest neighbours. And herein let the executor or administrator take this caution by the way, not to intermeddle with the goods before he hath done this; for howsoever he may do any act as executor before the inventory be made, yet the ordinary may punish this upon him, except it be done with the ordinary's licence, who, in this case, may give what time * he will for the doing of it; and until the inventory be made and put in, it shall be presumed against the executor or administrator that he hath assets in his hands to pay all men; [this presumption may possibly be allowed in the ecclesiastical court; but at law the creditor must prove assets before he can recover; and hence frequently the necessity of a suit in the ecclesiastical court, or in a court of equity, to have an account of the assets, as ancillary to an action:] and besides, until this be done, he cannot deduct to satisfy his own debt first, and bar other men by plea. [This rule does not prevail at law.] But of the other side, when he hath made and exhibited a true and perfect inventory of all the goods and chattels, it shall be presumed against him, that he hath so much as is contained in the inventory, and no more, unless more can be proved by witnesses (49). 3. The third thing whereof the executor or administrator is to take care, is to prove the will, if there be

Doct. and Stud. 35. Stat. 21 H. 8. c. 5. Dyer, 166. Swinb. pt. 6. sect. 6, 7, 8, 9, 10.

*P. 477.

Thirdly, in probate of the will.

See Probate, infra, at numb. 41.

(49) And this inventory must be delivered to the ordinary upon oath of the executor or administrator, if he is thereunto lawfully required. 2 *Bl. Com.* 510. See further as to the necessity and manner of making an inventory, in *Went. Off.* 50; 4 *Burn's Ecc. Law*, 235; *Com. Dig. Administration* (B. 7.); *Swinb.* 420. See accordingly *Swinb.* 756, part 6, § 7 to 10, where it is said, divers are the effects and benefits of an inventory: to which may be added, its utility in preventing a tedious, intricate, and expensive suit in equity; or in any suit, necessarily commenced, where an account is directed to be taken, a clear and fair inventory is not only reputable to the executor, but prevents much delay and expence.

any (50): and this the ordinary will compel him to do, but otherwise he may do any thing as executor, save only, sue actions, as well before probate as after. [By the statute of 37 Geo. 3, c. 90, executors are subjected to a penalty of 50 *l.* for administering for a given time without proving the will.]

Co. 9. 88. Plow. 184. 545. Dyer, 80. Doct. and Stud. 75, 76, 77, 78. 132. Star. 33 H. 8. cap. 39. Co. 5. 28. 4. 54. 59, 60. 8. 132. Dyer, 232. 32. 21 Ed. 4. 21. Bro. Executor, 88. 172. Co. 8. 132. Dyer, 32. Plow. 279, 280. Bro. Executors, 103. Kelw. 74.

Fourthly, in payment of debts and legacies; and the order of payment of debts and legacies.

4. The fourth thing whereof the executor or administrator must take care, is to sell and make money of the goods and chattels, and to receive the debts due to the deceased, and then to pay the debts and legacies due to the creditors and legataries, wherein the executor or administrator must be very cautious and wary (51). [Executors ought not, without great reason, to permit money to remain on personal security longer than is absolutely necessary, *Powell* v. *Evans*, 5 *Ves.* 844; nor ought executors or trustees, without very clear and explicit directions, to lend money on personal security.] And for this purpose let him observe, that all the debts must be paid before any legacies be paid or delivered; and if there be not enough besides to pay the debts, any thing given by way of legacy may be sold to make money to pay the debts, and the legataries [legatees] must lose their legacies; for *legatarii contendunt de lucro captando, creditores autem de damno vitando* (52). And in payment of debts this decorum [order of priority] must be observed: 1. Amongst persons that are creditors [in equal degree,] the executor or administrator himself shall be preferred; so that if any debt be due to him, he may deduct to satisfy him-

(50) What fees are to be paid upon probate, see *Went.* 50 and 132.

(51) The personal estate is to be applied for the payment of debts, in the first place, is the general rule, and it is as certain that the testator cannot, as against his creditors, exempt the personal estate; but against his heir at law, or the devisee of his real estate, he may substitute the real in room of the personal estate, and charge the debts upon another fund, not primarily liable; but to exempt the personal estate, there must be express words, or a plain intention to do so. See *Walker* v. *Jackson*, 2 *Atk.* 624; S. C. 1 *Willes*, 24, and the cases there in margin. As to the order of affecting assets, see *Donne* v. *Lewis*, *Bro. Rep.* Mich. 1787, where it is laid down by Lord *Thurlow* that they are to stand thus: 1st, That the general personal estate is to be applied; 2dly, Ordinarily speaking, estates devised for the payment of debts; 3dly, Estates descended; and 4thly, Estates specifically devised, even though *they are generally charged with the payment of debts*; but if the *estate* descended is acquired after making the will, it seems, according to that case, to be postponed till after estates specially charged by the testator.

(52) And in case of a *deficiency of assets*, all the *general* legacies must abate proportionably, in order to pay debts; but a specific legacy (of a piece of plate, a horse, or the like,) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. 2 *Bl. Com.* 512; 2 *Vern.* 111. See fully of abating, refunding, and giving security for that purpose, *Bac. Abr. Legacies* (H.)

self first, albeit others, [being creditors in equal degree,] lose their whole debt thereby, and especially then when his debt is in equal degree with others debts (53). [The rule applies only as against creditors in equal degree; and an executor *de son tort* cannot retain; nor can one executor retain as against another executor. A creditor made executor, but not proving or acting, may maintain an action against another executor who acts. *Rawlinson* v. *Shaw*, 3 *Term Rep.* 557.] 2. After the executor or administrator is served and satisfied his debt, then the king is to be preferred; so that if there be any debt due to him (54), and he begin his suit for it before any other man can get a judgment for his debt against the executor or administrator, his debt shall be paid before any others (55).

---

(53) See accordingly 1 *Roll. Abr.* 922; *Plow.* 543. An executor or administrator hath a right at law, in case of debts in equal degree, to prefer one to another, to retain for his own in the first place against any other creditor, for he cannot sue himself; and this privilege of retainer is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worse condition than all mankind besides; but an administrator may not retain against his co-administrator in equal degree, but shall be decreed to account. See *Chapman* v. *Turner*, in Chancery, 26th February 1738; *Vin. Abr. Executors* (D. 2.) pl. 2.

Order of payment of debts:—Executors or administrators;

Record - - { King; Judgments; Statutes or Recognizances;
Bonds; Rents; Wages; Simple Contract.

Note, This order preferable to *Wentworth*.—Being (next to debts due to the crown) of a higher nature and more dignity than any other; for though statutes and recognizances are debts upon record, yet they are begotten by the voluntary consent of parties; whereas, in every judgment, there is presumed a course of justice against the will of the defendant in a court of justice. *Went.* 137. Judgments by mere confession, without defence, (of which nature, I apprehend, may be deemed judgments upon warrants of attorney to confess them,) are of the same nature, and to have the same respect, as judgments upon trial or otherwise. *Went.* 139. Creditors by *judgment at law*, and creditors by decree in equity, shall be paid equally by an executor, without any preference enforced by law. *Peploe* v. *Swinburn*, *Bunb. Rep.* 48, by *Wilson*. If a debtor makes his creditor and another person executors, and the creditor neither acts nor proves the will, he may maintain an action against the other named executor, for the debt due from the testator. *Rawlinson* v. *Shaw*, in King's Bench, in last Hil. Term, 3 *Durnf. & East*, 557.

(54) On record or specialty, *Skogs* v. *Gresham*, 1 *And.* 129; for otherwise debts to the crown, such as for wood sales, or sales of tin or other minerals, for which no specialty is given, or for fines or amercements in courts which be not of record, are not to have priority of payment before the subject's debts, though the king's debts of record are so to have. *West.* 134. In a note in 2 *Bac. Abr.* 432, it is said "that it seems, if the king's debt, and likewise that of the subject's, be both inferior to debts on record, that the king's shall be preferred," and refers to tit. *Prerogative*.

(55) Mr. J. *Blackstone*, in describing the rules of priority to be observed by an executor or administrator in payment of debts, immediately after debts due to the king, mentions such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen, 30 Car. 2, c. 3; money due on poor's rates, 17 Geo. 2, c. 38; for letters to the post office, 9 Anne, c. 10, and some others. 2 *Comment.* 511, 9th edit.

[And the statute of 33 Hen. 8, c. 39, (4 *Term Rep.* 405,) has given the king a priority. 2 *Black. Com.* 511. At the common law the king stood on the same footing as other creditors. 1 *Roll. Abr.* 927. Debts to the post office, and to the overseers of the poor, are also to be preferred. *Toller's Exec.* 261.] 3. After the king is served and satisfied his debt, then the debts of common persons must be paid. And these also must be paid in this order or manner: 1. The debts due by record, by any judgment had against the deceased in any judicial proceeding in any court of record, [and docketted; and decrees stand on an equal footing with judgments.] 2. The debts due by statutes or recognizances entered into by the deceased; for the debts due upon judgments must be satisfied before these; *sit judicium prius vel posterius.* 3. The debts due by obligations, and penal and single bills; for these are in equal degree, and these are to be paid after statutes and recognizances (56). And yet if the statute or recognizance be only for performance of covenants, and no covenant is broken, an obligation for the payment of present money shall be discharged before it. [See 5 *Co.* 28; *Toller's Executors*, 276.] 4. The debts due for * rent upon leases of land, or grants of rents; but some say that debts due for rent in the testator's lifetime (be the rent reserved upon leases made by or without deed, for years, or at will,) are in equality of degree with debts due upon specialties; [*i. e.* they are of the nature of specialties, though there be not any covenant to pay; and as creating a specific lien in right of the remedy by distress, they at least, if a distress be taken, must be paid before other debts.] 5. The debts due for servants wages and workmen (57). [This is a matter of courtesy, rather than right.] 6. The debts due upon shop-books

*P. 478.

(56) The preference given to bond creditors, over simple contracts, depends upon whether the testator's assets are legal, or only equitable, as *an equity of redemption of a mortgage in fee of a trust estate*, for in that case Lord *Hardwicke* decreed the creditors to take *pari passu*. See *Plunket* v. *Penson*, 2 *Atk.* 290. Note the distinction in that case between a chattel mortgage and a mortgage in fee: in the former, the reversion in fee being in the mortgagor, the assets are legal.

(57) Among simple contract debts, *servants wages* are by some (*Roll. Abr.* 927,) with reason preferred to any other; and so stood the ancient law, according to *Bracton*, l. 2, c. 26, and *Fleta*, l. 2, c. 57, § 10, who reckon among the first debts to be paid, *servitia servientium et stipendia famularum.* 2 *Bl. Com.* 511.

and verbal contracts; and yet it is said by some, that legacies are to be paid before debts due by shop-books, bills unsealed, or contracts by word, *quod non credo* (58). [Unquestionably legacies are to be postponed to debts of any nature, even voluntary debts.] And amongst debts also that are in equality of degree, those that are due are to be paid before those that are not due; and those whose day of payment is already come, before those whose day of payment is not yet come: and yet if the creditor, whose day of payment is already come, do not sue for his debt, until his debt, whose day of payment is at a day to come, become due, the executor or administrator may satisfy which of them he will first (59); [since he will have the opportunity of pleading *plene administravit.*] And amongst debts that are due and already to be paid, those that are first sued for, [*i. e.* can first obtain judgment,] are to be first paid (60); or if the creditors begin their suits together, the executor or administrator may pay which he will of them first; [or may confess a judgment to one; and may plead the judgment and no assets, or no assets *ultra* a given sum, to the action of the other creditor;] and to pay debts in any other order is dangerous; [and executors or administrators, who are mere trustees, are generally advised to administer the assets, under the sanction of a court of equity, so as to avoid responsibility:] and therefore for this purpose, if the deceased owe two several debts of 10*l.* a-piece to two several creditors by several obligations, and the executor or administrator hath enough only to pay one of them, he that can first get judgment and execution [*omit*, and execution] shall first be satisfied; and if the executor or administrator do afterwards pay the other his debt, he must satisfy the first [judgment]

Addition to Just. Dodridge, 92.

(58) Debts by contract, or *assumpsit* express, are to be satisfied before legacies: 1st, Because by the common law they are recoverable, and legacies are not; 2dly, Because, as the books say, it concerns the soul of the testator to have *æs alienum*, all debts and duties to other men satisfied before the debtor's voluntary gifts or bequests. *Went.* 156. Simple contract debts are also to be satisfied before the reasonable part of the wife or children, to which by custom they are in some counties entitled. *Ibid.* It is a *devastavit* in an executor to pay legacies before debts. *Keil.* 128; *Dyer*, 254; *God.* 148.

(59) Though he has nothing left for the other; for until a suit is commenced the executor has not legal notice of the debt. *Dyer*, 32; 2 *Leon.* 60.

(60) See accordingly the words of Lord *Hardwicke*, in *Ashley* v. *Peacock*, 3 *Atk.* 209.

out of his own estate (61): [*query*, if the priority does not depend on the pleading; for if the defendant plead to both actions generally, without pleading that he has fully administered, except, &c. and the judgments, &c. and no assets *ultra*, or no assets except to a given amount; what is there to preclude either creditor from obtaining execution?] If one that hath a debt due to him from the deceased upon a simple contract, or the like, sue the executor or administrator for it, and there be debts due to others upon bonds and bills unsatisfied, [or other specialties, as covenants, &c. and the executor have notice thereof;] in this case, the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in his action; for if he do, and he have not assets besides to satisfy the debts due upon bills and bonds, [and other specialties, &c.] he must satisfy so much out of his own estate, as he hath so paid, or suffered to be recovered from him; for, in the case of an action brought, he is to plead and to set forth these debts upon [judgments,] especialties, [&c.] and to say that he hath no more but what is sufficient to satisfy them, &c. and thereby he shall bar the plaintiff in his action; [or if he plead no more *ultra* than a given sum, then the creditor may take judgment for that sum, out of assets, when they shall happen. But in some books it is said, that an executor is not bound to take notice of debts by specialty, without an action brought.] In like manner it is, if one that hath a debt due to him from the deceased upon an obligation sue the executor or administrator thereupon, and there be debts due to others upon judgments, statutes, or recognizances, [duly docketted, &c.] and the executor or administrator suffer the plaintiff to recover the debt due upon the obligation for want of pleading the judgments, &c. or doth voluntarily pay that debt, and he hath not assets besides to pay the debts due upon judgments, &c; in this case, he must pay so much out of his own estate, towards the satisfaction of * the said debts due upon judgments, &c. as he hath paid of the debt

*P. 479.

(61) The judgment creditor who *first sueth out execution* must be preferred; and before any execution sued it is at the election of the executor to pay which he will first, but this must be understood only of *judgments* recovered against testator. *Went.* 138.

due upon the obligation. [But now, judgments, &c. have not any priority, unless docketted.] But here it must be noted, that no judgment or statute that is discharged, or is left and suffered to lie by agreement to bar others of their debts, shall be any bar to others that sue for their due debts upon
Covin. obligations, &c.; and therefore if any executor or administrator shall plead any such judgment, &c. in bar of any other debt sued for by any other creditor, the creditor may by special pleading set forth this matter of covin, and avoid the plea and bar of the executor or administrator. If one creditor, whose debt is in equal degree and presently due and to be paid, begin a suit against the executor or administrator for his debt, and he hath notice that the suit is begun against him, or the action is laid in the county where the executor or administrator doth dwell, or (as some have said) in *London*, (in both which cases, it seems, he is bound to take notice thereof at his peril;) and after this suit begun he doth make voluntary payment of another debt in equal degree in all respects, for which no suit is begun, this is a *devastavit* in the executor or administrator; [*query*, if the executor may not pay another creditor in equal degree at any time before plea, and set forth the payment as a defence; at all events, it is apprehended, an action may be brought by one creditor, and a judgment confessed to him, so as to give priority;] and if he have not assets to satisfy him who began his suit first, he shall be compelled to satisfy so much thereof as he doth voluntarily pay to the other, and that out of his own estate: and yet an executor or administrator may make voluntary payment of any debt due by record, as by judgment, statute, &c. after such a suit begun, and justify it. If two creditors in equal degree to all purposes begin to sue for their debts at one time; in this case, the executor or administrator cannot safely make voluntary payment to either of them, unless he have enough to pay them both; but his safest way is to pay him first, that in a due and legal proceeding (for he may not covinously help one of them to a judgment sooner,) [the practice is the contrary,] can first recover it by judgment and execution, [*omit*, and execution;] and yet if, in this case, no suit

be begun, the executor or administrator may make voluntary payment to either of them in equal degree of his whole debt, albeit he have no assets left to pay unto the other any part of his debt. If *A.* and *B.* be two creditors in equal degree, and *A.* begin his suit first, and after *B.* doth begin his suit, and it happeneth that *B. bonâ fide* without any covin or agreement between him and the executor or administrator, [or even by the confession of the executor or administrator,] doth get judgment and execution [*omit*, and execution] first; in this case, the executor or administrator may make payment to *B.* first of all. But if the executor or administrator doth by any covin and agreement, [but the mere confession of judgment or default is not covin,] help *B.* to his judgment and execution [*omit*, and execution] first, and by this means he is first satisfied, if there be not enough left to satisfy *A.* he must satisfy him out of his own estate. [*Toll. Exec.* 264.] If two suits begin at or about one time, upon two several obligations, and the executor is forced to plead to them both * before either of them hath a judgment, so that he cannot plead the judgment that the other hath against him, and he hath not assets to satisfy both the debts sued for, and after the plaintiffs in both the suits get judgment and execution; *quære*, what the executor or administrator may do in this case. And here note by the way, that it is policy for a creditor that hath cause to sue an executor or administrator, to be doing [begin] betimes, and to get judgment and execution [at least judgment] as soon as he may; for it falleth out in this case, that he that doth first come shall be first served (62). [A judgment cannot be confessed in trust for creditors generally, so as to be pleaded in bar; there must be payment or satisfaction, that is, receipts taken, so as to support the plea of *plene administravit*. All this

Covin.

*P. 480.

(62) See more amply as to the order of payment of debts in respect of their priority, in *Swinb.* 455; 2 *Bl. Com.* 511; *Com. Dig. Administration* (C. 2.); *Chancery* (3 G. 6.); *Vin. Abr. Executors* (Q. a.) to (X. a.); *Bac. Abr. Executors, &c.* (L. 6.); *Went. Off. Ex.* 130; *Treat. of Eq.* 112. The order of payment of debts pointed out in the text must be considered as referring only to *legal* assets, *i. e.* assets which come to the hands of executor in the character of executor; for where an executor is a devisee to sell and pay debts, the assets are equitable; he is considered as a trustee. A court of equity in that case marshals the assets, and pays the creditors *pari passu*, whether by specialty or simple contract. See the notes of *Barker* v. *Boucher*, at the Rolls, in 1784; and of *Silk* v. *Prime*, cor. Lord *Camden*, inserted in the case of *Newton* v. *Bennet*, cor. Lord *Thurlow*, in 1782, in *Bro. Rep.* 139; *ante*, 431.

learning is so important to persons advising executors and administrators, and any error is so fatal to the peace of families, that the reader should not adopt any of the conclusions in this section, without consulting the authors who treat professedly on this subject.] After all the debts are paid in such order and manner as before, then is the executor or administrator to pay and to deliver the legacies: and herein the executor may prefer himself so, that if any legacy be given to him, he may detain and deduct it, albeit there be nothing left to discharge the legacies given to others (63): and after he hath satisfied himself, he may satisfy and deliver what legacies he will, albeit there be not enough to satisfy all the legatees; or he may pay to each of the legatees a part of their legacy, and deduct a part out of every legacy, where there is not enough to satisfy all the legacies (64). [It is apprehended, all legatees, except specific legatees, must, in case of deficiency, be paid *pro rata*, and that the executor cannot prefer his own legacy. Specific legatees must, as between themselves, abate *pro rata*.] But if any particular thing, as a lease of a horse, or the like, be given, [by way of specific legacy, as distinguished from a legacy of quantity, or appropriation;] this [legacy] must be delivered accordingly, and may not be sold by the executor or administrator to pay others all, or any part, of their legacies; and if there be enough to pay all the legacies, they must be paid all according to the will; and it is said by some, that if an executor or administrator make no inventory of the goods, that he must pay all the legacies whether he have assets or not (65). [This rule does not prevail at this day: it must be admitted by the executor, or proved against him, that he has assets before he can be charged.] The last thing an executor or administrator is to take care of, is, to make an account, (for it is held that an executor or administrator is not bound in law or conscience to

Doct. and Stud. 34. Plow. 545. Swinb. 110. 114.

Swinb. pt. 6. sect. 17.

Fifthly, in making an account.

(63) But it is said an executor may not prefer himself, in retaining his legacy, as he may a debt due to him from the testator. See *Fretwill* v. *Stacy*, 2 *Vern.* 434; *Attorney General* v. *Robins*, 2 *P. Wms.* 23; *Swinb.* 29.

(64) An executor need not pay a legatee, without security to refund if the assets fail. *Chamberlain* v. *Chamberlain*, 1 *Cha. Ca.* 257.

(65) See fully how an executor shall pay legacies, *Com. Dig. Chancery* (3 G. 3.)

make restitution for personal wrongs,) [*i. e. actio personalis cum persona moritur*] wherein this is to be known, that the ordinary may, if he will, call the executor or administrator to account concerning the goods and chattels of the deceased, either generally or particularly, as the case requireth; and that with or without the creditors or legataries [legatees] instigation, within a year or what time he will; unto which account he may call all the creditors and legataries [legatees]; and therein the executor or administrator must show what he hath received, and what he hath laid out, and prove it in such sort as the ordinary shall like; and then if it be found he hath faithfully and fully administered, the ordinary may acquit him of the burthen, and then he is discharged of all suits in the spiritual court; but this account and discharge will not help nor avail him at all to discharge him of suits at the common law (66), [at the suit of creditors. In general, the account is now taken in equity, on a creditor's bill, and the account so taken will be binding on all the creditors; and this is one of the advantages which has drawn most cases of the administration of assets into courts of equity.]

Co. 5. 83. 9. 29. Lit. sect. 233. F. N. B. 120. Dyer, 232. Doct. and Stud. 132. Bro. Executor, 90. Testament, 27. Stat. 31 Ed. 3. c. 11. 23 Ed. 1. c. 19. 21 H. 8. 25.

The office and duty of the ordinary, after the death of any person within his diocese, is, if he hear of any will made, and any executor appointed, to cite the executor, and to compel him to come in and prove the will, and to accept and take upon him * the administration of the goods, or to refuse it; [this is generally done at his annual visitation;] and if the executor refuse, or if there be a will made and no executor appointed, the ordinary must commit the administration *cum testamento annexo* to whom he shall think fit, and take bond of the administrator to perform the will; [or in case of no will, then to an administrator.] And if there be no will made, he is to grant the administration of the goods to the next of kin, if he or they require it; and if not, to whomsoever besides shall desire it; or, if nobody seek it, he may grant letters to whom he will *ad colligendum bona defuncti*, and thereby take the goods of the deceased into

*P. 481.

(66) See further at what time and in what manner an executor must account, in *Swinb.* 464.

his own hands: and then it seems he is to pay therewith the debts and legacies of the deceased, so far as the same will reach, in such order as the executor or administrator is to pay them. See more of this question in *numb.* 29, *infra* (67.)

28. Where and how an executor or administrator shall charge others in respect of the estate of the deceased; and what actions and remedy he may have against others, and what not, and how.

An executor or administrator regularly shall charge others for any debt or duty due to the deceased, as the deceased himself might have done; and the same actions [as] the deceased might have had, the same actions for the most part the executor or administrator may have also: and therefore he may have an [a] action of account, [b] an action of trespass *de bonis asportatis in vita testatoris*, [c] an action of debt against a gaoler upon the escape of a prisoner, [d] a writ of error upon the statute of 27 Eliz. [e] an attaint upon the statute of 23 Hen. 8, a writ of restitution upon the statute of 21 Hen. 8, [f] an action upon the case, upon the *assumpsit* of [*read*, to] the testator, [g] an *indempnitate nominis* when the deceased's goods are taken upon an outlawry against another man of his name, [h] an action of covenant for breach of a covenant made to the deceased (68), [unless the heir be entitled to the benefit of the cause of action;] [i] an action upon the case, upon the trover and conversion of the goods of the testator, [k] an *ejectione firmæ* for an ejectment of the testator out of a term [of years,] [l] an action of debt for the rent behind in the lifetime of the deceased, [m] an action of debt for the arrearages of an annuity due to the testator in his lifetime, [n] and a ravishment or ejectment of ward for a wrong done to the deceased. [o] But an executor or administrator shall not charge another, or have any action against him, for a personal wrong done to the testator, when the wrong done to his person, or that which is his, is of that nature, as for which damages only are to be recovered: and therefore an executor or

[a] West. 2. c. 11.
[b] F. N. B. 117.
[c] Dyer, 322.
[d] Co. 11. 41.
[e] Co. 6. 80.
[f] Co. 9. 86.
[g] Stat. 9 H. 6. c. 4.
[h] Bro. Executor, 161.
[i] Co. 5. 27.
[k] 7 H. 4. 6.
[l] Co. 4. 50.
[m] Bro. Executor, 169.
[n] Bro. Executor, 122.
[o] Co. 9. 89.

(67) And further as to the office of the ordinary, in *Vin. Abr. Executors* (A.); *Bac. Abr. Executors, &c.* (E.); *Stat.* 4 *Anne*, *c.* 16, § 16. The ordinary, after the administrator has exhibited an inventory, cannot compel the administrator to account, but it must be *ad instantium partis*; and therefore the inventory and account are, as to the ordinary, the same thing. *Per* Lord *Hardwicke*, in *Greenside* v. *Benson*, 3 *Atk.* 253. See the cases which relates to sureties for the administrator, 2 *Ves.* 368.

(68) For a covenant broken in the lifetime of the testator, the executor, and not the heir or assignee, shall have the action of covenant, although it were a covenant real, which runs with the land, and the damages shall be recovered by the executor, though not named, as he personally represents the testator. 2 *Lev.* 26; *Vent.* 175; *Toll. Exec.* 158.

administrator cannot sue another for the beating or wounding of the deceased, or for a trespass done to him in his cattle, grass, or corn, or for waste done by his tenant in his lands; for these are said to be personal actions which die with the person, according to the rule, *actio personalis moritur cum persona.*

36 H. 6, 7. Co. 8. 135. If the testament be kept from the executor, he may have remedy to recover it in the spiritual court; so if the goods of the deceased be kept from him, he may sue there for them if he will, or * he may sue in any court of common law; [by action of trespass, trover, or detinue, according to the circumstances.] And if there be a will, and an executor made, or two administrations granted together, he that is rightful executor or administrator may sue the wrongful administrator for the goods in his custody. *P. 482.

Co. super Lit. 146. If one grant a rent out of his land for life, provided that it shall not charge his person, and the rent is behind, and the grantee dieth; in this case, the executor or administrator of the grantee may have an action of debt for these arrearages, [or may distrain for them.]

Co. 4. 50. Stat. 32 H. 8. c. 37. If any rent, or arrearages of rent, be due to me upon a grant of rent out of any land to me, or reservation of rent upon any estate made by me of land; in these cases, my executor or administrator may have an action of debt for this rent, or he may [by the statute law] distrain for it, so long as the land chargeable with the rent, and out of which it doth issue, is in his possession that ought to pay it, [the rent,] or in the possession of any one that doth claim by or under him. [*B. N. P.* 138. 139.]

See stat. 38 H. 6. c. 1. If any of my household servants do convey away and eloigne, or destroy any of my goods, my executor or administrator may have a special commission out of the Chancery to inquire of and to punish it.

Co. 5. 33. Bro. Trespass, 346. Fitz. Executor, 14. And in case where a man doth sue as executor or administrator, he must in his action name himself as he is; *i. e.* if he be an executor, he must name himself so; and if an administrator, he must name himself so: and if there be many executors, and some accept and some refuse, if they bring any action, they must be all named in the writ: and yet if one executor have goods in

his possession and he alone sell them, perhaps for this contract he may bring an action for the money in his own name; so also, if the goods be taken out of his possession alone, it is said he alone may sue for them; but the safest way in these cases is to sue in the names of all the executors; for the possession of one of them is said to be the possession of all of them (69).

29. Where and how an executor or administrator shall be charged by others, and what actions and remedy may be had against him, or not.

An executor or administrator regularly shall be charged by others, for any debt or duty due from the deceased, as the deceased himself might have been charged in his lifetime, so far forth as he hath any of the estate of the deceased [liable and sufficient] to discharge the same. And therefore if a man bind himself by obligation or covenant to pay money, or do any such like thing; and do not bind his executors or administrators by name; in this case, the executor or administrator may be sued and may be charged as far forth, &c. as if they where [*read*, were] named. And yet where the covenant is but personal, as where one doth make a lease for years, and the lessor doth covenant to pay the quit rents, but he doth not say, during the term; by this it seems the executor or administrator of the lessor shall not be charged (70). [At all events the executors will be charged for rents incurred in the lifetime of their testator. As to rent incurred after death, the covenant fails from the restricted language of the covenant; and the heir can never be charged for the debt or duty of the ancestor, unless the ancestor, and also the heir, be named, *Co. Litt.* 209, a.; and therefore the heirs are not bound unless named, nor are they bound when named, unless their ancestor was also bound. But an obligation

Co. super Lit. 209. 5. 17. Dyer, 14. 23. Doct. and Stud. 112. Bro. Descent, 53.

(69) Where there are divers executors, the action commenced by them, or against them, [*omit*, or against them,] ought to be commenced in all their names, and not in the name of some of them only; because they all represent the person of the testator, therefore they must join in all suits brought to recover his estate, and as well those who refused, as those who proved the will, must be named; but where they are defendants, those only are to be named who proved the will. *Swinb.* 324, 6th edit. See more amply, what actions may be brought by executors or administrators, and in what manner, in *Com. Dig. Administration* (B. 13.); *Bac. Abr. Executors, &c.* (N.) and (O.); *Went. Off. Ex.* 95; *God. Orp. Leg.* 154; *Vin. Abr. Executors* (Q.)

(70) As to covenants charging executors, see *Went.* 123. An action of *covenant* is as much a lien upon the assets, as an action of *debt*. *Per Denison*, J. in *Plumer* v. *Marchant*, 3 *Burr.* 1380. Wherever an executor may be sued, he may retain. *Per Wilmot*, J. in the same case.

for a man and his heirs, that his heirs shall do certain acts, is good to bind the heirs.] An action of the case lieth against him [the executor] upon *assumpsit* of [*read*, or] the simple contract of the testator, especially * where the ground of the *assumpsit* is a true debt. A *rationabili parte bonorum* lieth against him; a *detinue* lieth against him for the goods delivered to the deceased, if the executor or administrator do still continue the possession of them; [but in this case the action may be brought against him individually for the detinue;] and also an action of debt lieth against him for arrearages of account found upon the deceased before auditors.

Co. 9. 86. Plow. 182. F. N. B. 121. 3 H. 6. 35. 11 H. 4. 45. *P. 483.

Stat. 25 Ed. 1. c. 11. The executor or administrator of the father, that hath levied aid of his tenant for the marriage of his daughter, shall be charged with it, and the daughter may sue for it.

F. N. B. 56. The executor or administrator of a guardian in chivalry, that doth commit waste in the ward's lands, shall be charged, and may be sued by the heir for it.

Co. 5. 12. Co. 8. 94. If a man, possessed of a term of years, devise it to another, and the executor or administrator of the devisor, before the assent to the legacy, doth commit waste in the land in lease; in this case he shall be charged with, and may be sued for, this waste by him in reversion: but if the executor die, his executor shall not be charged with it: for it is a personal wrong that dieth with the person.

Dyer, 370. If a bishop grant an annuity out of his lands to *I. S.* for life, and die; in this case, it seems, the executor or administrator of the bishop shall be charged with the arrearages due in the bishop's time.

Bro. Executor, 127. Co. 3. 24. 22. If a lease for years be made rendering rent, and the rent is behind, and the lessee die; in this case the executor or administrator of the lessee shall be charged for this rent. So also if lessee for years assign over his interest and die, his executor or administrator shall be charged with the arrearages before the assignment, but not with any of the arrearages due after the assignment, [and acceptance of the assignee by the lessor. But if the lessee had covenanted to pay the rent, his assets, and consequently his executor, &c. would remain liable.]

The executor or administrator of a customer or comptroller shall be charged upon a taille (or tally) of the exchequer, showed to the testator. Bro. Executor, 157.

The executor or administrator shall be charged for a ravishment or ejectment of ward by the deceased. Westm. 2. c. 35.

The executor or administrator may be charged in the spiritual court for tithes due from the deceased: but he may not (as it seems) be sued in any temporal court for them. [He is liable to be sued in a court of equity, for an account and payment.] Trin. 7 Jac. B. R. F. N. B. 51.

The executor or administrator of a man that recovereth a debt upon a judgment had by the deceased, shall be chargeable with restitution, if the judgment be reversed for error. Curia, 21 Jac. B. R.

An executor or administrator shall not be charged for any personal wrong done by the deceased; and therefore no action may be brought against him for any such cause; as because the deceased did burn the deed of the plaintiff, suffer a prisoner at his suit to escape, cut down his trees, eat up his grass, beat or wound the * body of the plaintiff, defame him in his name, or the like; for all these are said to be personal actions that die with the person; [but *assumpsit* may lie for money received from goods converted:] neither is there any remedy to be had against the executor or administrator in equity in these cases; [this proposition admits of exceptions:] neither shall he be charged in any action of account for any receipt or occupation by the deceased (71). [Not law at this day.] And yet, perhaps, an action of the case may lie in this case: neither will an action of debt lie against him upon simple contract of the deceased, but an action of the case only; [*i. e. indebitatus assumpsit.*] Neither will an action lie against an executor or administrator upon an arbitrament made in the lifetime of the deceased, albeit it be made in writing. [This proposition is too general.] Neither will any action lie against any executor or admini- Co. 9. 87. F. N. B. 117. Dyer, 302. 11 H. 4. 46. Doct. and Stud. 76. Co. 8. 94. 133. *P. 484. Adjudged Hil. 40 Eliz. B. R. Bowyer's case.

(71) Trover does not lie against an executor for a conversion by his testator. *Hambly* v. *Trot*, *Cowp.* 371. In that case there is a full discussion of the doctrine as to actions which survive against an executor, or die with the person, on account of the *cause* of *action*; and also as to actions which survive against an executor, or die with the person, on account of the *form* of *action*.

Hil. 7 Jac. B. R. per 3 Justices. Co. 9. 39, 40. Bro. Executor, 78. 136. 156. Fitz. Brief, 341.

strator for costs given in the Star Chamber or Chancery against the deceased in a suit there; but when the party dieth, the same is lost; [the rule is only, that a suit cannot be revived for costs only:] and where a man doth sue an executor or administrator in a suit, he must charge him as he is, *viz.* if he be an executor, he must sue him by that name; if an administrator, then by that name. And where there be many executors, and have all accepted, they must be all sued; but if some of them have refused, perhaps the suit may be good enough against the rest (72). But otherwise one executor cannot be charged without his companions, except it be in the case of summons and severance, and in some special case where one alone doth the wrong, and the like, as where one executor alone doth detain the deeds from the heir; for, in this case, he alone may be charged; [for this is his act as a wrong-doer, and not as executor.] See more *infra*, at *numb.* 39 (73).

21 Ed. 4. 25. 4 H. 7. 4. 16 H. 7. 4. Bro. Executor, 66. 30. 65. 9 Ed. 4. 12. Fitz. Executor, 10.

All the executors, where there be more than one, be they never so many, in the eye of the law are but as one man; in which respect the law doth esteem most acts done by or to any one of them, as acts done by or to all of them (74). And therefore the possession of one of them of the goods and chattels of the deceased, is esteemed the possession of them all; payment of debts by or to one of them is esteemed payment by or to them all (75); the sale or gift of one of them of the goods and chattels of the deceased, [as] the sale

30. *What act one executor or administrator alone may do; and where the act or laches of one may prejudice or bar his companion, and where not.*

(72) See the note 69 to fol. 482 before, and also *Went. Off. Ex.* 95.

(73) And further as to what actions may be brought against executors and administrators, and in what manner, in *Bac. Abr. Executors, &c.* (P.); *Com. Dig. Administration* (B. 14.); *Went. Off. Ex.* 116; *Swinb.* 397; *Vin. Abr. Executors* (H. a.); *God. Orp. Leg.* 162.

(74) And therefore if testator dies possessed of a lease for years, having made two executors, and one of them grants all his interest to a stranger, the whole term passes, for each had an entire authority and interest different from other joint-tenants. *Dyer*, 23, b.; *Cro. Eliz.* 347; *Went.* 100.

(75) One executor shall not be charged with the wrong or *devastavit* of his co-executor, and shall be no further liable than for the assets which came to his hands. *Hargthorpe* v. *Miltforth*, *Cro. Eliz.* 318. But it hath been held in Chancery, that if two executors join in a receipt, and one only receives the money, as to *creditors* who are to have the utmost benefit of law, each is liable for the whole, though one executor alone might give a discharge, and the joining of the other was unnecessary; but as to the *legatees*, and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other; for the joining in the receipt is only matter of form: the substantial part is the actual receiving, and this only is regarded in conscience. *Per* Lord Chancellor *Harcourt*, in *Churchill* v. *Hopson*, 1 *Salk.* 318, who distinguishes between *trustees* and executors. If two trustees join in a receipt, and one receives the money, he only that receives shall be liable.

and gift of them all; [and although two executors be named as grantors or executors, and only one of them execute the grant, the grant would pass the entirety, *Dyer*, 23, b.;] a release made by or to one of them, is a release made [*omit*, made] by or to them all; and the assent of one of them to a legacy, the assent of them all. And therefore if there be two executors, and one of them deliver up the obligation to the debtor whereby he is bound, the other executor shall not recover it in a detinue. So if two executors have lands or goods in execution, and one of them release all his interest, this is a total discharge of the execution. And yet if, in this case, there be any practice [*read*, covin] between the executor and the creditor in this matter, and there be not assets besides to pay all the debts and legacies, here perhaps the other executor, [or creditors and legatees,] may have remedy in equity against his co-executor and the creditor. But how the law is of administrators, *quære*; for some think that one * of them also may sell goods, release debts, plead to actions, or the like, without the other. [In *Hudson* v. *Hudson*, 1 *Atk.* 460, Lord *Hardwicke* considered the administrators as having a mere authority, and that the act of one was not binding on the others, unless they all joined; but in *Willand* v. *Fenn*, cited 2 *Ves.* 267, and which was subsequent to *Hudson* v. *Hudson*, it was held in B. R. after three arguments, that one administrator stood on the same ground and foundation with one executor. *Per* Sir *John Strange*, Master of the Rolls.]

Adjudged Mic. 39, 40 Eliz. B. R.

Crompt. Jur. 45. 4 H. 7. 4.

*P. 485.

If one executor attorn to the grant of a reversion, or a rent, this is as good as if they did all attorn, and will bind all the rest; as in case of an assent to a legacy: for, in this case, the assent of one will bind all the rest, albeit there be not enough to pay the debts besides the legacy given away by assent; but his assent shall not hurt his co-executors in a *devastavit*.

Dyer, 210. Co. 4. 31. Addition to Justice Doddridge, 4.

If one executor appear to an action sued against them all, or plead a plea to it; this for the most part shall be said to be the appearance and plea of them all, and shall bind the rest.

Co. 9. 38. Dyer, 210.

If two executors sue together, and one of them is summoned and severed; in this case, he that is summoned may before judgment release the duty;

Dyer, 319. 18. 16 H. 7. 4.

but if the other prosecute to judgment first, and then he that is severed acknowledge satisfaction, this will not benefit the defendant, nor bar the rest that are plaintiffs in the judgment. And if three executors sue, and two are summoned and severed, and the third recover and die; in this case the other two shall have execution. See more at *numb.* 27, *supra* (76).

27 H. 8. 21. 6 H. 7. 5. Plow. 343. Fits. Executor, 6.

31. *What act one executor may do to another, and what remedy or action one executor or administrator may have against another, or not.*

One executor or administrator cannot give or sell any of the goods or chattels of the deceased to another executor or administrator; and therefore they may not make division of the goods amongst themselves; and regularly one of them [as such] cannot sue another of them, [as such, at law. (77) In equity one executor may sue another; and even at law an executor who has not proved, may, as a creditor, sue an executor who has proved. *Cro. Car.* 372.] And therefore if one keep, give, or sell all the goods, release debts, or the like, in the disturbance of the execution of the will or due administration of the estate; it seems the other hath no remedy against him, except it be in the case of covin before: but if all the residue of the goods and chattels, after debts and legacies paid, be given to one of the executors alone; and after the debts and legacies paid, the rest do detain it or any part of it from him; in this case, perhaps, he may have some remedy against them (78). [In equity, or in the ecclesiastical court.]

1 H. 483.

If the debtor make his creditor and another his executors, and the creditor doth refuse the executorship, and the other doth accept it; in this case the creditor may sue the [acting] executor for this debt: but if both prove the will, and one of them die, the surviving co-executor cannot sue the executor of the dead executor for this debt. And if one make a woman and two others his executors, and a creditor before she doth accept of the executorship doth marry her; in this case he may

---

(76) As to the subject of summons and severance, see *Went.* 95; *God.* 134, and 2 *Bac.* r. 396-7.

(77) For any thing relating to the testator's will, or that is within the power, interest, duty office of an executor, *God.* 135; *Went.* 99; but may in equity, and compel him to ount, &c.; yet see *Sid.* 33.

(78) In the spiritual court for his share, it being in the nature of a gift or legacy to ; or at law he may maintain trespass or detinue against a co-executor. *Went.* 100; . 105.

sue the other executors for this debt: but if she have accepted of the executorship first, *contra.* [On this subject, read *Wankford* v. *Wandfork*, 1 *Salk. Rep.* 299. Equity would give relief. The rule of law is, a personal action once suspended is extinguished. See distinctions in *Thomas's Co. Litt.* vol. 2, p. 453, (C.)]

32. Devastavit quid. *What shall be said a* devastavit *and wasting of the goods of the deceased by an executor, or administrator, and how he shall be charged thereupon.*

*P. 486.

A *devastavit* or waste in an executor or administrator is when he doth misemploy the estate of the deceased, and misdemean himself in the managing thereof against the trust reposed in him. * And this may be done divers ways, as 1. When the executor or administrator doth bestow more upon the funeral of the deceased than is meet, having respect to his degree and estate. [As against creditors only 5*l.* are allowed for funeral expences; but as against legatees the allowance will be more liberal.] 2. When he doth pay legacies in money, or assent to legacies given in other things before the debts are paid, and hath not enough besides to pay the debts. 3. When he doth not pay the debts in that order and manner as is before set down; but doth pay them first that he should pay last, and he hath not enough to pay them all. [Those creditors who are entitled to preference, are in the same condition as if such payments had not been made.] 4. When he doth release a debt or duty due to the deceased before he doth receive it; or when, the goods of the deceased being taken from him, he doth release to him that doth take them the action, whereby he may recover them. 5. When he doth sell the goods of the deceased much under value, especially if it be with covin, as to his near friends, to his own use, to have money under hand, [*i. e.* by fraud and concealment,] or the like; but otherwise to sell them under value, especially where he cannot conveniently make more of them, is no waste. All these, and such like acts as these, are said to be a waste in an executor or administrator; and being discovered against him by the return of the sheriff, (or as some think by inquest of office), [or in an action or suit against him for the debts of any creditor who was damnified,] it will produce this effect, to make the executor or administrator chargeable for so much as he hath misemployed and wasted *de bonis propriis*; so that any creditor may charge

Plow. 543. Co. 532. Doct. and Stud. 75. Perk. sect. 488. 570. Kelw. 59.

Dyer, 185. Co. 5. 32. Old B. of Entries, 11.

him for the debt due to him from the testator as for his own proper debt; and for so much the execution shall be made against him upon his own body, lands and goods: and yet so as one executor or administrator shall not be charged for the waste of another; for if there be many executors and one of them only doth commit the waste, he only shall be punished for this waste. And the executor or administrator, if he do commit a waste in the gift or sale of goods, shall answer it alone; for he to whom the goods are given or sold, shall not he punished for it; [in some cases equity would follow the assets:] neither shall the executor or administrator of the executor or administrator be punished for it after his death. [But the executor of the executor is now made liable by the statute of 4 & 5 Wm. & Mary, c. 24, § 12. See *Toller's Executors*, 342.] And howsoever the husband shall be charged in a *devastavit* for the waste of himself or his wife, where she is an executrix whilst they both live together; yet if a woman executrix take a husband, and during the marriage he or she doth commit a waste, and after she die; in this case, it seems the husband shall not be charged for the waste he himself or his wife did: *sed quære* of this. [It is apprehended he is chargeable in equity for his own waste.] For if a void administration be committed, and the administrator do waste the goods, and after the administration is committed to another; in this case the first administrator may be charged by the creditors for the waste done in his time (79). But an executor or administrator may lawfully sell or convert the goods of the deceased to his own use, so as he convert the money to the use of the deceased, in payment of debts, or the like, and pay so much of his own money as the * goods so converted to his use are worth; and these acts are not esteemed a waste in him. Also he may sell any special legacy that is given, and this is no waste in him; howbeit it is a wrong to the legatee, if there be assets to pay debts besides. And when he hath enough to pay all the debts and legacies, then he may dispose of the whole estate how he will, without any prejudice to himself at all. [This proposition

Dyer, 210. Doct. and Stud. 78.

2 H. 7. 15. Co. 5. 27. M. 3 Jac. B. R.

Co. 9. 18.

Dyer, 2. 187. Plow. 543.

*P. 487.

(79) See accordingly, *God. Orp. Leg.* 206.

supposes him to be executor beneficially or residuary legatee; but in many cases the executor is considered only as a trustee, and in that case the surplus will belong to the residuary legatee, if any, and if there be not any, then to the testator's next of kin (80).]

33. Executor of his own wrong: who shall be said to be so; and what act shall make him so to be accounted; and what act such an executor may do, and how he shall be charged, or not.

An executor of his own wrong is one that is neither lawful executor nor administrator, and yet doth take upon him to do and act such things as are only fit for and proper to an executor or administrator; as to take the goods of the deceased into his own possession; give and sell them; pay the debts of the deceased therewith; release the debts due to the deceased; and the like. [In point of law all these acts are void as against the rightful executor or administrator, so that there is not any effectual sale, release, &c.] And a man may make himself such an executor by any such intermeddling with the office and work of an executor, as followeth: 1. By proving the will with the money of the dead; but to prove another man's will at my own charge, will no more make me chargeable as executor of mine own wrong, than to bury the deceased in a decent manner out of my own estate. 2. By a seizing, gaining, keeping and using the goods of the deceased as a man's own, especially if he convert them to his own use, sell, or otherwise dispose them; and every colour of title will not help in this case: for if a man make a deed of gift of all his goods and chattels to another, and dieth intestate, and this in truth is fraudulent and in trust, and the donee after the death of the donor, doth dispose of these goods and chattels as his own; in this case, and by this means, he shall be esteemed as executor of his own wrong. [In *Edwards* v. *Harben*, 2 *Term Rep.* 587, where the deed was fraudulent only from the circumstances of permitting the deceased to retain the possession; and it was held that the bargainee taking possession of the goods, was

Terms of the Law. Kelw. 59. 93. Dyer, 105. 157. 255. Co. 5. 31. Bro. Executor, 162.

[1 Ld. Raym. 386, and notes. 3 Term Rep. 587.]

(80) See more amply what shall be deemed a *devastavit* in an executor or administrator, and in what manner remedy may be had against them, in *Bac. Abr. Executors, &c.* (L.); *Vin. Abr. Executors* (X. a. 5.); *God. Orp. Leg.* pt. 2, c. 26; *Went. Off. Ex.* 157; *Com. Dig. Administration* (I.) An executor or a trustee, not being bound to lend, &c. if he do so it is at his peril; and if by his so doing the money be lost, he shall answer the same out of his own estate; and therefore, as he shall bear the loss, he shall have the gain. *Per* Lord *Macclesfield*, in *Bromfield* v. *Wytherby*, 1 *Eq. Ca. Abr.* 398, pl. 7; *Treat. of Eq.* 75. [It is apprehended he cannot retain the gain.]

an executor *de son tort*.] And yet if the deed of gift be *bonâ fide* in satisfaction of a just debt, and the goods be no more than the debt, it may be otherwise: but if the goods be much more than the debt, there it seems it shall be charged so for the overplus; and that, whether he have them in possession or not: and so was the opinion of Justice *Jones* at Gloucester Assizes, 9 Car. [2 *Term Rep.* 587.] If the ordinary grant letters *ad colligendum et vendendum* the goods of the deceased that are like to perish, and *I. S.* to whom the letters are made, under colour thereof, doth take and sell the goods; hereby he may make himself chargeable, as executor of his own wrong: for the ordinary hath no[t any] such power [in] himself, and therefore he may not give that power to another. If a man that is next of kin procure a beggar, or a stranger, to take out an administration, and then to make him a deed of gift of all the goods for a small matter; he may be thus charged for the overplus of the worth of the goods more than he gave. So if a debtor procure such an administration to be taken out, and then get a release of his debt from the administrator; this [conduct] may make him chargeable as executor of his own wrong, for so much as his debt doth come unto. [*Query* if, in both these cases of appropriation, the only remedy is not in equity.] And yet a * man may take away his own goods, that were in the hands of the deceased, without danger [of being charged as executor of his own wrong.] And every having and possessing of the goods of the deceased will not make a man executor of his own wrong: for if a man die in my house and have goods there, and I keep them until I can be well discharged of them, [*i. e.* deliver them to an executor or administrator, duly qualified;] this will not make me chargeable as executor of mine own wrong. So if I do only lay up the goods of the deceased to preserve them in safety for him that shall have right to them, this [act] will make me no more chargeable, than if I take an inventory of all the goods of the deceased. So if another man take the goods of the deceased and sell them to me, or give them to me; howsoever this [act] will make him chargeable as executor of his own wrong, yet this [purchase] will not make me chargeable so.

Stat. 43 Eliz. c. 8.

Pasch. 7 Jac. Co. B. per Ch. Justice.

*P. 488.

in. 17 Jac. r Ch. Justice.

. 5. 34. lw. 63.

[But the value of the goods, &c. may be recovered from me in an action of trover.] Neither will every disposition of the goods of the deceased make a man executor of his own wrong; for if a man sell some of the goods of the deceased (where there is need) to help forward a decent funeral of the body of the deceased; this is no such disposition as to make a man chargeable thus. So if I deliver [to] the wife of the deceased her necessary wearing apparel; or if I be wife to the deceased, and take it myself (81). So where I take any of the deceased's goods into my hands by mistake, supposing them to be mine own, or under colour of title; as when I have a good deed of gift or sale of them, without any fraud or covin; or under a good authority, as when I take them upon a warrant from the sheriff, that hath process out of the Exchequer to take them; or as a trespasser only, as when I kill or otherwise abuse the cattle; such an intermeddling with the goods of the deceased will not make a man chargeable as executor of his own wrong, neither may I be so charged in these cases. [But, as already noticed, a person who takes goods after the death of the testator, under a fraudulent deed of gift, may be charged as executor of his own wrong.] The third way, by which a man may make himself chargeable as executor of his own wrong, is, by [acting as executor without title, and] delivering of the goods of the deceased to creditors in satisfaction of their debts, or by selling any of the goods of the deceased to pay the debts of the deceased, and paying the same with the money made thereof; but to pay the deceased's debt with a man's own money will not make him chargeable so, [*i. e.* as executor of his own wrong.] The fourth way, by which a man may make himself so chargeable, is, by receiving [under colour of being executor, and without authority,] any of the debts due to the deceased. The fifth way, by which a man may make himself chargeable so, is, by releasing [*i. e.* professing to release] any debts or duties due to the deceased. The sixth way, by delivering any legacies given by the deceased in kind, or by

Kelw. 63. 2a. 33 H. 6. 31. 32 H. 6. 6. Dyer, 167. Co. 5. 34. 20 Ed. 4. 17. Fitz. Executor, 122.

See the cases before.

Dyer, 166.

Ibid.

(81) But if I deliver the wife more apparel than are suitable for her, this will make me executor *de son tort*; or if she takes more, it will make her so. *Roll. Abr.* 918. As to the feme's taking. See *post*.

paying any legacies, except it be with a man's own money. The seventh way, by taking a man's legacy given to him, before the executor have accepted of the executorship and assented to the legacy. The eighth way, by suing [without authority] as executor to the deceased, for any debt due to the deceased. And the ninth way, by taking upon him to sell the lands of the deceased, as his executor. [This proposition is true only as applied to lands belonging to the executors as such.] In all these cases, * and by all these and such like means, a man may make himself an executor of his own wrong. So that [even] if an executor after he hath legally waved the executorship, or an administrator after his administration is repealed and revoked, intermeddle with the estate in any such manner, he may be charged as executor of his own wrong. And if a woman take more of her wearing apparel than is necessary and convenient for one of her rank and condition, without legacy of [*viz.* a legatory gift thereof by] the husband, and licence of the executor, she may be charged thus; [*i. e.* as executrix of her own wrong.]

*P. 489.

Dyer, 105.

Dyer, 166.
33 H. 6. 31.

Dyer, 255. 160.
Co. 5. 34. 9. 39.

And if a man, under colour of an administration that is not good; or of a commission *ad colligendum bona defuncti*, that is not good; or of a will, when in truth there is none at all, or no good will, do take upon him to intermeddle with the goods, and to dispose of the estate in manner as aforesaid, by this means he may make himself chargeable thus. And in these cases, and by these means, such persons that do so intermeddle, do make themselves to be accounted in law, executors; but executors by wrong only, and not executors by right. And therefore such persons have not the favour nor power of lawful executors, as to bring an action for debt due to the deceased, to deduct and pay themselves any debt due to themselves first of all, and to bar other creditors, and the like; [and should they bring an action, the plea of *ne unques executor* will be an answer to that action.] And for so much as they have so disposed and misemployed, and for no more, they make themselves chargeable to any creditor or legatee of the deceased that shall sue them, as far forth as a lawful executor is chargeable. And albeit he, that doth thus, be a creditor, yet this will not help

Co. 5. 34.
Plow. 148. 145.
33 H. 6. 31.

Dyer, 210.
Plow. 184.
Co. 5. 33.

him; for a creditor may not enter upon the goods of the deceased, and pay himself first; and if he do so, if there be a lawful executor or administrator made, he [the executor or administrator] may sue the creditor, [though he be a creditor in a higher degree, 3 *Term Rep.* 587; *Salk.* 313; 5 *Term Rep.* 590.] And if there be no executor or administrator made, the creditor may by this means make himself chargeable to other creditors, as executor of his own wrong, for so much as he hath taken into his own hands; and then a man shall be charged the rather in these cases, and by this means, when there is no executor made; or, if there be an executor made, when he doth refuse to take upon him the executorship; nor any administration granted: for when a man dieth intestate, and a stranger taketh and useth the goods of the deceased as his own, albeit he pay no debt or legacy, nor do any other act as executor, yet, when no other man taketh upon him the administration, this intermeddling shall make him chargeable as executor of his own wrong; for in that case the creditor hath no[t, as against him, any] other remedy. [But an executor *de son tort* remains liable, although there be a rightful executor, &c. unless he deliver the goods to the rightful owner before action brought. After such delivery, he may plead *plene administravit*. *Salk.* 313; 5 *Term Rep.* 590.] But in case where there is an executor made, and he doth prove the testament, and doth take upon him the administration of the goods, and then a stranger taketh out of the hands of this executor, or getteth into his own hands, all or some of the goods of the deceased, and useth them as his own; * this [wrongful act] will not make this stranger executor of his own wrong; for now there is a lawful executor, against whom the creditor may have his remedy; and the executor shall have his remedy for these goods against the stranger; for they are and shall be accounted assets in the hands of the executor still, notwithstanding the stranger hath the possession of them. [*Query*, if the executor may not protect himself by a plea of the special matter.] And yet in this case also, where there is a rightful executor, if a stranger shall take the goods into his hands, claim to be executor, pay debts and legacies, and receive debts, and intermeddle as an executor;

Co. 5. 33. Kelw. 59.

*P. 490.

in this case, perhaps, and by this express administration as executor, he may be charged as executor of his own wrong, albeit there be a lawful executor. [Vide *Toll. Exec.* 38, 39, 107.] And if a man die intestate, and a stranger intermeddle with the estate as before, and then the administration is granted to another; in this case, the stranger may be charged by any creditor or legatee, as executor of his own wrong, for his [acts of] intermeddling before the administration granted; for the rightful executor or administrator shall be charged with no more than what doth come into his hands. And if an administration be granted afterwards to any one that hath so intermeddled with the goods before; this [grant of administration] will not purge the wrong done before; and therefore, in this case, a creditor may charge him as executor of his own wrong, or as a lawful administrator, at his election (82). [2 *Strange*, 1106, 3 *Term Rep.* 589, are *contra*; *Toll. Exec.* 189.]

Pasche, 39 Eliz. Co. B. Bradbury v. Reynolds.

Co. 5. 29. 6. 27. 9. 27.

The administrator *durante minori ætate* is a special kind of administrator, and, in case where an infant under the age of seventeen years (for at that age an infant is capable of an executorship) [now by statute of 38 Geo. 3, c. 87, twenty-one] is made an executor, and the administration of the goods (as the manner is in that case) is committed to one or more of the next friend or friends of the infant during his minority, which is until he be of the age of seventeen years, [now by statute 38 Geo. 3, c. 87, twenty-one;] he that hath such an administration granted unto him is such an administrator (83). And he is sometimes general, *i. e.* when his administration is granted unto him without any words of limitation; and sometimes he is special, *i. e.* when his administration is

34. *Administrator* durante minori ætate; *what he is, and his power, and when it shall end.*

(82) See further as to what act will make an executor *de son tort*, and what remedy may be had against him, in the references in the note to page 447; and see also 2 *Bl. Com.* 507; *Com. Dig. Administrator* (C.)

(83) The Court of King's Bench refused a *mandamus* for an administrator *durante minori ætate*, upon a motion by a grandfather for administration of the goods of his deceased son, during *minori ætate* of his grandson. *Per curiam.* "When we grant *mandamuses*, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. In the case of the next of kin, he is entitled *de jure*, and therefore in his case we grant a *mandamus* of course. We will grant no writ in this case." *Smith's case, Stra.* 898. If an administrator *durante minori ætate*, neglects to sue in time on any contract in behalf of the infant, the infant is bound, for the statute of limitations runs against the administrator. *Pych v. East India Company*, 3 *Wms.* 309.

granted to him *ad opus et usum* of the infant only. In the first case, he hath as large a power as another administrator hath; and therefore he may assent to a legacy, albeit there be not assets to pay debts (84); he may sell any of the goods or chattels of the deceased, or give them away, or the like, as another administrator may do. But in the last case, it is otherwise; for such a special administrator can do little more than the ordinary himself [might have done;] and therefore he may not [or rather, ought not to] sell any of the goods or chattels of the deceased, except it be in case where they are like to perish, [or are wanted] for funeral expences, or for payment of debts; nor may he assent to a legacy where there is [*read*, are] not assets to pay debts, &c. And this administration is *ipso facto* determined, when the executor doth come to the age of seventeen [now twenty-one] years: and therefore if it be granted during the minority
*P. 491. of four executors, and * one of them die, or come to the age of seventeen [*read*, twenty-one] years; now is the administration determined. And if the executor be a woman, and she take a husband that is seventeen [*read*, twenty-one] years of age or upwards; in this case, it seems, the administration is determined. [Is this case remedied by the statute? it is apprehended it is not.] And therefore also it is, that if such an administration *durante minori ætate* be granted after the executor is seventeen [now twenty-one] years of age, the administration is void (85).

36. Where an administration, once committed by the ordinary, may be afterwards revoked; and what shall be said a revocation of such an administration, or not; and what acts done before shall stand in force, or not.

It hath been held, that the ordinary, after he hath granted the administration of the goods of a man intestate to one, may afterwards, without cause, revoke the same and grant it to another, at his pleasure; and that if the ordinary grant letters of administration to one, and after grant letters of administration to another, of the goods of the same man, that hereby [by this second grant] the first letters of administration are *ipso*

4 H. 7. 14. Lit. sect. 439. 34 H. 6. 14. Dyer, 339. Bro. Administrator, 7.

(84) But it is said, he may not assent if there are not assets to pay debts. 5 *Co.* 29, s cited in 4 *Bac. Abr.* 381.

(85) An administrator *durante minori ætate* cannot be charged as *executor de son tort*, where he wastes the goods; because he had a lawful authority to possess them: but when the infant comes of age, he may bring an action of detinue for the goods in the possession of such an administrator; but the safest way is, to charge him upon the special matter. *Swinb.* 333. See further as to the power of an administrator *durante minori ætate*, and its continuance, in *Vin. Abr. Executors* (M.); *God. Orp. Leg.* 102; *Com. Dig. Administration* (F.); 1 *Wood*, 147; *Curson's Supplement to Went. Off. Ex.* 119. 139; *Bac. Abr. Executor* (B. 1.)

facto countermanded, albeit there be no words of revocation in them. But it seems the law is otherwise, and that after the ordinary hath granted the administration according to the charge and direction given him by the statutes, he cannot afterwards revoke it, and grant it to another, without cause; *i. e.* unless the first administration be illegally granted; as when it is granted to a stranger, and not to the next of kin, or the like; or unless the first administrator cannot or will not administer; for, in these cases, he may without doubt grant the administration to another. And yet, in these cases, where there is a former administration granted regularly, all acts that the first administrator doth lawfully execute and do, as administrator; as sale of goods, payment or receipt of debts, making releases, and the like, are good, and shall bind the next and succeeding administrator. And therefore if the ordinary, after the death of a man intestate, doth grant the administration of his goods to a stranger, and then the next of kin doth sue by citation to have it repealed; and the first administrator, hanging [*i. e.* pending] that suit in the spiritual court, doth sell the goods, of purpose to defeat the second administration, [without any fraud on the part of the vendee;] and after, the first letters of administration are revoked by sentence, and the first sentence annulled, and the administration is committed to another; in this case, the second administrator cannot recover these goods, or have any remedy for them. And yet perhaps, if there be any fraud in the case, [and the bargainee be a party to the fraud,] an executor may have relief upon the statute of 13 Eliz. But if the first suit and sentence be by appeal avoided, [so that the adjudication of letters of administration is annulled,] then all that the first administrator doth is void; and the second administrator may recover the goods notwithstanding the sale: and if the first administration be upon condition, all the acts the administrator doth, before the condition is broken, are good; and therefore, if he give or sell the goods, the subsequent administrator cannot avoid it.

If a man die intestate, and have not *bona notabilia*, and the * bishop of the diocese grant letters of administration to one; and after, the arch- * P. 492.

See the stat. 21 H. 8. c. 5. Co. 6. 18. New Book of Entries, 38.

Plow. 281. Co. 6. 18, 19. Dyer, 339.

c. 6. 19.

. 8. 135.

bishop doth grant letters of administration to another; in this case, the effect of the first administration is suspended, until the other be repealed and declared by sentence to be void. [This case is mis-stated. The prerogative administration was granted in the first instance, and it was held, that the operation of the administration by the diocesan was suspended till the former letters were repealed; but when the prerogative administration was repealed, the letters of administration, granted by the diocesan, were good from that time. They operated as a future authority; the intermediate power was suspended.] If there be a will, and it is concealed, and thereupon an [a general] administration is granted; and after, the will is produced and proved; in this case, the administration is *ipso facto* determined, and all the acts the administrator hath done *ab initio* are become void; [since the letters of administration were void in the first instance. Formerly, when an executor was beyond sea, &c. no administration could be granted. This defect in the law was remedied by the statute 38 Geo. 3, c. 87. *Sed quære*; and see *Toller's Executors*, 46. 75, whether letters of administration, during absence, or to collect the assets, could not have been granted? If, upon the executor's attaining the age of twenty-one years, the administrator, as he ought to do, pay over to him all the goods that remain in his hands unadministered, he is no further chargeable; but to any action brought against him, charging him as administrator in respect of the goods, which came to his hands, he may plead *plene administravit*; and if the issue on that plea be found for him, he shall have judgment to go quit. *Brooking* v. *Jennings*, 1 *Mod.* 174; *Chandler* v. *Tompson*, *Hob.* 265, where the court inclined to the opinion, that it is not the fact that the executorship, &c. is determined, but the fact that the assets are duly administered, which discharges a former executor or administrator.] See more in the next question. Plow. 281. 9 H. 5. 5.

36. *What acts done by one executor or administrator, may be avoided by the subsequent executor or administrator, and what not.*

If a will be made by an idiot, and an executor appointed therein, and the executor take upon him the administration, and after the will is avoided for the weakness of the testator; in this case, it seems that all the acts the executor doth [after probate,] before the avoidance of the will, are good, and not

to be avoided by the administrator; [since he acts under the authority of the letters of probate. *Sed quære*; since the will itself is void, and there cannot be any executor where the will is void.]

3 H. 7. 14. If there be a will made and an executor appointed, and the ordinary cite the executor to come in and prove the will, and he doth not come, and thereupon the ordinary doth grant the administration to another; in this case, all acts done by the administrator are good, and shall bind the executor, if he [the executor] may and shall afterwards take upon him the executorship. But otherwise it is where the ordinary doth grant the administration before the executor be cited to appear, or before the time given him to take upon him the administration; for in this case, [as the administration is granted without jurisdiction,] nothing that he doth shall bind the executor. [See *Toller's Executors*, of administration during absence, &c. p. 38.]

Co. 6. 18, 19. Plow. 282. Co. 8. 143. 135. When there is an administration granted, and it is afterwards upon a suit by condition [*read*, citation] only repealed; in this case, all acts done by the first administrator are good and shall bind the subsequent administrator. But in case where the first administration is upon a suit by appeal, [and] by sentence annihilated and declared void, there all acts done by the first administrator are void, and shall not bind the subsequent administrator (86): and therefore if the ordinary of the diocese grant an administration that doth belong to the metropolitan to grant, (in which case, the administration is void,) all acts done by the administrator [under the grant of the diocesan] are void, and may be avoided by the succeeding administrator (87). But when the administration doth belong to the ordinary of the diocese to grant, and the metropolitan doth grant it, (in which case, it is only voidable,) in that case, all acts upon and by virtue of the first administration, before the second administration is granted, are good; [because such letters of administration of the metropolitan, before grant of letters of administration by the diocesan, are voidable only, and not void.]

(86) In what manner appeals shall be brought in cases testamentary, and from and to what jurisdiction, see *Curson's Supp.* 128.

(87) Administrator releaseth all actions; afterwards the administration was revoked, *and declared void by sentence*: the release is void.

If an administration be granted to a stranger, and afterwards it is revoked and granted to the next of kin; in this case, all lawful acts done by the first administrator before, and hanging [*i. e.* pending] the suit, are good and unavoidable by the subsequent administrator; and yet perhaps if the first administrator waste the * goods, it may be he may be charged for this by the subsequent administrator, or by a creditor. [No doubt he is liable in equity to account for all the assets which came to his hands; and the second administrator may recover the goods, &c. remaining unadministered.] Wilson v. Packman, M. 37, 38 Eliz. B. R.

*P. 493.

Where the executor by the will is not to administer until a certain time; in this case, the administration of the goods is to be granted until that time, and all acts done by such an administrator before that time are good, and shall bind the executor. So where an executor is made, or an administration is granted upon condition, which is after broken, so that the executorship or administration is determined; yet, in this case, all acts done by him before this time are good. Plow. 281. Co. 6. 19. 34 H. 6. 14.

If there be a false and a true will, and the executor of the false will prove this will first, and afterwards the executor of the true will doth disprove and avoid the first will; in this case, he may also avoid all acts [which] the first executor doth, [because the will and the executorship therein are void.] 4 H. 7. 13. Plow. 282.

37. *What shall be said a good bar in debt, or other action brought by, or against an executor or administrator, and what not.*

The same bars and pleas regularly, that a man may have to actions brought by the deceased himself in his life, a man may have to bar the action and suit of his executor or administrator after his death. But an executor or administrator may have, besides the same pleas and bars to actions the deceased might have had, as *non est factum*, *per duresse*, *non assumpsit*, and the like, divers other pleas and bars to actions in respect of his estate and condition as executor or administrator: for if he never meddle with the goods and chattels of the deceased, and yet be sued as executor or administrator, he may plead *ne unques* [*executor*,] *i. e.* he did never intermeddle as executor or administrator; and if this be found for him, this [defence] will bar the plaintiff: and if he do intermeddle and take upon him the administration, he may plead, if the case be so, that he cannot recover the goods of the deceased; [or more technically, that he hath not Co. 5. 33. Dyer, 30. 80. Co. 8. 132. 134. 21 H. 6. 19. Dyer, 2. 27 H. 8. 6. Co. 9. 108. 2 H. 4. 21.

any assets, or not any assets *ultra* a given sum, in his hands; or the special matter, as certain debts, &c.;] for he shall be charged for no more than what he can get in his possession; or he may plead that he hath fully administered all the goods and chattels of the deceased, and hath nothing left to minister, [or none *ultra* a given sum;] or he may plead that he hath paid so much of his own money as the goods in his hands do amount unto; or if he be sued for debts due by obligations, or such like especialties, entered into by the deceased, he may plead that there are debts due, and yet to pay, on judgments had against the deceased; or that there are debts due, and yet to pay, on recognizances or statutes entered into by the deceased, and that he hath no more than enough to satisfy them; or he may plead that there are judgments had against him for other debts of the deceased in equal degree with the debt sued for, and that he has no more than enough to discharge them; so as these former debts, on and for which these judgments were had and statutes given, be *bonâ fide* due, and the judgments, recognizances, and statutes in truth continued for the same: for if there be any fraud in the case, *viz.* that either the judgments, recognizances, or statutes, were * at first entered into, or are afterwards continued, of purpose to deceive or delay others of their due debts, when either the debt is satisfied, or compounded for less, or the like; in these cases, this plea will not serve; but this matter being disclosed, by the plaintiff's pleading, he will avoid it: [but as to debts in equal degree, the executor cannot protect himself otherwise than by administering the assets in paying them:] and if he be sued for a debt due upon a simple contract or promise of the testator, he may plead there are debts to pay due by [judgments, recognizances, &c.] obligations and other especialties, entered into by the deceased, and that he hath no more than enough to satisy those debts, and this will bar the plaintiff in his action; [or rather, leave him to the right of taking judgment of the surplus assets, or of assets when they shall fall:] and therefore if an executor or administrator plead a judgment in bar of an action of debt [against him] upon an obligation, he must show also that

*P. 494.

the suit, whereupon the judgment was had, was upon an obligation; for if it were on a simple contract, it is no bar. [The books are not agreed on this point: according to some authorities, the executor is not bound by specialty debts, unless he has notice of them, and this notice must be by action brought.] And if the executor be sued for debt on an obligation, he may plead he made voluntary payment of other debts due upon obligations, or gave new security for them in his own name before the suit began, and that he hath no more than enough to satisfy them. But to plead such a voluntary payment or giving of new security, after suits begun upon this obligation now in suit, is no good plea. [But the executor may assist another creditor, by confessing judgment, and pleading that judgment in bar to action.] If an action be brought against an executor or administrator on an especialty for money, it is no good plea in bar of this action to plead a statute or recognizance, with defeasance to perform covenants, when there is no covenant broken. If a suit be against an executor or administrator for a legacy, it seems it is no good plea to plead a bond, with condition for performance of covenants, or for the doing of any other collateral thing, that is contingent only, and not yet broken. [But the suit must be in equity, and equity will compel the legatee to give security to refund.] It is no good plea, in an action, for an executor or administrator to say, that the deceased was outlawed (88). [He must plead *plene administravit*, or no assets, &c.]

Curia, Trin. 37 Eliz.

Trin. 39 Eliz. B. R.

38. *Where, and in what case, an executor or administrator shall be charged, by his own act or pleading, upon his own goods; and where execution shall be* de bonis propriis; *and where not.*

An executor or administrator may make himself chargeable of his own goods, either by omission; as when he being sued upon an obligation, or the like, and there is a judgment, [&c.] against him or the deceased, in force, and he hath but enough to satisfy that judgment, and he doth not plead this [judgment, &c.] in bar of the present action, but doth suffer the plaintiff to recover against him; in this case, he must satisfy this second debt out of his own estate: or by com-

2 H. 6. 12. Dyer, 185. 8a. Co. 9. 90. 94. 9 H. 6. 57. 34 H. 6. 45. Bro. Executer, 141. 105. Lit. Bro. sect. 99. Kelw. 61. Bro. Executors, 164.

(88) See fully as to pleadings in actions by or against executors and administrators, in *Com. Dig. Abatement* (F. 10.); *Pleader* (2 D. 1.); *Vin. Abr. Executors* (Z. a. 2.) &c.; *Swinb.* 397.

mission; and that either by doing; as when he doth any act that is a waste in him, and thereupon a *devastavit* is returned against him; (for in this case he must answer so much as he hath wasted out of his own estate;) or by [false] saying, [*i. e.* pleading;] as when a suit is brought against him, and he doth plead such a false plea therein as doth tend to the perpetual bar of the plaintiff in the action, and yet it is of a thing that doth lie within his perfect knowledge, as when he doth plead he is not executor, nor did ever administer as executor, and upon trial of this issue against him it be found he is a * rightful or wrongful executor; in this case, he must satisfy this debt out of his own estate, whether he have assets or not, and the execution upon the judgment had in this suit shall be *de bonis propriis*. [And even after a creditor's suit in equity, a creditor suing at law may proceed and take advantage of such false plea. *Eden on Injunctions*, 64.] And if an executor or administrator be sued, and he plead to the action *plene administravit*, and upon trial it is found against him; in this case, if he have any of the goods of the deceased left in his hand, the execution shall be of them; but if he have none of the goods of the deceased left, the execution shall be, and he shall be charged for so much as is found to be in his hands, *de bonis propriis*. But where he is sued upon a promise made by the testator, and he plead *non assumpsit* to it; and where he is sued upon a deed made by the testator, and he plead *non est factum* to it, or the like; and these issues upon trial are found against him; or when he shall confess the action, or suffer a judgment to go by default against him; or plead any vain [*i. e.* ineffectual] plea; in all these cases, he shall not be chargeable of his own estate, neither shall the judgment and execution in these cases be *de bonis propriis*, but *de bonis testatoris* only for the debt, and *de bonis propriis* for the costs: and yet if an executor or administrator shall entreat a creditor to forbear his debt until a day, and then promise to pay him; by this promise he hath made himself chargeable [to answer for breach of the promise, and in effect] as for his own debt; howbeit it [the debt] shall be

*P. 495.

allowed him upon his account (89). But in all these cases, and such like, where a man shall be charged of his own estate, and the execution shall be *de bonis propriis*, it seems the judgment is always *de bonis testatoris*; and the course is this, the first execution is against the executor *de bonis testatoris*, and not *de bonis propriis*; and after a *devastavit* returned by the sheriff against the executor or administrator, and not before, a new execution is directed to the sheriff to levy the debt *de bonis testatoris*; and if there be none of them to be found in his hands, then to levy them *de bonis propriis*. And therefore if an executor or administrator be sued by a creditor, and the executor or administrator plead a *plene administravit* generally, or plead specially that he hath no more but [*i.e.* than] to satisfy a judgment or the like; and upon trial this issue is found against him, and it is found he hath in all or part enough to satisfy the debt; in these cases, the judgment is *de bonis testatoris*, and thereupon an execution is (as in other cases) to levy the debt *de bonis testatoris* in the hands of the executor or administrator, and for the costs *de bonis propriis*. And upon the return of the sheriff a special execution doth issue forth to levy the money *de bonis testatoris: et si constare poterit* that he hath wasted the goods, then that he, [the creditor,] shall make the execution *de bonis propriis*. And hereupon also the plaintiff may, if he will, have a *capias* against the body, or an *elegit* against the lands of the executor or administrator,

*P. 496. * and no other course of proceeding can or may be had against the executor or administrator in this case.

An action of debt was brought against two executors, and one of them did appear and confess the action, and the other made default, and thereupon judgment was given to recover against them both *de bonis testatoris* in their hands, and execution accordingly: and upon this execution the sheriff did return a *devastavit* against the executor that made default only, and hereupon a *scire facias* went out against him alone, and

Atworth's case, Mich. 38, 39 Eliz.

34 H. 6. 45. 46 Ed. 3. 9. Fitz. Executor, 9. Co. 5. 32. a. 134. Dyer, 185. 32.

Dyer, 210.

Terms of the Law. Co. sup. Lit. 374.

(89) See accordingly, *God. Orp. Leg.* 199; but this promise must be in writing, under the statute of Frauds, 29 Car. 2, cap. 3, § 4. See further in what cases an executor makes himself liable *de bonis propriis*, by his promise to pay his testator's debts or legacies, in *Bac. Abr. Executors, &c.* (M. 2.)

afterwards an execution against him alone *de bonis propriis* (90).

Assets in this case, is said to be where one dieth indebted and maketh his executor, or dieth intestate, and the executor or administrator hath sufficient in goods or chattels or other profits to pay the debts or some part thereof; this is said to be assets in his hands, and for so much he shall be charged. [*Com. Dig.* tit. *Assets.* The doctrine of assets is a copious head, and ought to be fully studied.] Assets. Quid.

39. *What shall be said to be assets in the hands of an executor or administrator to charge him, or not.*

All those goods and chattels, actions and commodities, which were the deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship and administration, and all such things as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee. And herein these things are to be known; 1. That assets in the hands of one of the executors shall be said to be assets in the hands of all the executors. 2. That assets in any part of the world shall be said to be assets in every part of the world: and therefore if that point be in issue, and it appear that there is [*read*, are] assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there is [*read*, are] assets. 3. All goods and chattels of what nature or kind soever that are valuable, as oxen, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets. [But the benefit of the next presentation is till avoidance, also a term in an advowson, are assets; since they are saleable. The books must be intended of a presentation when the avoidance has taken place.] 4. All the goods and chattels that come to the executor or administrator in the right of their executorship or administration, and

Kelw. 51.

Co. 6. 47.

Co. super Lit. 388.

Co. super Lit. 388. 5. 34.

(90) See further in what cases an executor shall be charged *de bonis propriis*, in *Swinb.* 390.

that are by law given to them by virtue thereof in the right of the deceased (for which, see before at *numb.* 25.) and which are in possession, shall be esteemed assets in his hands. And therefore a feoffment, made to the use of the feoffor for life, and after to the use of his executors and assigns for twenty years; in this case, it seems this twenty years, [not being considered as a term in the testator in his lifetime, *Spark* v. *Spark*, *Cro. Eliz.* 658, contrasted with *Cranmer's case*, *Dyer*, 309, pl. 96,] shall be said to be assets in the hands of the executor of the feoffor. And goods pledged to the deceased, and not redeemed, or the money wherewith it is redeemed, when it is redeemed shall be
*P. 497. said to be assets in the hands of the * executor or administrator. And if the deceased doth appoint that the executors shall sell his lands to pay his debts, the money, that is made of the land when it is sold, shall be said to be assets in his hands. [*Query*, and see the distinction between legal and equitable assets. *Toll. Ex.* 412.] 5. All the goods and chattels in action, or in possibility, at the time of the death of the deceased, that are afterwards recovered, and are gotten in possession into the hands of the executor or administrator, when they are so recovered, are esteemed assets in his hands, [and shall be recoverable on a judgment of assets *quando acciderint*.] But they are never accounted assets, until they are recovered and come in possession: and therefore if there be debts owing to the deceased upon statutes or obligations, or otherwise, these are never esteemed assets in the hands of the executor or administrator, until he hath recovered them. [By a suit in equity he may be compelled to recover them, or a receiver may be appointed.] So likewise if there be debt or damages recovered by a judgment had by the deceased, but no execution is done; until execution be made, this shall not be esteemed assets in the hands of the executor or administrator; [for the debt may never be recovered.] So if the executor bring an action of trespass against another *de bonis asportatis in vita testatoris*, and he have a judgment for damages; in this case, until he hath recovered it [the damages] by execution, it shall not be esteemed assets in his hands. And if the judgment be erroneous, and the execution avoidable, [by reason that the exe-

Dyer, 36a. Kelw. 63. Co. super Lit. 54. Dyer, 36a.

20 H. 7. 4. Bro. Assets, 12.

Co super Lit. 124. & 31. Bro. Assets, 24. Dyer, 264. 121. 2 H. 4. 21. Co. 6. 68. Kelw. 6. Dyer, 36a.

cutor, &c. had not any right to sue, since in point of law he did not sustain the character;] in this case, albeit it be recovered and gotten in possession, yet it shall not be esteemed assets. [*Query*, if law.] And therefore if one sue another, and recover against him as administrator of *I. S.*; and after a testament made by *I. S.* is produced and proved, and thereby an executor is made; in this case, the money recovered by the administrator shall not be said to be assets in his hands as to any of the creditors, because the executor may recover it from him, or the debtor will have it again. And if the executor or administrator do never recover and get the thing into his possession, he shall never be charged, especially there, where he hath done his best to get it, and cannot. [But equity will sometimes interfere, and compel an executor to sue, or will appoint a receiver.] If one covenant to make a lease for years to the deceased, his executors or administrators, and after his death the lease is made to the executor or administrator accordingly; in this case, this lease shall be said to be assets in his hands, and he shall be chargeable for so much to any creditor. [So is the good-will of a trade, &c.] And whatsoever the executor or administrator must be forced to sue for by the name of executor or administrator, being recovered, shall be esteemed assets in his hands. 6. Albeit the thing be extinct and gone as to the executor and administrator himself, yet it may have its being and be accounted assets as to the creditors and legatees: and therefore if an executor or administrator have a lease for years of land in the right of the deceased, and afterwards he doth purchase the fee simple of the land (whereby the lease is drowned,) yet in this case this lease shall continue to be assets as to the creditors and legatees still. [It is apprehended the term does not subsist, but the value only is assets. The language of the books is, when two have a lease for a year, as executor to *I. S.* and they purchase the reversion in fee, the lease is extinct, yet the executors shall be charged for the value thereof, as assets in account; but equity, no doubt, would follow the assets specifically; and see *Bro. Abr. Extinguishment*, pl. 54, and the commentary thereon; and *Vin. Abr. Extinguishment* (A.); and 3 *Prest. Convey.* 299. 529.]

Curia, Mich. 13 B. R.

Co. 1. 98. Plow. 84. 252.

Co. 5. 34.

Co. 1. 87. Bro. Leases, 63.

*P. 498. And if the debtee make the * debtor his executor, or the debtee die intestate, and the administration is committed to the debtor; in these cases, this debt [or rather its value] shall be said to continue, and shall be esteemed assets for so much as to other creditors. And if a woman executrix have goods worth 20*l.* and she marry with one of the creditors to whom 20*l.* are owing; in this case, it seems the husband may not retain the goods to pay himself, but they shall be assets to other creditors (91). [It is apprehended this is a mistake, if applied as between creditors in equal degree.] And yet, if the debtor make the debtee his executor, he may [as against creditors in equal degree] retain so much as to satisfy his own debt; and that he doth so retain shall not be said to be assets in his hands as to any other creditor (92). And if *I. S.* have goods to the value of 20*l.* and he is bound to *B.* and *C.* in 20*l.* a-piece, and he dieth intestate, and after *D.* doth administer, and then *B.* dieth, and maketh *D.* his executor; in this case, *D.* may retain this to satisfy his own debt, and it shall not be said to be assets in his hands as to any other [creditor in equal degree.] 7. The goods and chattels of other men in the hands of the executor or administrator, that were in the possession of the deceased, if he had no right to them, or if he had, and they do not belong to the executor, will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore if the goods of another man be amongst the goods of the deceased, and these come altogether into the hands of the executor or administrator; these goods that are the goods of another, shall not be said to be assets in the hands of the executor or administrator. And if the executor doth receive a rent that doth belong to the heir; this rent shall not be said to be assets in his

Trin. 7 Jac. B. R. Simon's case. Co. 8. 136.

Burnet's case, Hil. 8 Jac. Plow. 184.

Kelw. 63. Co. 6. 58. Dyer, 36a.

(91) But this is not correct, for a distinction is taken between a debtor who is made an executor; for being so by the act of the party, it is laid down as a general rule that it is an extinguishment of the debt, for he cannot sue himself: but where the debtee dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby extinguished, for he comes into the administration by the act of law. *Went.* 31. See fully in *Bac. Abr. Executors* (A. 10.)

(92) But this, it is said, must be understood where the debt is in equal degree with the debtee; for if he is a simple contract creditor, he cannot retain against a creditor by specialty, or any other of a superior nature. *Went.* 31; *God.* 115; *Hob.* 110; *Cro. Car.* 375; *Rast.* 345; *Bac. Abr. Executors* (A. 9.); *Vin. Abr. Executors* (K. 5.)

Doct. and Stud. lib. 2. c. 3. hands: and hence it is, that if the deceased were outlawed at the time of his death, that his goods and chattels are not to be accounted assets, for they are none of his. [But the executor cannot plead the outlawry, but must plead *plene administravit*, &c. and give the special matter in evidence.] 8. If an executor of his own wrong, to whom 20*l.* are owing, doth enter upon so much of the goods of the deceased as is worth 20*l.* intending to pay himself; this shall be esteemed assets in his hands to make him chargeable for so much to any creditor or legatee. [But if he afterwards, and before suit, obtain administration, his acts are legalized, and he may retain.] 9. If the deceased have goods worth 20*l.* and owe 20*l.* to *A.* and 10*l.* to *B.* and he compound with *A.* for 10*l.*; in this case, the executor shall be said to have assets [to the extent of 10*l.*] and be charged to pay the debt of *B.* also. [This rule is also adopted by courts of equity, as to trustees.] 10. If a man have a lease for years worth 20*l.* per annum, at the rent of 5*l.* and he die; in this case, not the whole value of the land, but so much as is above the rent, [*i. e.* the saleable value,] shall be said to be assets in the hands of the executor or administrator (93).

Co. 5. 30. Dyer, 2.

27 H. 8. 6.

Co. 5. 31. 10 H. 7. 5.

Swinb. 261. 264. The probate of a testament is the producing and insinuating of it before the ecclesiastical judge, ordinary of the place where the party dieth, or other that hath power to take the same; [*viz.* jurisdiction to grant letters of probate.] And this is done in two sorts, either in common form, *viz.* upon the oath of the executor or party exhibiting it, upon his credulity * [*viz.* credit or oath] that the will exhibited is the last will and testament of the party deceased, which is the ordinary course; and this the ordinary may accept if he will. Or *per testes*, *i. e.* [omit, *i. e.*] which is, when over and besides his oath, he doth also produce witnesses, or maketh other proof to confirm the same; and that, in the presence of such as may pretend any interest in the goods of the deceased, or at least in their absence,

40. *Probate.* Quid. Quotuplex.

*P. 499.

(93) See more amply what shall be deemed assets in the hands of the executor, in *Bac. Abr. Executors*, &c. (H.); *God. Orp. Leg.* 180; *Vin. Abr. Executors* (G. a.); 1 *Atk.* 463; *Atk.* 206. The editor has, during the present chapter, occasionally omitted inserting references to the latest reporters, under a presumption, that the cases contained in them are either inserted in the edition of *Bacon's Abridgment* lately published, or will be so in the edition of *Comyn's Digest* now in the press.

after they have been lawfully summoned to see such will proved if they think good. And this course is used only where there is a suspicion of the will, and a caveat is entered; or where there is a fear of contention and strife between the kindred and friends of the party deceased, about his goods; for a will proved in common form may be called into question at any time [within] thirty years after; and when the will is thus exhibited into the bishop's court, the same is to be kept by his officers, and the copy thereof in parchment [or paper] under the bishop's seal of his office, [or seal of office of any other ordinary,] to be certified and delivered, which parchment so sealed is called the will proved, [or more generally probate.]

41. *Where the probate of a will is necessary, and where not; and by and before whom; and in what time it must be proved.*

The probate of the will (as having respect to the goods and chattels) is in some respect necessary; for howsoever, as touching any freehold of lands devised, [or a term originally created by the will out of freehold property,] it is not at all material; and howsoever the executor before probate may receive and release debts, and do most other acts as executor, yet he cannot sue for any debt due to the testator (94). And if the executor delay the probate, the ordinary may by process compel him to come in and accept of or refuse the executorship. And when it is proved, it must be proved by the executors, or one of them at least; and if all the goods of the deceased be within the same diocese wherein he lived and died, the executor must prove it before the ordinary of the diocese, or before his lawful commissary or deputy, or before the archdeacon or his deputy or commissary (as their composition is); or if the goods be in a peculiar, then before him that is judge of that peculiar; or if the goods be within two peculiars, then before the ordinary of the diocese wherein these two peculiars lie. But if there be *bona notabilia* in the case, *viz.* that the testator have goods or chattels at the time of his death of the value of 5 *l.* or more, lying in two or more counties, or have good debts upon especialties (as some say), for otherwise they follow the person; or have any especialties (as others say) lying in other counties for debt, so that

Co. super Lit. 292. Perk. sect. 482.

Perk. sect. 491. 462. 486. Co. 9. 36. Fitz. Testament. 4. 3. 5. Plow. 280. Stat. 23 H. 8. c. 9. 21 H. 8. c. 5. See before at numb. 21.

Swinb. pt. 6. sect. 11.

(94) What acts an executor may do before probate, see *Bac. Abr. Executors* (R. 14): *ante*, 453.

there be of goods and chattels, or good debts, to the value of 5*l.* in any other diocese than that wherein the testator led his life and died, then the probate doth belong to the archbishop of that province wherein it is, unless the ordinary of the same diocese have the probate by composition between him and the metropolitan; for otherwise, [*i. e.* unless the metropolitan have jurisdiction,] there must be several * probates for the goods in every diocese, (as anciently was used in these cases) (95.) [And if there be assets within several provinces, then of necessity there must be letters of probate or administration from the proper jurisdiction in each province, and one may be a prerogative and the other an inferior jurisdiction. See *Toller on Executors*, 49; *Com. Dig. Administration* (B. 2.) So by composition two probates may be necessary, because there is a peculiar derived out of a diocese.] But if a man die in his journey in another diocese, and have more than 5*l.* goods about him, this shall not be said to be *bona notabilia*, but the will may be proved before the ordinary of the place where the deceased lived and his estate doth lie. And except it be in cases where men have *bona notabilia*, the officers of the courts of the metropolitans are not to cite men out of their own diocese; and, to discover this matter, it is the duty of the ordinary of the diocese, when any man comes to prove a will, to give him an oath, and examine him whether he know of, or do believe, there are any goods to the value of 5*l.* lying in any other diocese at the time of the testator's death; and if he hear of any, to dismiss them to the prerogative court, and to give them notice of it: also, in some places, the lords of manors have the probate of all the wills within their manor by custom of the place; and in those places it must be proved there, and not elsewhere. And when an executor is bound to prove the will before the ordinary as before, the ordinary may give him what time to do it he doth think fit, and, when he doth prove it, the ordinary doth take an oath of him to administer the goods faithfully, and

*P. 500.

Stat. 23 H. 8, c. 9.

Fitz. Testament, 4. 5.

(95) Five pounds is the sum or value of notable goods; but where, by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered; as in the diocese of London, it is ten pounds by composition. 4 *Burn's Ecc. Law*, 179; 4 *Inst.* 335. What shall be deemed *bona notabilia*, see *Vin. Abr. Executors* (H.); *God. Orp. Leg.* 69; *Com. Dig. Administrator* (B. 4.)

to take bond of him also, if he please; but this some do omit (96.)

And now because lands are oftentimes conveyed by the several kinds of assurance aforesaid unto one man, but to the use of another, and to the intent that another shall take the profits of it, we must of necessity hear somewhat of the learning of uses, and then we shall have done.

CHAP. XXIV.

Of an Use.

[THE learning of uses and trusts is of the first importance to a correct knowledge of the law of titles.

No one can be a sound lawyer without fully and accurately understanding this subject; contrasting cases depending on the learning of uses and trusts, with cases arising under, or depending for effect on the rules of the common law. The extensive heads of powers and perpetuities connect themselves very intimately with the learning of uses and trusts.

On these several heads there is a large display of learning and arrangement in different works. *Cruise on Uses*, for its simplicity; *Sanders on Uses and Trusts*, for its amplitude; *Sugden's* edition of *Gilbert on Uses and Trusts*; *Mr. Butler's Comment on Uses and Trusts*; *Sugden on Powers*;

(96) See fully before whom a will is to be proved, and in what manner, in *Swinb.* 427; *Treat. of Equity*, 108; *Went.* 44; 2 *Black. Com.* 508; *Com. Dig. Administration* (B. 6.); *Bac. Abr. Executors*, &c. (E.); *Vin. Abr. Executors* (B. 2.); 4 *Burn's Ecc. Law*, 176. The statute of Frauds, 29 Car. 2, after establishing, in the 19th and 20th sections, the various requisites to a good nuncupative will, enacts, in the 21st section, that no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please. And the 24th section of the same act declares, that nothing therein shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates; but that the prerogative court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect, subject nevertheless to the rules and directions of this act.

Preston on Estates; *Preston on Conveyancing*; *Preston on Abstracts*, (taking the subjects from the references in the indexes); *Comyn's Digest*, tit. *Uses*; and lastly, (for its profound and historical learning, as tracing the progress made by the statute law to convert equitable into legal estates,) *Bacon on Uses* should be read, in the order, or with some attention to the order, in which the several works are enumerated.

The object to which the editor will, in the present chapter, as in former chapters, direct his attention, will be to guard the reader against error, by making those additions and observations, which decisions, since the original work was written, or a more correct knowledge of the subject, may suggest.]

Co. 1. 121, 122. See the addition to Justice Doddridge's Treatise. Co. super Lit. 271, 272.

1. *Use.* Quid. *P. 501.

* A[n] use is the [right in equity to have the] profit or benefit of lands or tenements; or, as others define it, the equity and honesty to hold the land in *conscientia boni viri*; or, as others define it more fully, it is a trust or confidence reposed in some other, [not necessarily in some other,] which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land; so that he [the *cestui que use*] for whom he [the owner of the seisin or estate] is trusted, shall take the profit of the land, and the terre-tenant [*i. e.* the trustee or owner of the seisin] shall dispose of it according to his direction: as for an example; if a feoffment be made to *I. S.* and his heirs, to the use, profit, or behoof of *W. S.* and his heirs; in this case, heretofore *I. S.* had the estate [seisin] and property of the land, but *W. S.* had and was to have the profits in honesty and equity. [*I. S.* was the feoffee to uses or trustee, *W. S.* was the *cestui que use*.] So if one agree[d] with *W. S.* for a piece of land for 20*l.* and pay [paid] him the money, but hath [had] no assurance of the land, yet the equity and honesty to have this land is [was] in him that hath [had] contracted and paid his money for it: and this trust was called the use of the land, [and the purchaser was deemed the bargainee of the land;] and hence, [or rather to exclude a resulting use,] came the course in conveyances to set down in the *habendum*, to whose use; as *habendum* to *A.* and

his heirs, to the use of *A.* and his heirs: and he for whom this trust is [created,] and that ought to have the profit of the land by conveyance as aforesaid, is called *cestui que use.* There is a[n] use also of goods and chattels, which is properly called a trust or confidence, for one may have such things to the use of another; [but the use or trust confers the equitable and not the legal title; and it is not every use of land which confers a legal title.]

Cestui que use. Trust or confidence. Quid.

2. Quotuplex.

A[n] use is either express; *i. e.* when the use or intent is openly declared and expressed between the parties, upon the making of the estate of land, whereunto the use is annexed; as when a feoffment is made of land to *I. S.* and his heirs, to the use of *W. S.* and the heirs of, or heirs male of, the body of the said *W. S.*; or to the end and intent that *W. S.* and his heirs, or *W. S.* and the heirs of his body, shall take the profits of it, or the like; or when I covenant to stand seised of the land to the use of my wife for life, and after of my eldest son, and the heirs of his body, or the like. Or, it is implied, [or resulting;] *i. e.* when the use is not declared upon the agreement between the parties, but is left to the construction and made by the operation of law; as when a man seised of land doth make a feoffment in fee, or doth levy a fine, or suffer a common recovery of it to another, without any consideration, and it is not agreed nor declared [neither in fact or by consequence] to what use or intent it shall be; this, by construction of law, shall be to the use of the feoffor, conusor, or recoveree: but if there be any consideration of money, or other thing, paid or given, or any rent * or tenure reserved, [or any other reason,] then, by construction of law, it shall be to the use of the feoffee, conusee, or recoveror: for otherwise, [*viz.* in the absence of such inducement,] the law presumeth that the intent of him that did part with the land was so; *viz.* that the other should have the property of the land to his use, and that he himself should take the profits of it. So when one doth bargain and sell his land for money to another, and no use is expressed; in this case, the law doth say, it shall be to the use of the bargainee and his heirs. [And under a simple bargain and sale, as distinguished from a bargain and sale to the intent that a common recovery may be suffered, there cannot be a resulting

Doct. and Stud. 95. Perk. sect. 533. Co. 2. 58. 9. 11. Dyer, 18. 146.

*P. 502.

Co. 1. 121.

use, although there may be a resulting trust.] A[n] use also is either *in esse*, [namely, vested,] and that in possession, reversion, or remainder; as when a feoffment is made to *I. S.* to the use of *I. W.* and his heirs, or to the use of *I. W.* and after to the use of *I. D.* and the heirs male of his body, and after to the use of *S. T.* and his heirs for ever. Or, it is *in posse*, or in contingency; as when by possibility, it may [or may not] happen to be in possession, reversion, or remainder; as where a[n] use is limited to me for life, and after to him that shall be my first son in tail, this is only the possibility of a[n] use, for it may or may not be. [To these may be added future uses, or springing uses, though they be not limited on any contingency.]

3. *The nature, incidents, and original of it.*

Co. in Chudleigh's case, in toto, and Shelley's case. Kelw. 160. Dyer, 12. Bro. Feoffment, all uses in toto. Conscience, 25.

A[n] use at the common law, before the statute [of 27 Hen. 8, c. 10,] hereafter spoken of was made, was, and where that statute doth not take place is, nothing but a mere confidence and trust, collateral to and distinct from the land, annexed in privity to the estate, and to the person touching the land, to this purpose, that *cestui que use* should take the profit of the land, and the feoffee or terre-tenant that was trusted should make estates, and otherwise dispose of the land as the *cestui que use* in his life, or at his death by his last will and testament, should direct and appoint; and if he made no disposition, then that it should go to his heir; so that the feoffee had the freehold [seisin] or sole property of the thing in him, and *cestui que use* had neither *jus in re* nor *jus ad rem*, (for if he against the will of the feoffee had entered into the land, he had been a trespasser,) but a bare confidence or trust, for which the *cestui que use* had no[t any] remedy, but in Chancery upon breach of the trust, and there to have the feoffee imprisoned [under process of contempt] until he perform the trust according to the order of the court. And these uses, to some purposes, were reputed in law as [*i. e.* of the like nature as] chattels, and therefore were devisable by will; and to some purposes as hereditaments, and a kind of inheritance of which there was a *possessio fratis, &c.*; and to some purposes, neither chattels nor hereditaments, for they were not esteemed assets in the heir or executor; neither were they reputed as commons, rents, conditions, and such like inheritances, which are

discontinued or taken away by the alienation of the terre-tenant, escheat, disseisin, &c.; but a[n] use is not so. [An escheat of the legal estate will defeat a trust; and a disseisin will not be subject to a trust, but the trust will remain as an interest in equity, and be transferrable, even during the disseisin.]

Incidents of it. And to every of these uses, there were two inseparable incidents, confidence in the person, and privity in the estate expressed by the parties, or implied by the law; and when either of these failed, the use was either gone for ever, or sus-
*P. 503. pended for a time at the * least; [but though suspended, it was devisable, grantable, &c. so far as it was an equitable interest:] and therefore if the feoffee to use, upon good consideration, had enfeoffed another of the land that had not notice of the use, the use had been gone for ever; because howsoever here was a privity of estate, yet here was no confidence in the person. But if the feoffment had been without consideration to such a one; in this case, the use had remained still, because the law did imply a notice; [or rather, there was not any change of equity, because the alienee had not given any consideration which could entitle him to have the benefit of the land, as against the *cestui que use*.] So also, it seems, the law was when it was made in consideration of marriage only. [At this day, marriage, and a title at law without notice, is considered a good consideration to change the equity.] And if a disseisor, abator, or intruder, had come to the possession of the land whereof the use was, albeit he had notice of the use, yet the use was suspended during their possession, [seisin,] and they should not have been seised to [the] use as the feoffee was; for they [the disseisors] come not to the land in the *per*, [*i. e.* by conveyance or title;] but in the *post*, [by wrong.] And if a lord by escheat, lord of a villain, or one that had entered for mortmain, or that had recovered in a *cessavit*, *&c.* had come to such land and [though they] had notice of the use, the use had been gone for ever; for these came to the land in the *post* and above the use: and tenant in dower, and by the courtesy, should not be seised to uses in being, for all these wanted privity of estate. [*Query*, for their estates are a continu-

Trin. 17 Jac. Cancellaria.

ance of the same seisin.] And if there had been tenant for life, the remainder in fee to the use of another, and the tenant for life had made a feoffment in fee to one that had notice of the uses, this second feoffee should not have stood seised to the first uses; [because he had a new seisin, and a new estate under the tortious alienation.] So if the husband had made a feoffment in fee of the land of his wife, upon consideration, and without any use expressed, the wife should not have had a *subpœna*; because the feoffee was not in privity of estate of the wife: [and the remedy of the wife was at law.] And if *cestui que use* for life or in tail, the remainder in tail with divers remainders over in use, had made a feoffment to one that had notice, he should not have been seised to the first uses *causâ quâ supra*. But otherwise it is of commons, advowsons, and such like appendants or appurtenants; for if tenant in tail, or husband in right of his wife, make a feoffment of a manor, or of part of it, with an advowson appendant; the advowson, at least after presentment, shall pass as appendant to the manor, or to part of the manor, and not to the estate of the land which is discontinued by the feoffment. So a disseisor, abator, intruder, or the lord by escheat, or the like, shall have these things as annexed to the land or the possession of the land; so that there is a difference between a[n] use, a warranty, and such like things that are annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments that are annexed to the possession of the land.

[Goodright v. Forrester, 1 Taunt. 578.]

Dort. and Stud. 96. Co. 1. 123. 124. Stat. 27 H. 8. c. 10. in the preamble.

The original of it, and why so much lands were put in use.

And these uses began first when the custom of property began and was brought in, that one man knew his own from another man's, and then was to enjoy his own, and not to be deprived of it without consent or order of law; for then he that had land, had two things in him, a possession of the land, and power to take the profits of it; and those being to be distinguished, he might give the * freehold or possession, [*i. e.* the seisin,] to another, and take the profits himself; and they were the rather allowed by the law for a time as reasonable, because they gave a man, [through the medium of the use or trust,] power to dispose of his land by will, which otherwise he could not

*P. 504.

have done but in some special cases by custom of the place (1): but in time this use was turned into an abuse, and the greatest part of all the lands in the kingdom, especially in the time of the broils between the houses of York and Lancaster, were put in use, partly of fraud, and partly of fear, which [*i. e.* and these uses] produced not a few inconveniences; for thereby many were deceived of their just and reasonable rights (2); as namely, a man that had cause to sue for his land, knew not against whom to bring his action, or who was owner of it; the wife was defrauded of her thirds, [when her husband had the use only, and not the legal estate; and hence at this day, there is not any dower of a trust or an equity of redemption in fee, *D'Arcy* v. *Blake*, 2 *Sch. & Lef.* 388;] the husband of being tenant by the courtesy, [courtesy now attaches on a trust or equity of redemption in fee, *Casborne* v. *Scarfe*, 1 *Atk.* 603; 3 *Prest. Abstr.* 381;] the lord of his wardship, relief, heriot, and escheat, [so at this day, on the death of a *cestui que trust* in fee without heirs and without alienation, the trustee and not the lord shall have the beneficial ownership, *Burgess* v. *Wheate*, 1 *Black. Rep.* 120;] the creditor of his extent for debt, [the statute of 29 Car. 2, c. 3, has given execution against trust estates, while they remain in the trustee in trust for the conusor of the judgment;] the poor tenant of his lease, [from their ignorance of secret uses, &c.] and other purchasers of their purchase; [but possession by a lessee or a purchaser, is implied notice of his title, and may protect him from any abuse of the legal title:] for these rights and duties were given by the law from him that was owner of the land and none other, which at this time was the feoffee of trust; and so the feoffor, the old owner of the land, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee; and yet the feoffee was not such a tenant of the land, as that his

The mischief of uses.

(1) For the nature, origin, and introduction of uses, see *Gilb, Law of Uses*, 3; 2 *Bl. Com.* 327; *Bac. Law Tracts*, 302; 1 *Wood*, 625; *Vin. Abr. Uses* (A. 3.)

(2) About the reign of Edw. 4, courts of equity first began to reduce uses into a kind of regular system, 2 *Bl. Com.* 329; for before that time there are not six cases to be found [illegible]e doctrine of uses. See *Bac. Tracts*, 313.

wife might have dower; [she was dowable, but her dower was subject to the equity arising from the use, &c.;] or the land be extended for his debt; or that he might forfeit it for felony or treason; [but if there be an escheat, the land may be held discharged from the use or trust;] or that his heir should be in ward for it; or any duty of tenure fall to the lord by his death; or that he could make any estates of it (3): also lands were many times conveyed by last wills by word only, and sometimes by tokens only in time of great extremity of weakness; and many perjuries for trial of secret uses were daily committed. [The statute of Frauds and Perjuries, 29 Car. 2, c. 3, has remedied this evil as to equitable, as well as legal estates.] All which having been espied, have been laboured to be cured and holpen by divers particular acts of parliament in all succeeding ages: but the makers of these laws, finding the continuance of these uses so mischievous, that they did overreach the policy of all laws, for a general remedy, and a perfect cure of all the said mischiefs and abuses, have at last provided,—that where any persons are, or shall be, seised of any lands to the use or trust of any other, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement or otherwise by any means whatsoever,—*cestui que use* or *trust*, that hath any such use in fee simple, for term of life, or years, or otherwise, or any use in reversion or remainder, &c. shall have the possession of the land in such quality, manner and condition as he had the use or trust (4). And where any one is seised of lands to the use or intent that another

Stat. 1 R. 2. c. 9.
4 H. 4. c. 7.
11 H. 6. c. 3.
1 R. 3. c. 1.
4 H. 7. c. 17.
1 H. 7. c. 1.
19 H. 7. c. 15.
27 H. 8. c. 10.

Uses and possessions united.

(3) See accordingly *Bac. Tracts*, 153. But see *Co. Lit.* 76, b.; *Jenk. Cent.* 4, *case* 92. This passage is copied *verbatim* from *Bacon's Tracts*, 153. But *Bacon* and *Sheppard* are totally mistaken: 1st, with respect to *dower*, it is very clear that the wife of a feoffee to use had a legal title to dower; for *Broke* (*Feoffment al. Use*, 40,) lays it down, that tenant in dower and by the courtesy were seised to their own use, and not to the use of any other person; and Lord *Coke* lays down the same doctrine (1 *Rep.* 122, a.) But it is true, the doctrine whether tenant in dower is compellable to execute the use has been much controverted; however, that does not invalidate the above position, that the wife of the feoffee was entitled to dower: 2dly, with respect to *wardship*, it is clear that the heir of a feoffee to use was in ward, and the lands which the ancestor held to an use were in ward, as appears from 1 *Inst.* 76, b.; *Jenk. Cent.* 4, *case* 92.

(4) See the words of the statute 27 Hen. 8, c. 10, and the references thereto in the margin of *Ruffhead*'s and *Pickering*'s edition of the *Statutes*. And for some remarks on the operation of the words of that statute, see *Fearne on Cont. Rem.* 226, 3d edit.

shall have a yearly rent out of the same lands, *cestui que use* of the rent shall be deemed in possession [*i. e.* seisin] thereof of like estate as he had the use: by which statute, [when it applies,] the use and possession, [*i. e.* seisin,] of land is now at this day coupled, conjoined and married, with an indissoluble knot, so as they cannot now stand apart and
*P. 505. divided, but he that hath * the one must have the other, and the one doth ensue the other as the shadow doth the body; [*i. e.* the equitable is converted into, and becomes a legal seisin, estate or interest, whether vested or contingent (5);] and therefore now upon fines, recoveries, and feoffments, the estate doth settle as the use and intent of the parties is declared by word (6) or writing before the act done: as for example, if a writing be made between two or more, that one of them shall levy a fine, make a feoffment, or suffer a recovery to the other, to the use and intent that one of them, or another man, shall have it for life, and after another in tail, and after a third in fee simple; in this case, the law settleth the estate according to the use and intent declared, so that now what estate a man hath in the use, the same he hath in the possession, [seisin or legal ownership. See *Prest. Est.* 142. 180.] But herein for the more full understanding of this statute, and the law at this day, it must be observed, that this statute doth not extend to all manner of uses, neither are all uses executed and united to the possession [*i. e.* seisin] hereby; for, to every execution of a[n] use within this statute, four things are requisite: 1. That there be a person seised. 2. That there be a *cestui que use in esse*. [*Query*, and see 1 *Prest. Est.* 180.] 3. That there be a[n] use *in esse* in possession, reversion, or remainder, [or in contingency.] 4. That the estate, out of which the uses do arise, be vested in *cestui que use*; [this is a point not to be conceded:] so that when these four, *viz.* seisin in the feoffees, *cestui que use in rerum natura*, *use in esse*, and that the estate of the feoffees doth vest in *cestui que use*, then there is an execution of the

To what uses the statute of 27 H. 8. doth extend, and to what not.

Co. 1. 126. 138. Plow. 591.

(5) So before the statute, "the *use* was to the *estate* like a shadow following the body." *Bac. Tracts*, 153.

(6) Not by word, since the statute of Frauds.

use within this statute (7): but if any of these fail, there is no execution of the use within this statute; and therefore it is agreed, that this statute doth not execute any use, but only uses *in esse*; so that the right of a present use, and a future or contingent use, are excluded until they come *in esse*; and then the statute doth execute them also, if no alteration be of the estate of the land before. [These propositions cannot, consistently with practical and acknowledged accuracy, be carried further than that an use cannot be executed into estate when the seisin is divested or discontinued. But contingent or future uses become contingent future interests at law, by a change from equitable into legal interests, if there be a seisin to serve them.]

Co. 1. 126. Dyer, 58. 88. 330.

And if *cestui que use* in tail, with divers uses in remainder, had made a feoffment, [so that the seisin was discontinued,] and died before the statute, no execution should have been of this right of a[n] use until entry by the feoffees [to revive the seisin.] So if *cestui que use* in possession had made a feoffment before the statute, no right of the use in possession or remainder shall [after the statute] be executed by the statute until the entry by the feoffees, [to restore a seisin which may feed the uses. 1 *Prest. Est.* 182.] So if a feoffment had been made before the statute, to the use of the

(7) The statute of Uses does not affect *copyholds*, "because (according to Lord *Coke*, in his *Comp. Cop.* 124,) the transmutation of possession by the sole operation of the statute, *without the allowance of the lord, or the agreement of the tenant*, would tend to the prejudice both of the lord and of the tenant." This *reason* might be true, supposing any act could be done with the estate whereby the statute could operate (if it were construed to extend to copyholds,) without the allowance of the lord or the agreement of the tenant; but it is presumed no act can be done respecting the actual transfer of a copyhold estate, which does not include both the allowance of the lord and the agreement of the tenant. The reasoning of Lord C. B. *Gilbert* does not appear more satisfactory. He says, the statute of Uses "extends not to *copyholds*, which is plain from common experience; for when a copyholder surrenders to the use of another, the possession is not executed to the use, for the surrenderee hath nothing till admittance; for it was not the intent of the statute to execute the possession to the use of copyhold lords, *for then a tenant would be introduced without the lord's consent.*" *Gilb. Ten.* 182. This reasoning seems to be without the consideration, that, though the surrenderee hath nothing till admittance, yet if the statute were allowed to execute the possession to the estate upon the surrender, the tenant would not be (as is implied in *Gilbert's* reason) introduced without the lord's consent; for the surrender must be with *the lord's privity*, and he can no more refuse the admittance than the surrender. If the mode of the conveyance by surrender and admission was not evaded, the operation of the statute could not be prejudicial as to copyholds; but in truth, the reason of the statute not extending to them, seems to be, that from the nature of the tenure, and the mode of conveyance or transfer of copyholds, they do not stand in need of the operation of the statute; *i. e.* none of the inconveniences which occasioned the statute of Uses, as to lands of inheritance at common law, exist as to copyholds.

feoffee for life, and after to the uses of others in remainder, and the feoffee had made a feoffment in fee to another; [thus divesting the old fee, and gaining a new fee by wrong or disseisin;] this use shall not be re-continued, or the re-possession of the land executed unto it, by this statute; [that is merely by the operation of the statute. The seisin must be regained before the use may be executed into estate.] So that the right of uses *in esse*, and uses in contingency, until they happen to be *in esse*, remain at the common law, as they were before the statute; [the conclusion, as it applies to contingent uses, is not warranted by the language or the object of the statute, or the acknowledged operation of the statute:] and therefore, if the estate of the feoffees be in such cases divested by disseisin; or the king, or a corporation, or an alien, or a person attaint, &c. be enfeoffed of the land before the use come *in esse*; or if the land be aliened *bonâ fide* upon consideration to one that hath not notice of the use, [being cases existing at the time of passing the statute;] this use can never be executed until these possessions be removed by
*P. 506. lawful entry or * action of the feoffees; and if their entry and action be barred, the use is gone for ever, and the party grieved thereby hath no remedy but in Chancery; and therefore, if *cestui que use* in tail, the remainder in tail restrained with a clause of perpetuity, be disseised, no use in contingency can be executed by this statute, [while the disseisin continues:] and if before the statute, a feoffment had been made in fee to the use of *I. S.* for life, and after to the use of the right heirs of *I. N.* and the feoffees had been disseised, and then the statute had been made, and after *I. N.* [had] die[d], and after his death *I. S.* die[d]; this use shall never be executed in the right heir of *I. N.* [Why not?] And so Co. 1. 138. also if a disseisin be after the statute and before the death of *I. N.* no possession [*i. e.* seisin] shall be executed in the right heir of *I. N.*; [nor is this proposition law, unless the contingent use became a contingent remainder, and failed by the determination of the particular estate. Both propositions are aimed against uses in contingency, and are at least questionable.] Also uses that need no execution by the statute: as when a man

doth convey land to *I. S.* and his heirs, to the use of *I. S.* and his heirs; this doth not need help of this statute, [for *I. S.* will be seised by the rules of the common law. The use is void. 1 *Prest. Est.* 175. 180.] Also uses that are against the rules of the common law, shall not be executed by this statute: and therefore, if a feoffment be made to the use of *A.* for life, and after to the use of every person that shall be his heir one after another for term of his life, [being a perpetuity;] or if one make a feoffment to the use of another in tail, with divers remainders over, with a proviso that neither of them shall discontinue or alien, &c.; these uses shall not be executed, because these limitations are wholly void: [in the last example, the limitations are good; but the proviso will be rejected as repugnant and void;] and in these cases, it seems there is no[t any] remedy to be had in Chancery against the feoffees. So that out of all this it appeareth, that some uses are executed presently, as uses *in esse*; and some are executed by matter *ex post facto*, if they be according to law, and come *in esse* in due time; but if they be uses invented and limited in a new manner, [having a tendency to a perpetuity,] and not according to the ancient common law, they are altogether void, and extinguished and abolished by this statute, [or rather by the rules of law, which intercept the operation of the statute.] And where lands are conveyed to others in trust after this or the like manner, *viz.* that the feoffees shall take the profits, and deliver them to the feoffor and his heirs, &c.; or that the feoffees shall convey it to the heir of the feoffor at his age of twenty-one years, [thus requiring that the feoffees should retain the legal seisin:] and where lands are conveyed to certain uses expressed and declared, and there be other secret uses and intents agreed upon between the parties, [being uses on uses;] these uses or trusts are not within this statute, neither will the statute execute them, but they remain as they were before the statute, [trusts] determinable in Chancery. Also leases for years of lands in use, that have their being before, and are granted over in use, are not executed by this statute, [since there is not any seisin:] and therefore, if a lessee for years of land grant, or assign over his estate, to *A.* and *B.* and

Dyer, 369. 356. Cromp. Jur. 65.

their assigns, to the use of the grantor and his wife for the term of their lives; this use or trust is out of this statute, and not executed thereby; and therefore, in this case, all the estate is in *A.* and *B.* and the grantor hath nothing but a[n] use, [*i. e.* a trust,] for which he hath his remedy in
*P. 507. Chancery. So if one * be seised of land in fee, and he bargain and sell it, or make a lease of it to another in trust, and for the benefit of a third person; this is but [an use on an use, or use in the second degree, and therefore] a chancery trust, &c. in this third person, as was held clearly, Mich. 8 Car. B. R. And yet if a feoffment be made to the use of *I. S.* and his assigns for the term of twenty years; this term of years shall be executed by the statute. [And so may an alternate or substituted use, as distinguished from an use on an use:] and so in all such like cases and questions of trust, and uses that are not within the statute of Uses, the law is now as it was before the same statute was made, and all those matters are determinable in Chancery; for as the questions of uses and trusts, that are within the statute, are to be decided and ruled by the judges of the common law, so are all other questions of uses and trusts, that are out of the statute, to be ruled and decided by the judges of the Chancery (8).

(8) It seems to have been the evident intention of the legislature, when they made the statute 27 Hen. 8, c. 10, to abolish uses, by transferring the possession [*i. e.* seisin] to the use; but the strict construction of that statute defeated the intent of it, and gave rise to *trusts* of lands, which are of the same nature as *uses* were before the statute; so that as Lord *Hardwicke* observed, in 1 *Atk.* 591, *A statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect, than to add, at most, three words to a conveyance.* There are three direct modes of *creating* a *trust* estate. 1st, Where a man seised in fee, raises a term for years, and limits it in trust for *A.* &c.; for this the statute cannot execute, the termor not being *seised.* 2dly, Where lands are limited to the use of *A.* in trust to permit *B.* to receive the rents and profits; for the statute can only execute the first use. 3dly, Where lands are limited to trustees, to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them, to answer these purposes. 1 *Ab. Eq.* 383. [See Serjeant *Williams's* note to 2 *Saund.* 11; 1 *Prest. Abstr.* 144.] *Trust* estates may also arise by *implication* in two several ways. 1st, Where a conveyance has been taken in the name of one man, and the purchase-money paid by another; or, 2dly, Where the owner of an estate has made a voluntary conveyance of it, and made a declaration of trust as to one part of the estate, and has been silent as to the other part of it. These are said to be the only two instances of trusts that have been allowed to arise by operation of law, since the statute of Frauds; unless where there has been a plain and express fraud in gaining a conveyance from another, which may be a reason for making the grantee in that conveyance to be considered merely as a trustee. See *Lloyd* v. *Spillit*, *Barnard.* 384, as incidental to and consequential on the right to relief. *Trust* estates are to be governed by the same rules, and are within the same reason, as *legal* estates (1 *P. Wms.* 109;) and if there were not the same rule of property in all courts, things would be at sea, and there would

[An use declared on a surrender of copyhold lands is a limitation which has effect by the rules of the common law, and not under the learning of uses, as governed by the statute of 27 Hen. 8, c. 10.]

Co. super Lit. 271. Plow. 301.

To make a good use, or to make a[n] use to [a]rise, especially such a[n] use as may be within the statute, respect must be had to divers things: 1. To the ways or means of creating and raising of uses, wherein is to be observed, that albeit the quality of the uses be changed in most cases by the statute of Uses, yet uses, and uses within this statute, are and may be raised, as they might before the statute, either by transmutation [*i. e.* conveyance] of the estate, as by fine, feoffment, common recovery, &c.; or out of the estate of the owner of the land, as by bargain and sale, by deed indented and enrolled, or by covenant to stand seised to uses upon good [*viz.* appropriate,] consideration; and therefore a fine, feoffment, or recovery may be had of land, to the use and intent, that either of the parties thereunto or others shall have it for any time or estate; and by this means what [any] uses [consistent with the rules of law,] and consequently what [any] estates a man will, may be raised and created: and in these cases the conusor, feoffor, or recoveree, may appoint the use of the same fine, feoffment, or recovery to whom he will, without any respect

4. What shall be said a good use of land, or not; and when and where such an use shall be raised, altered or created; or not.

First, in respect of the manner of raising it, and the several ways whereby uses may be raised

---

be the utmost uncertainty (2 *P. Wms.* 713;) [1 *Prest. Abstr.* 104. 196; 2 *Ibid.* 223.] And Mr. Justice *Blackstone* (2 *Comm.* 337,) upon this subject, says, "courts of equity consider "a *trust* estate (either when expressly declared or resulting by necessary implication) as "equivalent to the *legal* ownership, governed by the same rules of property, and liable to "every charge in equity [except dower] which the other is subject to in law. The *trustee* "is considered as merely the instrument of conveyance, and can in no other shape affect "the estate, unless by alienation for a valuable consideration to a purchaser without notice, "which, as *cestui que use* is generally in possession of the land, is a thing that can rarely "happen, [because the possession is constructive notice of his equity.] The *trust* will "descend, may be aliened, is liable to debts, to forfeiture, to leases, and other incum-"brances, nay even to the courtesy of the husband, as if it was an estate at law. It "has not yet indeed been subject to dower, more from a cautious adherence to some "hasty precedents, than from any well grounded principle. It hath also been held not "liable to escheat to the lord, in consequence of attainder or want of heirs, because the *trust* "could never be intended for his benefit." *Hardr.* 494; *Burgess* v. *Wheate*, in Chancery, Hil. 32 Geo. 2. To this may be added, that it is said to be a general rule, that any legal conveyance or assurance by a *cestui que trust*, shall have the same effect and operation on the *trust* estate, as it should have had upon the estate *at law* in case the trustees had executed the trust (2 *Ch. Ca.* 78.) And therefore a fine or recovery levied or suffered by a *cestui que trust* of an estate tail, shall have the same effect in barring the issue in tail and remainders, [if they be remainders of the trust estate,] as if the *cestui que trust* had been actually seised of the *legal* estate. *Ch. Ca.* 49; 1 *P. Wms.* 91.

[consideration] of marriage, money, kindred, or the like; for, in this case, his will guideth the equity of the estate, [or rather the feoffee, &c. cannot controvert the use:] or if a man make a lease to *A.* for life, to the use of *B.* for life; this is a good use and estate in *B.* during the life of *A.* [for the estate arising from the use cannot be more extensive than the estate conveyed to serve the use. May an use be raised on a release operating by *mitter l'estate*, as from one joint-tenant to another? it is apprehended it may, *sed quære.* An use may be declared on a release in fee to a copyholder. *Sammes' case*, 13 *Co.* 57; *Vin. Abridg. Uses*, (O. 3); 2 *Roll. Abridg.* 210; *Leo.* 205. But an use cannot arise on a release by way of extinguishment of right, *Gilb. on Uses*, 231; for there is not any seisin or estate. Nor on a surrender of an estate of freehold, *Walker* v. *Snow*, *Palm.* 359; for the estate is extinct by the operation of the surrender.] Or if a man by bargain and sale for good consideration sell his land to another, hereby the use will rise according to the estate bargained and sold unto the bargainee; but in this case, if it be an estate of freehold, as of fee simple, fee tail, or for life, that is sold, the bargain and sale must be made by deed indented and enrolled within six months after (9), in some of the courts at Westminster, or in the sessions rolls of the shire where the land lieth, (except it be in cities and corporate towns where they use to enrol deeds,) otherwise no use will rise by it: but if it be an estate or term for years only that is sold, there the use will rise well enough without any such matter; [hence the validity of the bargain and sale for a year, which is the foundation of a release:] or if a man seised of land in fee, covenant to stand seised of it to the use of his wife, children, brethren, or other kinsfolk for * life, in fee simple, or fee tail; or if one seised of land in fee simple covenant to stand seised of it to the use of a woman he is to marry; or to the use of a woman, his son or other kinsman is to marry, or the like; [in all which cases there is the consideration of blood, by consanguinity or affinity;] hereby the uses, and consequently the estates, will rise accord-

Dyer, 186.

Co. 6. 68.

Dyer, 155. Co. 2. 36. 7. 40. 8. 93. 4. 17. See Bargain and Sale.

Co. 2. 35. 8. 94.

*P. 508.

(9) Six *lunar* months. See before, p. 223.

ingly. And in these cases [of covenant to stand seised] there is no need it should be by deed indented, &c. or that the deed be enrolled; for uses, [except on a bargain and sale, under the statute of enrolment,] may be raised by deed poll as well as by deed indented. Also uses may be created (as some hold, [and truly,]) by word or parol agreement, as well as by deed or writing: for it is said it hath been adjudged, [but the proposition is not law,] that if a man say to his son, and a woman that his son is to marry, that in consideration of the same marriage they shall have the land to them two in tail, that hereby a good estate tail will arise after the marriage; and that where one doth by word without deed grant to his son, and to his wife in tail, land in consideration of their marriage, that it was agreed by all the judges, that the use did arise upon this agreement. Howsoever it is most safe in these cases to do it by deed, and in writing; for *Dyer*, 296; *Plow.* 22, seem to oppugn this (10). [And uses to be declared of fines already levied, or recoveries already suffered, as distinguished from instruments to lead the uses of fines or recoveries, must be by deed. 2 *Prest. Convey.* 41.] And if a man make a feoffment, levy a fine, or suffer a recovery, to the use of his last will, or to the intent to perform his last will, or to the use of such person and persons, and of such estate and estates as he shall limit by his last will, and then afterwards by his last will declare the uses; these are good uses, and this is a good way of raising of uses. [But in the meantime, unless the contrary be declared, the use will result to the conusor, &c. and he may extinguish this power.] So if a man devise his land by will to *I. S.* and his heirs to the use of *I. D.* and heirs; it seems that the use will rise to *I. D.* and his heirs by this means; [for though the statute of Wills, 32 Hen. 8, c. 1, was subsequent to the statute for transferring uses into possession, yet the statute of 27 Hen. 8, c. 10, being a remedial law, will execute the use into estate. *Pow. Devises*, 272.] And if a man by a verbal agreement, in consideration of money or the like, sell his land to another, or agree and promise that the bargainee shall have it for any time, how-

Cromp. Jur. 61, 60. Plow. 301. 308. And the better opinion of the Judges in Corbin's case, 38 Eliz.

Lit. sect. 462, 463. Co. 6. 17.

See the stat. 27 H. 8. of Uses. Fits. Devise, 22.

(10) See the statute 29 Car. 2, c. 3, which makes a writing necessary.

soever that hereby no use nor estate will arise (if it be a freehold that is sold) within the statute, because it is not by deed indented, &c. yet it seems a good use will arise at the common law, and that the bargainee shall have relief in equity for his purchase. [See *Sugden on Vendors*, 120. 174, on the consequences of the contract.] The second thing whereunto respect must be had, is to the person intrusted, or to him to whom the conveyance is made: for to every good use there must be a person seised to use, and he must be a person capable of such a seisin. And for this [point] it must be known, that any sole person that may take an estate to himself may make [have] an estate to other uses. Also a man may be seised of his own land to other uses, as in the case of a covenant to stand seised to uses; [and he may by such covenant alter the uses for his own benefit, so as to take an estate for life, or in tail, &c.] But the king, or any body corporate (11), alien born, or person attaint, [2 *Prest. Convey.* 251,] cannot be seised to other uses no more by an original feoffment to use, than when they come by the land in use at the second-hand; in which case, (as hath been showed) neither such persons, nor disseisors, abators, or intruders, or lords of villains, or by escheats, shall be seised to other * uses; but in all these cases the uses are void, and the parties shall hold the land to their own uses, or to the uses of the feoffors, &c. and not to the use of *cestui que use*. And a bargainee of land for valuable consideration cannot be seised of the land to any other use but his own (12); [for an use in the second degree would be an use on an use, and void; but the use may be effectual as a trust.] The third thing to be respected is, the *cestui que use*; for to every good use, as there must be a person seised to use, so there must be a person to whose use he is seised, and he must be capable also. And for this it must be observed, that any man that is capable of an estate directly and immediately to himself, is capable of the same estate by way of

Conscience.

Secondly, in respect of the persons trusted, and what persons may not be seised to the use of another, but to their own use.

Dyer, 229.

Co. 1. 122. 137. 135. Plow. 238. Dyer, 8. 283.

Resolved in Doctor Atkin's case, case 44 Q. Co. B.

*P. 509.

Dyer, 155. Lit. sect. 60.

Thirdly, in respect of the persons for whom the trust is, or the *cestui que use*.

Bro. Mortmain, 37.

(11) The reason why neither the king nor a corporation can be seised to uses, is because an attachment does not lie against them out of Chancery. See *Plow.* 555; *Jenk. Cent.* 5, *case* 1; *Co. Lit.* 19, b. 13th edit. and note 3, thereunto.

(12) See more amply what persons may be seised to an use, in *Bac. Abr. Uses* (E. 1.); *Vin. Abr. Uses* (C.)

use: but if the use be limited to a corporation there must be a licence had; otherwise it will be an alienation in mortmain. And if future uses upon contingencies be limited to such persons as are not in being, these uses, howsoever they are good at the common law, yet they are not good within the statute; neither doth the statute execute them at all, until they come in possession. [This mistake runs through the books. It is apprehended, contingent uses may become legal interests, and be contingent remainders, and be liable as such to destruction. 1 *Prest. Est.* 156.] And if a feoffment be made to *I. S.* and his heirs, to the use of the parishioners of *Dale*; this use is void, for they are incapable by this name; and it shall be to the use of the feoffor, [by resulting use.] The fourth thing to be regarded, is the estate of him that doth raise the use in the land whereof the use is raised; for howsoever the tenant in fee simple of land may create what uses he will in fee, for life, or years upon it, and such uses are good; and the tenant in tail, or for life, may perhaps, [unquestionably, see *Machel* v. *Clarke*, 2 *Ld. Raym.* 778. 781,] grant their land for their own lives, [or as to tenant in tail even for a base fee,] to the use of a third person; yet if a tenant in tail for good considerations covenant to stand seised to the use of himself for life, and after of his eldest son in tail, no use will rise by this covenant. [*Machel* v. *Clarke*, 2 *Lord Raym.* 778; but a covenant to stand seised to the use of another person in being, will change the use. The former case rests on the learning of uses. At the common law, (before the statute of Uses, 27 Hen. 8, c. 10), to have enforced a specific performance of this covenant, would have been to oblige the tenant in tail to discontinue the tail, or to bar it, therefore the courts of equity would not interfere. This is the only reason by which the resolution of the cases of *Blithman* v. *Blithman, Cro. Eliz.* 279, and of *Freshwater* v. *Rois, Moor. Rep.* 683, can be supported on principle, or the adjudication of them reconciled to the general reason of the law.] So if tenant in tail of an advowson in gross grant it by deed to one and his heirs to the use of himself for life, and after to the use of another in fee; this grant is void by the death of the tenant

See before.

12 H. 7. 27. 49 Ed. 3. 4.

Fourthly, in respect of the estate and possession of him that doth create the use.

Hil. 38 Eliz. C. B. Curia. Co. 2. 54. Pasche, 13 Jac. C. B. Seignor Say v. Smith.

in tail. [It is apprehended the law is clearly otherwise at this day, on the authority of *Machel* v. *Clarke*, 2 *Lord Raym.* 778. The grant is voidable only by the issue.] And if such a tenant in tail bargain and sell his land by deed indented and enrolled, hereby the bargainee hath an estate descendible to his heirs, but determinable upon the death of the tenant in tail, [or rather defeasible, by the entry of the issue in tail. The grant passes a base fee.] And if one covenant by indenture to stand seised to the use of *B.* of *Whiteacre* which he hath not then, but he doth afterwards purchase it, by this no use will rise; [for want of ownership at the time.] And if one that hath but a term of years grant it to *I. S.* to the use of himself for life, &c. this is no good use within the statute, but a chancery trust only; [because a termor is not seised.] The fifth thing to be respected, is the estate of him that doth take by the conveyance out of which the uses are derived: for, howsoever, where a man doth grant a fee simple to another and his heirs, he may limit what uses he will, [so as they be consistent with the rules of law,] upon this estate; and if a man make an estate for life to another, he may limit an use thereupon, [during the life;] yet if a man make a gift in tail to another, he can limit no use thereupon. And therefore if one grant his land to *I. S.* *P. 510. * and the heirs of his body, to the use of *I. S.* and his heirs in fee, this limitation of use is void, and *I. S.* hath hereby an estate in tail. [The difference is, an use may arise from express declaration, though not from mere implication. *Thurman* v. *Cooper*, *Poph.* 138.] And if a feoffment be made to *I. S.* to have and to hold unto him and the heirs of his body, to the use of him his heirs and assigns for ever, this use [as such] is void. [Would he not have an estate tail, and by the common law a fee superadded?] And where one doth bargain and sell land for money, (in which case the law doth make an express use,) no other use can [under the statute] be appointed. And therefore if *A.* for money bargain and sell land to *B.* and his heirs, to the use of *A.* for life, and after of *B.* in tail, and after of *A.* in fee; all these uses are void, for a[n] use cannot rise out of a[n] use. [This is the case of an use upon an use,

Co. 10. 96.

Yelverton's case, 37 Q. B. R.

Fifthly, in respect of the estate and possession of him that doth take by the conveyance.

Dyer, 369.

Co. 2. 72.

Co. super Lit. 19.

Trin. 14 Jac. B. R. adjudged Couper and Franklin's case. Dyer, 169. Cromp. Jur. 53. Lit. sect. 284.

since the bargainee necessarily takes the first use; and therefore though the bargain and sale was made to *A.* to the use of *B.* in consideration of money paid by *B.* the second use would be void at law. 1 *Inst.* 271, b. But the secondary use may be effectual as a trust.] So if *A.* make a lease to *B.* for years rendering rent, to have and to hold to the use of the lessor; this use is void as being against reason also. [There is not any seisin, and without a seisin there cannot be an use to be executed by the statute. But the use will be good as a trust.] And if a feoffee to use, before the statute of uses, had bargained and sold the land to one who had notice of the former use, no use had been made hereby; for there might not be two uses in being of the same land at one time, [except alternate uses. The point of this case is, that the equity of the original *cestui que* was superior to the equity of the bargainee.] And if *A.* enfeoff *B.* to the use of *C.* and his heirs, with proviso that if *D.* pay to *C.* 100*l.* that *C.* and his heirs shall stand seised to the use of *D.* and his heirs, this last use is void; for the use must arise out of the estate of the feoffee, and not out of the estate of the *cestui que use.* [This case also turns on the ground, that an use cannot arise from an estate executed by the statute of Uses, being an use on an use. But this secondary use may be a valid trust.] The sixth thing whereunto respect must be had, is the cause or consideration: for howsoever in cases where uses pass by way of transmutation of possession, [*i. e.* conveyance,] as by fine, feoffment, or recovery, there the consideration is not at all material, for he that doth make the estate, may appoint the use to whom he will, without any respect to [consideration of] marriage, kindred, money or other thing; for in this case his own will and consideration guideth [guide] the use and equity of the estate; [and the use is binding on the estate subjected to these uses;] yet in bargains and sales, and covenants to stand seised to uses, it is otherwise: for there consideration is so necessary that nothing will pass, neither will any use rise without a consideration, *i. e.* some matter that may be a cause or occasion meritorious, which amounteth to a mutual recompense in deed or in law; which must be expressed or

Dyer, 255. Co. 1. 136, 137.

Co. 1. 176.

Sixthly, In respect of the cause or consideration of it; and what shall be a sufficient consideration to raise or alter an use, or not.

Dyer, 169. Cromp. Jur. 62.

Averment.

implied in the deed whereby the use is created, or else supplied by averment and proof (13). For howsoever in this case an averment shall not be allowed and taken against a deed, that there was no consideration given, when there is an express consideration upon the deed, yet when the deed expresseth no consideration, or saith "for divers good considerations," or the like, there an averment of a good consideration given shall be received, for this is an averment that may stand with the deed; and without consideration enrolment [of a bargain and sale] will not help. And therefore if one bargain and sell his land to another by deed indented and inrolled, without any consideration, it seems no use will rise by this to the bargainee. So if one "for divers good causes and considerations, or for divers great and valuable considerations," bargain and sell his land to another, or covenant to stand seised of his land to the use of another that is not

*P. 511.

of * his kindred, no use will rise by this [deed,] unless it be proved that money or something else [*viz.* money's worth, 2 *Prest. Convey.* 225. 233,] was given for it. But if a man by deed in consideration of money, as, "in consideration of the sum of 100*l.* to him paid, or in consideration of a competent sum of money to him paid, or otherwise promised to be paid, or in consideration of other land, or of giving of counsel, or the like," [counsel, friendship, &c. are not sufficient considerations,] bargain and sell, or by such like words grant his land to another in fee simple, fee tail, for life, or years; in these cases, the use will arise to the bargainee well enough. And therefore if I covenant with *B.* that when he doth enfeoff me of *Whiteacre*, I will stand seised of *Blackacre* to the use of him and his heirs, and he doth enfeoff me accordingly; in this case, the use of *Blackacre* will rise to *B.* and he and his heirs shall have it according to the agreement. [And though *B.* die before the feoffment be made, the heir will be entitled to the benefit of the covenant, and the estate will vest in him by descent. *Bro. Feoffment*, 59; *Viner's Abrid.*

Dyer, 146. Co. 1. 176. 11. 25. Dyer, 312.

Plow. 301. Bro. Feit. Enrol. 9. Doct. and Stud. 99. Cromp. Jur. 60, 61. Dyer, 90.

Cromp. Jur. 61

---

(13) further as to the consideration necessary to create an use, in 2 *Bl. Com.* 330; *Gilb. Uses*, 151; *ante*, 161; *Bac. Abr. Uses, &c.* (E. 2.)

Descent, 577. This instrument takes effect as a bargain and sale, and the case proves that it is not necessary that the estate should pass immediately on the execution of the deed; also, that an instrument in the form and words of a covenant, may be a bargain and sale. From a case in page 514, *infra*, it may be collected, that a deed made by the words bargain and sale, will not operate as a covenant to stand seised; but the contrary has been decided. 1 *Prest. Abstr.* 71.] So if I agree with my lessee for years, that if he [*i. e.* personally] pay me 100*l.* within his term, that I will stand seised of the land to the use of him and his heirs, and he do pay me the 100*l.* accordingly; in this case, the use will rise, and he and his heirs shall have it according to the agreement. So if I covenant that my son shall marry the daughter of *A.* and *A.* promise to give me 100*l.* for the marriage portion, and I covenant that if the same marriage do not take effect, I and my heirs will stand seised of the land to the use of *A.* and his heirs until the 100*l.* be paid; in this case, a good use will rise of the land accordingly, if the marriage do not take effect: but in all these and such like cases the covenant, [or rather bargain and sale,] must be by deed indented, and it must be enrolled, [and must keep within the rule against perpetuities,] otherwise no uses will arise. And when the deed is enrolled, it shall take effect as from the beginning by relation, to avoid all intervenient estates and charges whatsoever. [That is, its operative force, as binding the land in point of title, shall be taken from the period at which the deed of bargain and sale was executed. And, unless the use be future, the use arises from the execution of the bargain and sale, subject only to be defeated if the deed should not be enrolled within the limited time. The act of enrolment does not pass the estate, but is merely a circumstance required in order to the notoriety of the conveyance, in like manner as before the statute of the 4 & 5 Anne, c. 16, attornment of the tenant was, on the principles of feudal connexion between a lord and his tenant, required to the perfection of a deed of grant.] And in like manner it is if one for no cause, or for no consideration, as, " because he is of his ancient

Bro. Exposition of Words, 44.

Relation.

Plow. 302. 21 H. 7. 20.

acquaintance; or because there hath been entire love or great familiarity between them; or because he hath been his chamber-fellow, school-fellow, or fellow-servant; or because he hath done him good service; or because he was his master and taught him; or to the end that he may pay his debts and legacies and discharge his funeral expences; or for divers good causes and considerations," [not being money or money's worth, and without any consideration in money or money's worth, which may be proved;] if one, for any of these, or any such like causes and considerations, covenant with another that he will stand seised of his land to the use of that other and his heirs; or that he and his heirs shall have the land, &c.; by this covenant, [or rather bargain and sale,] whether it be enrolled or not, no use at all will rise. So if one covenant to stand seised to the use of *I. S.* (who is his bastard son) and his heirs, no use will arise hereby; [because, in point of law, a bastard is *nullius filius*; and therefore no consanguinity or consideration of blood exists between the parties:] and yet perhaps upon such a covenant as this, whereupon no use nor estate doth arise, an action of covenant may lie. But if one "in consideration of nature, kindred, blood, or marriage, with one's self, or any of his blood, payment of debts, or for the like cause," [*omit*, payment of debts or the like cause,] or without any such express consideration at all (14), [so as it, in fact, do exist; for such consideration existing in point of fact, (7 *Bro. Parl. Cases*, 70; *Rex* v. *Scamander*, 3 *Term Rep.* 474,) may be proved;] * covenant to stand seised to the use of himself, his wife, [or intended wife (this case comes within the consideration of marriage,)] children, brothers, sisters, or cousins, or their wives, [or intended wives;] these are good considerations, and the uses and estates thereupon thus raised and made are good (15); and therefore, if one covenant by his deed, without expression of any consideration, to stand seised of his land to the

Dyer, 374.

Covenant.

Co. 7. 11. 10 143. 1. 83. Plow. 301. Lit. sect. 284. Co. 1. 154.

*P. 512.

(14) A covenant to stand seised can only operate when made upon such weighty and interesting considerations as those of blood or marriage. 2 *Bl. Com.* 338.

(15) And the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without seeing it, by a kind of parliamentary magic. 2 *Bl. Com.* 338; *Bac. Use of*

use of himself for life, and after of his wife for life, and after of his child in tail, or for life, and after of his brother in tail, or for life, or in fee, or in any such like manner; these uses will rise, and the estates will be well made hereby accordingly.

Plow. 301. Bro. Feoffment, al. Uses, 54.

So if I agree with another, that if he marry my daughter, from the time of the marriage they shall have my land to them and their heirs; in this case, and by this agreement, if he do marry my daughter, they will have my land according to the agreement, [and by springing use.] So if I, being about to marry with a woman, covenant with *I. S.* to stand seised of my land to the use of myself for life, and after to the use of the woman I am to marry for her life, [being a contingent remainder,] and after to the use of the heirs of my body begotten on her; these are good uses and estates that are made by this covenant. But here, by the way, this difference must be observed, where a man doth covenant, in consideration of a marriage to be had, to stand seised to an use, and the marriage doth not take effect, there no use shall arise. So also if the parties disagree at their age of consent; and so was it held in the Lord *Herbert's case.* But where one doth covenant to make a feoffment, or levy a fine to such uses, and the feoffment is made, or fine levied accordingly, there notwithstanding the marriage doth not take effect, yet the use shall arise; for there he is in by the fine or feoffment, in which case there needs no consideration. [The usual provision in settlements, limiting the use to the owners of the estates and their heirs till marriage, prevents these consequences; and without this provision there is every reason to conclude, that a court of equity would relieve.] And therefore if *A.* covenant with *B.* that in consideration [that] *C.* is his kinsman, and in consideration of a marriage to be had between *C.* and *E.* he will make a feoffment and other assurances to the use of himself for life, the remainder to *C.* and *E.* and the heirs of their two bodies, and after assurances are made accordingly by fine or feoffment, but they do not intermarry, but marry others; in this case, notwithstanding, *E.* shall have a moiety of the land. So if I covenant (in consideration of the love I bear to my wife) to stand seised to the use of her and the heirs of my body upon her begotten, and after to the use of my brother;

Curia, Trin. 10 Car. B. R. Hoskin's case.

Co. 7. 40. 11. 24. Dyer, 374.

hereby the use will [a]rise to my brother also, albeit he be not within the express consideration. [Though the brother is not within the express consideration, the circumstance that he is the brother, is sufficient to raise the use to him; and it will be understood that the express consideration was applied to those persons who were the immediate objects of the deed; and that the consideration, as expressed, was not to be a consideration for the whole deed. *White* v. *Stringer*, 1 *Lev.* 105. And under this limitation, as it is apprehended, the wife will take an estate for her life, and the husband an estate in special tail, by reason of an estate for his life, resulting to him by implication, with remainder to the brother.] So if one covenant with his two sons, for the love he doth bear to them, to stand seised of his land to the use of himself for life, and after of his wife for life, and after of his two sons in tail one after another; in this case, the consideration is sufficient to raise the use to the husband and wife also. So if one (in consi- Plow. 307.
deration of the love he doth bear to his brother)
*P. 513. doth covenant to stand * seised to the use of his brother, and the wife of his brother for life, or in tail; in this case, the consideration is sufficient to raise the uses to them both. So if I covenant (in consideration of the marriage of my son with the daughter of another) to stand seised to the use of myself for life, and after of my son and his wife in tail; these are good uses, and will [a]rise accordingly. If I covenant with *I. S.* to stand Ibid. Dyer, 174.
seised to the use of him, his executors, &c. (he being none of my kindred) for twenty years, and after to the use of my son in tail; in this case, the use will not [a]rise to *I. S.* but it will rise to my son well enough [after the twenty years.] For albeit the consideration of money given by one, [in a bargain and sale enrolled,] may be a consideration to all the estates; yet the consideration of blood, &c. is singular, and will raise the use of that [to that person] only to which it goeth. But if I covenant with *B.* in consideration of the marriage of my son with the daughter of *B.* to stand seised to the use of *R.* (a stranger) for life, and after to the use of my son and his wife in tail; in this case, the use shall rise to *R.* albeit he be a stranger, [*query*, and see p. 523;] and that for the support-

ance of the remainder, which cannot be without a particular estate: and in all these and such like cases, [of covenants to stand seised,] no enrolment of the deed is necessary. If I (in consideration of 10*l.* given to me by my son) covenant with him to stand seised of land to the use of him and his heirs; in this case, no use will rise without enrolment by the implied consideration, because there is an express consideration, [and therefore a bargain and sale,] *et expressum facit cessare tacitum.* And yet if I covenant, in consideration that *I. S.* is my son and hath paid me 10*l.* that I will stand seised of land to the use of him and his heirs; in this case, [the deed may operate as a covenant to stand seised, and] the use will arise without enrolment. And if I covenant in consideration of 100*l.* and of a marriage, to stand seised to the use of myself for life, and after of my son in tail; [this deed may operate as a covenant to stand seised, and] hereby the use is raised, and the possession [*i. e.*, seisin] changed without enrolment. So also where a feoffment is made, fine levied, or recovery suffered, and no use declared thereupon; and the same is without any consideration of fine or rent; by this the use is not changed, for it doth result to the feoffor, conusor, or recoveree, and he hath the estate as he had it before. But if, in these and such like cases, there be but a penny or a pennyworth of consideration given, or any rent reserved upon the feoffment, the use will rise well enough to the feoffee, &c.: and if any tenure be created, as where a gift in tail, lease for life, or years, is made; in these cases, albeit there be no consideration given, yet the use will [*supra*, 236; 2 *Wils.* 22; *infra*, 511,] rise well enough to the donee or lessee, and especially if any rent be reserved, for that is a kind of consideration: but if a lessee for years grant over his term to another without any consideration at all; it seems, by this, no use at all will rise to the grantee, and therefore the grantee shall hold it to * the use of the grantor; *sed quære.* [Cases of this sort must depend on the apparent intention.] The seventh thing whereunto respect is to be had, is the manner and form of words used in the making and raising of uses, wherein there is much regard to the mind and intention of parties; for if one covenant in consideration of 20*l.*

Enrolment.

Co. 12. 24. 26. 7. 40.

Manrel's case, Trin. 3 Jac. B. R. Bro. Feoffment al. Use, 15.

Co. 1. 24. Doct. and Stud. 97. 99. 101.

*P. 514.

Seventhly, in respect of the manner and frame of the words used in the raising of uses; and what manner of uses may be made, or not.

paid him by *I. S.* to stand seised of land to the use of *I. S.* and his heirs; or if one covenant that *I. S.* and his heirs shall have his land; if this deed be enrolled, this is a good bargain and sale to raise the use, and will do it, [accomplish the object,] as well as when it is made by the words "*bargain and sell.*" [A woman, in consideration of marriage, by deed enrolled granted and confirmed the land to *B.* and his heirs with a clause of warranty. *B.* was the intended husband, and it was held that the deed operated as a covenant, to stand seised to uses. Vide *Tebb* v. *Popplen*, 2 *Roll. Abrid.* 783; *Pollexf.* 534. A man made a feoffment *sub conditione ea intentione*, that his wife should have the lands for her life, remainder to his youngest son in fee. The feoffee died without making any estate. The heir of the feoffor entered, but it was resolved that there was not a condition, but an use, which was executed presently according to the intent. 4 *Leon*, 2. In the case of *Baker* v. *Lade*, 4 *Mod.* 149, a father, in consideration of affection, and of 5*l.* paid to him, gave, granted, assigned and transferred to his son; and it was held, that there being two express considerations, affection and money, the deed might operate as a bargain and sale, if enrolled, or as a covenant to stand seised. And in a late case, *Shove* v. *Pinck*, 5 *Term Rep.* 124, it was held that the words *limit and appoint*, in a deed intended to operate as an appointment to uses, might be good by way of grant, and pass the reversion; and by Lord *Kenyon*, in the same case, a feoffment without livery of seisin, may amount to a covenant to stand seised; and a deed, purporting to be an appointment, may receive the same construction. And in *Doe* v. *Simpson*, 2 *Wils.* 22, the words give, grant, alien and confirm in a settlement, previous to marriage, were held to operate as a covenant to stand seised to uses. And in *Roe* d. *Wilkinson* v. *Tranmer and others*, 2 *Wilson*, 75, an instrument which, with a lease for a year, was clearly intended to operate by way of lease and release, was construed to be good as a covenant to stand seised to uses, because it could not have effect in the mode in which it was prepared. And in *Brown* v. *Jones*, 1 *Atk.* 190, there was an instrument which purported to be a release grounded on a lease

Ca. s. 34.

for a year, but there was not any evidence of the lease; and the deed was in consideration of money, and of marriage theretofore had, &c. and Lord *Hardwicke* held that the deed might operate as a covenant to stand seised. 2 *Lev.* 11. The mere circumstance that the party intended to pass the property in another manner, is not always decisive of the effect of an instrument. The rule, *cum quod ago, non valet ut ago valeat quantum valere potest*, interferes with the *mode*, and directs its force to the *effect*; and therefore it seems necessary to discard the intention as to the mode, and to resort to the general intention; therefore whatever may be the words, the instrument will operate according to the effect which the parties intended to give to it. This position necessarily admits of the exceptions which must arise from instruments requiring particular circumstances to give them operation. To imply these circumstances, would be to annul the effect of an express consideration. See p. 513.]

Co. 2. in Sir Rowland Hayward's case. Wards *v.* Lambert, C. B. Pasche, 37 E.

So if one, for good consideration, by words of demise and grant, make a lease of his land for a term of years; hereby the use will rise to the lessee, as well as if the lease were made by the words, *bargain and sell: et sic de similibus.* [2 *Prest. Convey.* 225. 233.] And yet if one, by words of *bargain and sell*, convey his land to his son, no use will arise by this [deed, as a bargain and sale,] except there be money paid, and the deed be enrolled. [The deed may operate as a covenant to stand seised.] And if one, in consideration of money, grant his land to his son, or any other, by the word "*enfeoff*," no use will rise by this, unless livery of seisin be made thereupon; because the intent of the party in these cases doth appear to be to pass it in another manner. And if in the last case livery of seisin be made, then the use shall be guided by law; that is, if nothing be given, it shall be to the use of the feoffor, and not amount to a limitation of use to the son. [Each conclusion seems to be erroneous.] If one covenant with his son, that his land shall remain, or that his land shall descend to him; this is a good covenant to raise the use according to the limitation. And yet if one covenant with his son upon his marriage, that his land shall remain, revert, or descend to his son in fee, or in fee tail;

Enrolment.

Resolved in Stile's case, 37 Eliz.

21 H. 7. 18. Plow. 308. 301. Bro. Feoffment al. Use, 16.

Covenant.

by this no use will be raised, because it is so incertain, [whether the deed was to operate in any other manner than as an executory covenant;] but perhaps this may amount to a covenant, whereupon the son may have an action of covenant (16). [At this day, unless there was a context leading to a different conclusion, an use would arise to the son.] If I covenant for me and my heirs, that I and my heirs, and all others that are seised of my lands, shall be thereof seised to the use of, &c. this is a good covenant to raise the use, albeit it be in words of the future tense. If Dyer, 374. I covenant with my eldest son, and strangers, to convey my land to the same strangers to the use of myself for life, and after of my son in tail, &c. and I grant by the deed, that the said persons seised of the said land, shall be from thence seised to the said uses, and none other use, and no other conveyance is made; it seems this [deed] is, [by force of the second clause,] sufficient to raise the use. And yet if I be seised of land in fee, and covenant with *I. S.* that *A. B.* and *C. D.* and their heirs, shall stand and be seised of this land to the use of, &c. it seems, this is not a good covenant to raise the uses: [1st, Because the instrument cannot have effect according to the expressions of the deed; *I. S.* himself, and not *A. B.* and *C. D.* being seised. 2dly, Because one man cannot for this purpose covenant that another shall stand seised to uses.] If a feoffment or other conveyance Co. 1. 100. be made to the use of the feoffor and the heirs of his body, begotten on the body of *M.* the wife of *S. T.* [notwithstanding the anticipation of two deaths, *viz.* marriage of the husband of one woman with the wife of another man,] and for default of such issue, to the use of him and the heirs of his body, begotten of *S.* the now wife of *W. K.* and for default of such issue, then to the use
*P. 515. and performance of * his last will, for ten years immediately after his death, and after the term ended, to the use of the feoffees and their heirs during the life of *W.* (eldest son of the feoffor)

(16) If I covenant that my son shall have my land, this was held good by reason of the word *covenant*, in *Chudleigh's case*, 1 *Co.* and was cited out of *Seymour's case*, in *Dyer*, 96. But *Hobart*, Chief Justice, (in *Buckley* v. *Simmonds*, *Winch.* 61,) denied this; and *Bridgman*, Chief Justice, agreed with *Hobart's* opinion, that it wanted consideration. But, *per Bridgman*, if I will that my son shall have my land in consideration of marriage, though the word covenant is wanting, yet the use is well raised. *Sid.* 26.

and after his death to the use of the first issue male of the body of the feoffor lawfully begotten, and the heirs of the body of such first issue male, and for default of such first issue male to the second issue male, &c. (in the same manner;) these are good limitations of uses. So if [upon a conveyance] a[n] use be limited to *I. S.* for life without impeachment of waste, and after to the use of *B.* and *C.* their executors and administrators for the term of twenty years, and after to the use of *C.* and the heirs male of his body, &c. these are good uses. So if [upon a conveyance] a[n] use be limited after this manner, *viz.* to the use of a man's last will and testament, or to the use of such person or persons and of such estate and estates as he shall limit and appoint by his last will and testament; or to the use of such person and persons, or to such uses and purposes as he shall by any writing under his hand and seal declare and appoint; these are good limitations. [But if on a conveyance to *A.* there be a limitation to such uses as he shall appoint, and in default of appointment to the use of himself in fee, the uses are *void*, because he cannot be seised to his own use, unless there be some other purpose to be answered, as an estate to trustees, &c. *Goodhill* v. *Brigham*, 1 *Bos. & Pull.* 192; but he will be seised by the rules of the common law.] If I covenant with another, in consideration of blood, &c. that I will stand seised of my land to the use of such of my sons, or such of my cousins, as the covenantee shall name; in this case, after a nomination made, the use will rise well enough. But if I (for and in consideration of 10*l.* or the like good consideration,) covenant to stand seised of land to the use of such persons as the covenantee shall name; in this case, albeit the covenantee do nominate some of my cousins, or blood, yet no use will rise by this for the incertainty of it. [The power is void in the first instance, because it is not confined to persons of kindred. Of course, covenants to stand seised admit of such powers only as are to be exercised in favour of kindred, &c.] If a feoffment or other conveyance be to the use of *I. S.* and his heirs, provided that if the feoffor pay 10*l.* at such a day, that then it shall be to the use of the feoffor [or a stranger,] and his

Co. 1. 98.

Co. 6. 18. Lit. sect. 462, 463.

Co. 1. 176.

Incertainty.

heirs; this is a good limitation, and the use will [a]rise accordingly; [and immediately after the execution of the conveyance, the feoffee has an estate in fee, to be determined by a shifting use, to arise on the payment of the 10*l.* at the appointed day. The use would, it is apprehended, have been equally good, if declared in a bargain and sale. This case is to be distinguished from those cases, in which the secondary use is directed to arise out of the seisin or estate of the first *cestui que use.*]

A[n] use may be limited to a woman *durante viduitate sua*, [or for any other period allowed in conveyances at common law,] and this is good. Co. 4. 3.

If a man be seised of two manors, and covenants to stand seised of the same to the uses following, *viz.* of the one to the use of the covenantor for his life, and after to the use of his wife for life, and after to the use of his eldest son in tail, &c. and of the other manor, to the use of his second son in tail, &c. these are good limitations, and the uses will [a]rise accordingly. Co. 11. 23.

If a man seised of land in fee, agree with another, that a fine shall be levied of it, and that the same shall be to the uses following, *viz.* that *I. S.* (the conusor) shall have one yearly rent of 50*l.* during his life, to be issuing out of the same land, and as touching the land charged with the rent, &c. to the use of *I. D.* (the conusee) until default of payment of the said yearly rent; and then to the use of *I. S.* and his heirs for ever; this is a good limitation, and the use will [a]rise accordingly; *et sic de similibus.* [But unless there be words of limitation to the heirs, *I. D.* will be only tenant for life, determinable, &c.; and if there be a limitation to the heirs, the limitation over must be kept within the boundary prescribed by the rule against perpetuities.] Co. 2. 69. 70.

If a feoffment be made by *I. S.* to the uses in certain indentures * tripartite of the same date, and therein is declared that it shall be to the use of *A.* for life, without impeachment of waste, and after to the use of such farmers, or tenants, to whom he shall demise any part of the premises for life, or lives, or for any term of years, as in any such demise shall be limited and appointed, and after to the use of the performance of the last will of the said *A.* and to the use of such person or Co. 10. 78.

*P. 516.

persons severally to whom the said *A.* by his last will and testament, shall appoint any estate, and after to the use of, &c. these are good uses, and the estates shall rise accordingly.

Co. 4. 11. A[n] use may be limited upon condition, [*read*, contingency,] and the condition may be annexed to one of the uses, and not unto another. [And the use, or the estate, arising from it may be defeated, without defeating the other estates. These are provisoes of cesser and of shifting use: and they must be kept within the limits of the rules against perpetuities.]

Co. super Lit. 19. If lands be conveyed to *I. S.* and the heirs of his body, to the use of *I. S.* and his heirs, or to the use of a stranger and his heirs; this use will not rise in this manner (17): yet if lands be conveyed to *I. S.* and his heirs, to the use of him and the heirs male of his body, and after to the use of a stranger and his heirs; it seems this is a good limitation. [Most clearly so; and in the former case, the law seems to be understood differently, and very properly so, at this day. The distinction is, that the law shall not raise an use by *implication*, on the limitation of an *estate tail*; but an use expressly declared of an estate tail, will be executed by the statute of Uses, 27 Hen. 8, c. 10. No determination has been made on the quality of the estate which vests in the *cestui que use* by reason of such a limitation; but it is probable, whenever the case may arise, the *cestui que use* will be held to have an estate in fee, determinable on failure of issue of the person to whom the estate is conveyed to serve the uses.]

Hil. 6 Car. B. R. adjudged. If one grant lands by deed to husband and wife, to have and to hold to the use of the husband and wife, and of the heirs of their two bodies; this is a good estate tail by this limitation, albeit he do not say *habendum* to them and their heirs, &c. but *habendum* to their uses; [for the use is part of the limitation of the estate:] but otherwise it were if the use were limited to a stranger in this manner; [for, in that case, the use is distinct from the estate; and the estate arising from the use cannot be

(17) A tenant in tail cannot be seised to any use expressed; for the stat. of *Westm.* 2, *ch.* 1, *de donis*, has so appropriated and fixed the estate tail, that neither the donee nor his issue can execute this use. *Jenk. Cent.* 5, *case* 1. [See the text.]

larger than the estate which was conveyed. 1 *Prest. Est.* 180.]

If lands be conveyed by *I. S.* to *I. D.* [in fee,] to the use of *I. S.* or to the use of his wife for life, or to the use of another for life, the remainder to another in tail or for life, the remainder to a third, his executors, &c. for six months, and after the six months ended, to the use of a fourth, and his heirs; these are good limitations, and the estates will [a]rise accordingly. Dyer, 314.

If a[n] use be limited to the conusee of a fine, or to a recoveror in a recovery, until he make a lease for forty years, and after to the use of the recoverees or conusors, and their heirs; this is a good limitation, and the use will rise accordingly (18). [This use makes the act personal, and keeps the case free from the objection of being a perpetuity.] Dyer, 290.

Contingent uses, or uses *in posse*, may be created as well as uses *in esse*; and therefore, if lands be conveyed to the use of a man and the wife he shall afterwards marry, or to the use of his first, second, or third wife; or to the use of *I. S.* for life, and after to the use of the right heirs of *I. D.* and *I. D.* is then living; or to the use of *I. S.* for life, and after to the use of him that shall be his first heir male, and the heirs of the body of such heir male, &c.; all these, and such like, are good uses: but they are uses at the common law still, and are not executed by the statute until they come *in esse*. [The better opinion, and with the exception of future springing uses, is, that the statute operates so as to change contingent uses, limited by way of remainder, into legal interests, capable of destruction, as legal remainders, &c. See 1 *Prest. Est.* 156.] Co. 1. in Chudleigh's case, 135.

Eighthly, in respect of the nature and quality of the use.

The last thing, whereunto respect is to be had, is the nature and quality of the use: and herein it is to be known, that a man may * at this day, by act executed in his lifetime, or by his last will and testament at his death, give his lands, tenements, or hereditaments to any person or persons, not corporate, and their heirs, for any religious, charitable, or civil use, as well as for any private use. [See the restraints imposed by the 9 Geo. 2, c. 36.] And therefore a man may so

*P. 517.

Charitable uses.

Co. 1. 26. 2. 131. 4. 113.

(18) See further by what words uses may be created, in *Vin. Abr. Uses* (E. 4.); *Gilb. on Uses*, 60.

dispose of his lands for the finding of a preacher, erecting or maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparations of churches, highways, bridges, discharging of the poor inhabitants of a village of the common charges, to make a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, or other such like uses, and these uses are not prohibited by any statute: and it is good policy, upon every such feoffment or estate, to reserve to the feoffor and his heirs some small rent, or to set down some small consideration. [The statute of 9 Geo. 2, c. 36, annuls the gift, if there be such reservation.] But these uses are not such uses as are executed by the statute of Uses, neither are they to be resembled to the uses aforesaid; [they are trusts only:] for, in this case, if there be any misemployment of the lands, or breach of the trust by the parties trusted, redress is to be had of the Lord Chancellor or Lord Keeper by a special course of proceeding. For which, see the statutes of 39 Eliz. c. 6; 43 Eliz. c. 9; 7 Jac. c. 3 (19).

Stat. 15 R. 3. c. 5. 37 H. 8. c. 4. 1 Ed. 6. c. 14.

Superstitious uses.

But if any man have heretofore given, or hereafter shall give, any lands, tenements, or hereditaments, by act executed in his life, or by his last will at his death, to any person singular or corporate, in fee simple, fee tail, for life, or years, to the intent or upon condition to maintain any superstitious use, as to find a chaplain, and have the service of a priest to say mass, or to have a priest or other man to pray for the soul of any dead man in such a church or other place; or to have or maintain perpetual obites, lamps, or torches, &c. to be used at certain times, to help to save souls out of the supposed purgatory, [or to establish a jesuba, *Ambl.* 228;] all these and such like uses are void; and the lands that are so given to such superstitious uses are to be forfeited, and given to the king, and he shall have them; and yet if there be any charitable use intermixed with the superstitious use, and they may be distinguished, the king shall have only so much as is given to the superstitious use, and not that which is given to the charitable use

(19) See fully what devises for charitable purposes are good, in *Duke's Law of Charitable Uses*, 105, &c.; and what shall be a good appointment to a charitable use, in *Com. Dig. Uses* N. 11.); *Chancery* (2 N. 2.)

also: for which, see *Adams* and *Lambert's case* at large, *Co.* 4. 104, (20).

5. Declaration of uses; and where a[n] use of land may be declared upon any assurance, and what shall be a sufficient declaration of such use, or not.

As touching the declaration of uses, *i. e.* the manifestation or agreement of the parties, to what uses and intents the assurance made shall be, these things are to be known: 1. That uses may be declared or averred on a fine, feoffment, or recovery of land; but on a bargain and sale of land, no use may be declared or averred, but what the law doth make. [At this day, except in the case of resulting uses, or uses arising in favour of the conusee, &c. (*Roe* v. *Popham*, *Dougl. Rep.* 25,) there must be a writing in evidence of the uses. See statute 29 Car. 2, c. 3, of frauds and perjuries. So that now the general rule is, that uses cannot be averred in favour of a stranger. And the use of fines already levied, or recoveries already suffered, cannot be declared without a deed. 2 *Prest. Convey.* 41.] And upon a covenant of uses, [*i. e.* to stand seised to uses,] no other use may be declared or averred, but what is contained * within the deed. 2. Every one may declare and dispose the use of land according to the estate that he hath in the land; for the declaration and disposition of the use doth ensue the ownership of the land, *sicut umbra sequitur corpus*; [and therefore if tenant for life, remainder-man in tail, with reversioner in fee, join in a fine without declaring the uses, the use will result to each according to his former estate, merely converting the estate tail into a determinable fee. 2 *Prest. Abstr.* 239; 1 *Prest. Convey.* 195. And if the tenant for life and tenant in tail alone declare uses of the fine, this declaration will not be binding on the reversioner, but the use of the fee will result to him. *Roe* v. *Popham*, *Dougl.* 25.] And at this day the use doth draw the [estate in the] land to it, as the body or principal doth the shadow or accessary; and therefore the owner of the land, or he from whom the land doth move, ought to limit and declare the use of the land; as if the husband and wife levy a fine of the land, whereof he is seised in the right of his wife; the husband alone may declare the use of this fine, and this declaration shall bind the wife, albeit her assent to the limitation of the

Co. 1. 175. 176. Dyer, 169.

*P. 518.

Co. 2. 57. Dyer, 290.

(20) See further what uses are suppressed as superstitious, in *Com. Dig. Uses* (M.)

uses do not appear, if her dissent doth not appear, [*Swanton* v. *Raven*, 3 *Atk.* 105;] but, in this case, it is most proper to have a declaration of the uses by the husband and wife both; for she alone, because she is *sub potestate viri*, cannot declare or limit any use; neither can the husband alone limit any use against her good will, because he hath not the estate of the land: and therefore, if *A.* and *B.* his wife be seised of land in the right of his wife, and she, without the consent of her husband, covenant by indenture with *C.* and *D.* 14 Martii, 14 Eliz. that a fine shall be levied of this land, and that it shall be to the use of herself for life, without impeachment of waste, and after to the conusees for their lives, to the intent that they shall suffer *I. S.* to take the profits for his life, with divers remainders over; and afterwards, and before the fine levied, the husband alone, by another indenture, 21 February, 22 Eliz. (wherein the wife is named a party,) without the consent of his wife, doth agree that a fine shall be levied to the use of him and his wife, and after to the uses limited by the wife's indenture, and after the fine is levied accordingly; in this case, albeit the variance be in one particular only, and the limitations in all the rest of the uses and estates do agree, yet all the same limitations by both indentures are void, and the use upon the conveyance is left to construction of law, and therefore shall be to the wife and her heirs for ever: and yet if the husband and wife agree in the limitation of the uses for part of the land, and differ in the rest, the limitations for so much as they agree in are good, and void for the residue: and in these cases, where the declaration is good, the wife and her heirs shall be bound by it. [This case is fully examined in 2 *Prest. Convey.* 46.] So if two joint-tenants are, and they, or two others having several estates, join in a fine, and one of them declare the use in one manner, and the other doth declare the use in another manner; this declaration is good for either of their parts; for the declaration shall be governed according to their estates; [*i. e.* the declaration by each shall be applied to his part, and be effectual for that part.] And if an infant, or a man *non sanæ memoriæ*, doth declare the use of a fine levied by him, this declaration is good, and shall bind him so long as the fine shall continue

Husband and wife.

Joint-tenants.

Infant.

in his force (21). 3. This declaration of uses may
*P. 519. be made * either by deed indented, (which is the Co. 2. 73. 5.
most usual and safe way,) or by deed poll; as where the parties do by such a writing agree that an assurance passed, or to be passed, shall be to such and such uses; as that a fine shall be levied by such a time, and that it shall be to the use of one for life, of another in tail, and of another in fee. Or it may be made by a verbal agreement, without any writing at all; as where an agreement is so had, and made between two or more, that a fine or recovery shall be had, and shall be to such and such uses, and the same is had accordingly; in this case, this is a sufficient declaration, being proved; but it is not safe in these cases to depend upon slippery memory (22). 4. This declaration Co. 2. 69, 70, 6. 27. 63. Dyer, 290. Co. 7. 40. Co. 9. 8. Dyer, 136.
by word or writing, may be made before, at, or after the time of making the assurance: and therefore one may covenant or agree that *I. S.* shall recover against him, or that he will levy a fine, or make a feoffment to *I. S.* of such land, and that the same shall be to the use of, &c. And if one make a feoffment, he may declare the uses of it at the same time, and that within the same or in another deed at his pleasure: and if the assurance be past, and no declaration of uses had before, or at the time of passing it, a declaration may be subsequent, *viz.* that the same assurance was and shall be, and recoverors, &c. shall stand and be seised to such and such uses; for an indenture subsequent may direct and declare the uses of a fine or recovery precedent. [The common law required the subsequent declaration to be by deed indented; 2 *Prest. Conv.* 41. The statute of 4 & 5 Anne declares that it shall be good if by deed. In *Althan* v. *Anglesea*, *Gilb. Eq. Ca.* 16, a fine was levied, and several years afterwards a recovery was suffered, and in that recovery the conusee was tenant, and it was

(21) See accordingly *Mansfield's case*, 12 *Co.* 124; *Pig. on Rec.* 72; 2 *And.* 163.

(22) But now by statute 29 Car. 2, c. 3, all declarations or creations of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or else they shall be utterly void, and of no effect. After the statute of Frauds, it was doubted, whether it was not necessary to declare the uses of fines or of common recoveries, either at, or previous to, the time of levying or suffering thereof; and whether a subsequent declaration of the uses would not have been void; and therefore the statute 4 Anne, c. 16, § 15, enacts, that such subsequent declarations of uses shall be good and effectual. Since the statute of Frauds, uses may be declared by writing only, without seal. *Per Holt*, Ch. J.; 7 *Mod.* 76.

determined that he was a good tenant to the writ of entry, consequently the uses remained *in fieri* during the intermediate period.] But herein these diversities are to be observed; when precedent indentures are made to direct the uses of a subsequent assurance, and after the assurance is made accordingly, there no averment shall be taken by word, that the same assurance was to other uses than are declared by the indenture: but against an indenture subsequent, declaring the uses of an assurance precedent, an averment may be taken, that there were other uses expressed and limited, before or at the time of the assurance, than are contained in the indenture. If a precedent indenture be made to direct the uses of a subsequent assurance, when the assurance comes, the land is bound, and the conusor or recoveree cannot by any act of his, after the recovery had, charge or avoid it; but if the declaration be subsequent, [and] if in the interim, between the assurance had, and the declaration of the uses, the conusor or recoveree sell, give, or charge the land to others; this subsequent declaration will not subvert the mean estates, charge or interests; unless it can be otherwise proved, that, by a certain and complete agreement of the parties, the assurance was had and made to these uses. 5. When the agreement for the limitation of uses is precedent [to the conveyance,] whether it be by writing or word, [it cannot now be by word,] it is but directory, and doth not bind the estate, until the same assurance be afterwards had; and therefore by a new agreement or declaration made in the same manner as the *former, *P. 520. *viz.* in writing, if the former be so, and between the same parties, [so far as they are concerned in interest, 2 *Prest. Convey.* 45,] either before or at the time of the same assurance passed, new uses may be made and the former uses changed (23): but when the same assurance is pursued accordingly, and no intervenient alteration is made, it shall be expounded to be to the same uses, and shall bind the parties; and no naked averment

Averment.

(23) And the revocation of the former uses will be good, though it be but by a writing, and not by a deed; for where the conveyance enures by way of transmutation, the use is according to the intent of the party; and it is no matter how that intent is manifested, so as it may be known. *Jones* v. *Morley, Show. Parl. Ca.* 140; S. C. 1 *Salk.* 677, and see the cases in the margin of the last edition of that reporter.

shall be received of any latter or other agreement contrary to the indentures. [The general rule, therefore, supposing all parties interested to concur, is, that as between precedent declarations of use, the last declaration shall prevail; as between subsequent declarations of use, the first declaration shall prevail: for if there be a conveyance to uses, a fine or recovery afterwards suffered, will necessarily operate to confirm the conveyance, and consequently the uses. 2 *Prest. Convey.* 22. 142.] 6. The declaration of the uses must be certain, and that especially in three things; in the persons to whom, in the lands, &c. of which, and in the estates by which, the uses are declared (24); and if there want certainty in either of these [particulars,] the declaration is not good; and it must be complete of itself without any reference to indentures, or other writings to be made afterwards, for then it is but an imperfect communication, and no complete declaration. [This proposition must be understood with considerable qualification; for it is clear that a declaration that a fine, &c. shall enure to such uses as *A.* shall hereafter appoint, or shall hereafter declare, will be good.] 7. Where an indenture precedent is to limit the uses of a subsequent fine or recovery, and is not pursued in some circumstance of time (25), person, quantity, or the like; yet if no other new mean agreement may be proved, the assurance shall be, in judgment of law, to the uses contained in the same indenture; but if the variance be in these particulars, and the form of the indenture be not pursued, there an averment without writing may be taken, that the fine or other assurance was to other uses than are contained in the indenture: and if none such can be made, then it is left to construction of law (26). [Not at this

(24) It is not necessary in declaring an use, if there be a transmutation of possession, to use the very word *use*. Any expression whereby the mind of the party may be known, that such a one shall have the land, is sufficient. *Per Holt*, 12 *Mod.* 162.

(25) Where there is an agreement to suffer a recovery, and uses are declared, if the recovery is after suffered, though it varies in point of *time* from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will enure to the uses so declared. *Per* Lord *Hardwicke*, 1 *Atk.* 7.

(26) Where the uses of a recovery are declared by deed precedent, no new or other use can be averred by parol, unless there was some variance between the deed and the recovery; and in case of a deed precedent, if the party set up other uses, he must confess and avoid: but where they are by deed subsequent, new or other uses may be averred without showing the deed, though there be no variance, &c.; because there was an intermediate time when there might be such agreement made, and the uses arise by the recovery according to that agree-

day, by reason of the statute 29 Car. 2, c. 3, because there must be at least a writing. On resulting uses, when tenant in tail suffers a recovery, see *Moxon* v. *Moxon*, in the Exch. 1777.] And therefore if *A.* be seised of divers manors in fee, and by his indenture, dated 10 Martii, 21 Eliz. doth covenant with *B.* and *C.* that he, before the end of Trinity term next, will by fine, or other conveyance, assure one of these manors to them, and that the same assurance shall be to the use of *A.* and *E.* his wife, and of the heirs of *A.* and the twenty-eighth day the deed is enrolled; and, the twenty-ninth day of the same month, he doth by another indenture covenant with the same *C.* and *D.* [this is an important feature in the case,] to convey all the same manors to the same *C.* and *D.* before the Annunciation next, and that the same assurance shall be to the use of *A.* and the heirs male of his body, and for default of such issue, to the use of divers others in remainder, and by this indenture doth covenant, that if he shall not sufficiently convey this land by the day, that he will stand seised to the same uses, &c. and no fine is levied by the end of Trinity term, but, the seventeenth of September following, a note of a fine is acknowledged to *B.* and *C.* and the heirs of *B.* of the land within the first indenture; and, the eighteenth of the same month, another note of a fine is acknowledged to *C.* and *D.* of the same and other land in the last indenture, and both these fines are entered in Octabis Mich. following; in this case, these fines cannot be directed and declared by both indentures, and therefore it seems the declarations are void (27). [*Query* the accuracy of this conclusion; and see *Taylor* v. *Horde*, 1 *Burr.* 60, for an instance of a declaration of uses by two instruments, construed as parts of the same assurance.]

*P. 521.

Co. 9. 8. 5. 20. 25. Doct. and Stud. 95. Co. 2. 57.

As touching averment of uses, *i. e.* the proof of uses by witnesses, these things are to be known; that where any use is expressed upon a charter of feoffment, no other use *contra* or *preter* [*præter*] the use * which is expressed, shall be admitted. [Since the statute of Frauds and Perjuries, 29

6. Averment of uses; and where a[n] use of land may be averred upon any assurance; and what shall be said a sufficient averment, or not.

ment; and if a deed subsequent be set up, the other may traverse those uses. *Per Holt*, Ch. J. in *Tregame* v. *Fletcher*, 1 *Salk.* 677.

(27) See further as to the doctrine of declaring uses, in the books referred to in the concluding notes to the chapters on fines and recoveries; and in *Vin. Abr. Uses* (T. 2.) &c.

Car. 2, c. 3, no uses can arise to a stranger by averment. *Gilb. Eq. Ca.* 16. But uses may be averred as between the conusor and conusee. *Ibid.*; *Dougl.* 25; *Stran.* 12; and may result to the conusors, according to their respective estates or ownerships. But *query*, whether there may be an averment, so as to create particular estates, unless they are the estates resulting from the former ownership. It is apprehended no such particular estates could be created without declaration.] But in cases of fines and recoveries wherein no uses are expressed, other uses than what law construction will make, may be showed and proved to be agreed upon; and the same assurances shall be to such uses, as by proof shall be made to appear to be the intent of the parties: as if a man and his wife sell her land for money, and after levy a fine to the vendee and his heirs; in this case, it may be averred it was for money; and this sale shall carry the use to the vendee without any declaration of use, while the use would otherwise result to the former owner; [*Dougl.* 25; *Str.* 12; *Gilb. Eq. Ca.* 16:] and yet if a fine be with a grant and render, no averment to prove it to be to other uses than what are contained in the fine shall be received. [The fine, regularly speaking, does not contain uses, but common law grants; and there may be an express declaration of the uses of estates passing by these grants.] And where the uses of a conveyance are declared by indenture before or at the time of the same conveyance, no averment shall be received of any other uses than what are contained in the indenture: but if the indenture of declaration be subsequent, there an averment lieth, and shall be received, that there were other uses agreed upon at or before the time of the conveyance made; [*ante*, 519 and 520.] And where an agreement is made to levy a fine, or suffer a recovery, before or at a time certain, and that it shall be of such and such lands, and to such and such persons; and after it falleth out that the fine, or recovery, is not had by that time, or not of the same land, or not between the same persons; in these cases an averment may be had of other uses and of another agreement (28); [because these circumstances allow

Co. 9. 8.

Co. 5. 26.

(28) See further in what cases averments may be made of uses, in *Bac. Abr. Uses* (E. 5.); *Uses* (O. 6.)

of evidence of a change in the agreement of the parties. See the rules, 2 *Prest. Convey.* 45.]

Doct. and Stud. 95. Perk. sect. 533. Co. 1. 24. Dyer, 18. Cromp. Jur. 62. Co. super Lit. 271.

7. To what use an assurance of land shall be by construction of law; and how the limitation of the uses of land by a deed shall be construed.

Where the uses of an assurance are certainly agreed upon and declared between the parties thereunto, there, regularly, it shall be to such uses as are declared and agreed upon, [provided they are warranted by the rules of law,] and to none others. But if a conveyance be made of land by fine, feoffment, or recovery, and no uses thereof declared and agreed upon, the law will limit and appoint the use according to equity and conscience; [*i. e.* according to the former ownership.] And therefore if a man levy a fine, make a feoffment, or suffer a recovery of land without any consideration; the law will adjudge the use to be in the feoffor, conusor, or recoveree who doth part with the land. [And if tenant in tail suffer a common recovery, he will, under the resulting uses, have an estate in fee simple. *Moxon* v. *Moxon*, in the Exch. 1777. And if a mere tenant in tail levy a fine without making a discontinuance, he will, under the doctrine of resulting uses, have a determinable fee. If he discontinue, he will have a fee simple.] And so if a man make a feoffment to the intent to perform his last will, or to the use of his last will, or to such persons as he shall limit by his last will, [without declaring any ulterior uses, or without declaring any use of the fee;] in all these cases, the use shall be in the feoffor and his heirs, [*i. e.* he shall have the fee,] while he doth live, to dispose at his pleasure. And so if one make a feoffment of land to *I. S.* and his heirs to the use of *W. S.* for twenty years, and limit the use no further; in this case, the residue of the use, after the twenty years, shall be to the feoffor and his heirs: [for cases of resulting uses for particular estates, see *Pybus* v. *Mitford*, 1 *Ventr.* 372; and for resulting uses of the fee, till future uses can take effect, see 2 *Roll. Abr.* 789; 2 *Co.* 58:] but if in these cases there be any consideration of money or the like, though never so little given, [see *Shortridge* v. *Lamplugh*, 2 *Salk.* 678,] or any rent reserved upon the feoffment, the law will adjudge the use in the feoffee, conusee, or recoveror: and yet in that case also, if other uses be expressed upon the deed, it seems it [the seisin] shall go to the uses expressed; as if *A.* for 20 *l.* paid by * *B.* enfeoff *B.* and his heirs, to the use of

Baker's case, Co. B. Hil. 37 Eliz.

Doct. and Stud. 96.

*P. 522.

C. and his heirs. [Certainly; but *query* if *C.* will not be a trustee for *B.* who pays the consideration; it is apprehended he will be a trustee.] If the husband and wife levy a fine of the wife's land without consideration, and without any declaration of use, the law will adjudge this [fine] to be to the use of the wife and her heirs; but if they sell her land for money, and after levy a fine thereof to the vendee, this [fine] shall be to the use of the vendee and his heirs; [for the previous conveyance of the estate operates as a declaration of use.] And if a man be seised of land of the part of his mother, and without any consideration make a feoffment in fee of it; this shall be said to be to his use in the same nature [descendible quality] he had it before (29). [*Fenwick* v. *Mitford*, 1 *Leon.* 182; 2 *Prest. Abstr.* 100; 1 *Prest. Conv.* 204. 318.] So if two joint-tenants be of land, the one in fee simple, and the other but for life, and they without any consideration levy a fine of it, and make no declaration of uses; the use shall be to them of the same estate as they had before in the land; [so that the joint-tenancy will be revived.] So if *A.* tenant for life of land, and *B.* in reversion or remainder, levy a fine of this land generally, this [fine] shall be to the use of *A.* for life, and to the use of *B.* in fee afterwards, as it was before. [*Argol* v. *Cheney*, *Latch*, 82. But if *B.* had an estate tail, the entail shall be converted into a fee. *Moxon* v. *Moxon*, in Exch. 1777; 2 *Prest. Convey.* 64.] So if *A.* be seised in fee of an acre of ground, and he and *B.* join together and levy a fine of it to another without any consideration; this [fine] shall be to the use of *A.* and his heirs only. Co. 2. 57, 58.

If one make a gift in tail, or lease for life or years, albeit it be without any consideration of fine or rent, yet the law will adjudge the use in the donee or lessee, and not in the donor or lessor. [The tenancy which is created, is deemed a consideration; and there cannot be any resulting use Perk. sect. 533.

(29) The contrary is said in *Hobart*, 31. But the case in *Hob.* is denied to be law (and consequently the passage above supported) by Lord Chancellor *Macclesfield*, who says, that in the cases of *Godbolt* v. *Freestone*, 3 *Lev.* 406, and in *Abbot* v. *Burton*, in 1 *Salk.* 591, it was solemnly adjudged, that the use, whether expressly declared by the feoffor, or permitted to arise by implication, was the same thing, and would go to the mother's side. But where a man so seised on the part of his mother, levies a fine *sur done, grant et render*, it operates as a feoffment and re-feoffment, and gives a new estate descendible to the heirs general. *Price* v. *Langford*, 1 *Salk.* 337.

in opposition to an use declared, unless that use be void in law, or incapable of effect; as too remote, uncertain, &c.]

Plow. 539. Co. 1. 87; yet see Lit. Bro. 538. Crompt. Jur. 47. 27 H. 8. 6. Co. 1. 110.

If one at this day, by deed indented, bargain and sell his land to another for money, and doth limit no estate, but the deed is *habendum* to him only, and not *habendum* to him and his heirs, or to him and the heirs of his body, or to him for life; howsoever in this case, before the statute of Uses was made, it was otherwise, yet now the common received opinion is, [and so is the established law,] that by this there doth pass only an estate for life, and not a fee simple; [but though, as to words of limitation, the rule of the common law is adopted, yet as to words of regulation or modification of the tenancy, a different construction is applied; and the tenancy may be severed by the words "equally to be divided," &c. *Rigden* v. *Vallier*, 2 *Ves.* 257. But a limitation in a conveyance to uses, to all and every the child or children, without any other words of severance, will not create a tenancy in common. Formerly uses were construed with more favour than limitations at the common law, more like gifts in wills than in deeds. In modern cases, and particularly in *Cholmondeley* v. *Clinton*, 2 *Meriv.* 71, that distinction has been treated as void of foundation; and it may be true, since the same rules of construction prevail in deeds and wills, except that in wills estates may be limited, without naming the heirs, &c. See *chap. Exposition of Deeds.*]

Co. super Lit. 42. Dyer, 169.

If a feoffment be made to *I. S.* and his heirs, to the use of *I. D.* without any more words; by this limitation *I. D.* hath only an estate for life, [and the fee will result to the feoffor.] So if a feoffment be made to *I. S.* and his heirs, to the use of *I. D.* for ever, without saying "and his heirs;" hereby *I. D.* hath only an estate for life [at law, though he may, by reason of the contract, have a fee in equity; the fee will be in the feoffor by resulting use:] and so of other uses the construction shall be according to the rules of law.

Pasche, 3 Eliz. B. R. the Lord Mordant's case.

If a[n] use be limited to *I. S.* and his heirs, until *A.* shall come from beyond the sea, and attain his full age or die, in this case, if he come from beyond sea, [or] attain his full age, or die, the use shall cease. [If the word *and* should be read as

a conjunctive, making return, as well as majority or death, essential to the determination of the estate, there would be a determinable fee. 1 *Prest. Estates*, 430. As, at all events, the estate of *I. S.* is determinable on the death of *A.*, *I. S.* is merely tenant *pour autre vie*.]

If one covenant to stand seised to the use of *A.* his eldest son, and the heirs male of his body, and after to the use of *B.* his second son in tail, in the same manner, or according to the limitation to *A.* by this *B.* hath an estate tail to him, and the heirs male of his body, [on account of the words of reference, and the rule *verba relata*, *&c.*] Hil. 17 Jac. B. R. Rigway's case.

*P. 523. * If a feoffment in fee be made to the use of a man and his wife for their lives, and after to the use of their next issue male to be begotten, in tail, and after to the use of the husband and wife, and of the heirs of their two bodies begotten, (they having no issue male then); by this [use] the husband and wife are tenants in special tail executed, [*Lewis Bowles' case*, 11 *Rep.* 80;] and after they have issue male, they are tenants for life, the remainder to the son in tail, the remainder to them in special tail. [But, without words of inheritance, the issue would have taken for life only.] Co. super Lit. 28.

If one make a feoffment to the use of himself for life, and after his decease to the use of *Alice*, whom he doth intend to marry, until the issue he shall beget of her shall be of the age of twenty-one years, and after the issue cometh to that age, then to the use of the wife during her widowhood, and the husband die without [leaving] issue; by this the wife shall have an estate at least during her widowhood. Dyer, 300.

If I covenant with *B.* in consideration that he will marry my daughter, that from the time of the marriage I will stand seised to the use of myself for life, and after to the use of *C.* a stranger, and the heirs male of his body, and after to the use of *B.* and my daughter, and the heirs of their two bodies; in this case, albeit the use limited to *C.* the stranger, be void, yet it seems *B.* and my daughter shall not have the land till the death of *C.* without issue, but that my heirs shall have it till that time. [If it is meant that the limitation over is to operate as a future springing use, it is too remote. The only way of making the remainder good, is to

admit the validity of the intermediate limitation; or to reject it, and deem the remainder accelerated. In a conveyance to uses there would be an acceleration; in a mere contract the use or ownership cannot be taken out of the covenantor, except so far as the use is founded on a consideration. This distinction will probably be found correct. *Co.* 155.]

Co. 1. 155. If I covenant with *B.* to stand seised to the use of myself for life, and after my death to the use of *C.* a stranger, for the term of twenty years, and after the end of the term to the use of my son in tail; in this case, the use limited to *C.* is void, and my son after my death shall have the land: but if the words of the covenant be "and after the end of twenty years," instead of "and after the end of the term," my son shall not have the land until the twenty years be expired (30). See more in *Exposition of Deeds, chap.* 5. [As a fine levied, or recovery suffered, may be with a view to particular purposes, the use of the estate taken in the former case by the conusees, and in the latter case by the recoverors, will result, unless there be some consideration paid, or rent reserved, or unless the estate in the use be expressly limited, so as to rebut the presumption of law in favour of the conusor, in the case of a fine, and of the recoveror in case of a common recovery. In all other cases of conveyances at common law, in which the proprietor parts with a particular estate, reserving the reversion to himself, or limiting the remainder to a stranger, the conveyance would be taken to be to the use of the person to whom it is made, though it be made without any consideration or use expressed. Were the contrary held, the law must presume, while it will not presume, that an act is done to no purpose. But if, on a conveyance, the use of a part of the estate be limited, either to the person taking the conveyance, or to a stranger, but no use be declared of all the estate conveyed, in such case, and in all such like cases, except in the particular instances where a child is a party, for whom it is evident some provision was

(30) The particular signification given to the word "*term*" in our ancient law books, and particularly in the *Rector of Chedington's case*, from which the passage in the text is taken, has been exploded by the Court of King's Bench, in the case of *Wright* on the demise of *Plowden* v. *Cartwright*, for the reasons in 1 *Burr.* 282. [But this case would not necessarily govern the case in the text.]

intended, or where a man pays a consideration to a considerable amount, so that it may not be supposed to be a mere nominal consideration, the person making the conveyance shall have, by resulting use, that part of the estate of which no use is declared. This leads to the question, what is the law when a person makes a conveyance to the use of himself for life, or years, without superadding any other limitation of use? In solution of that question, it is conceived these differences may be taken: When the limitation of the use is expressly to the person making the conveyance for a particular estate, which, immediately on its limitation and execution by the statute, would merge in the reversion, if the reversion or remaining part of the use of the estate was allowed to result, and consequently execute into estate, then (since this would be to do an act to no purpose,) the use of the residuary part of the estate would not result; but it would result if the conveyance were made to the use of a person conveying, either in tail, or for any particular estate, with one or more remainders over, which would prevent an immediate merger, even though the estate expressly limited, and the estate of which no use was declared, both execute in the same person.]

8. Where and how uses of land may be extinguished and destroyed, or suspended, or not; and where the ancient uses shall be revived by the entry of the feoffees, or not.

All such uses, as are not within, nor executed by the statute of 27 Hen. 8, but remain at the common law, may be destroyed, discontinued, or suspended, as uses before the statute might have been. [This position is too general, as applied to contingent remainders arising from contingent uses. 1 *Prest. Est.* 156.] And therefore contingent uses may be extinguished or suspended at this day. As if a man, seised of land in fee, have three sons, *A.*, *B.* and *C.* and he make a feoffment of his land to divers feoffees, to the use of them and their heirs during the life of *A.* and after to the use of the first son that *A.* shall beget, and the heirs male of the body of such first son; or if a feoffment be made to the use of a man and the wife that he shall marry, or the like; if, in these cases, the feoffees make a feoffment over before the contingent uses happen to be *in esse*, as before *A.* have any son, or the man take a wife, &c. albeit it be to one that hath notice of these uses, yet the uses are destroyed for ever, and the feoffees cannot enter and revive * them con-

Co. 1. Cludleigh's case.

*P. 524.

trary to their own feoffment: and if in these cases the feoffees, before the contingent remainder vest, be disseised, hereby the uses are suspended; but then, by the re-entry of the feoffees, the ancient uses will be revived again: and therefore, if the feoffees release to the disseisor, and so bar themselves of their entry, the uses are extinguished and shall not be revived, and the party grieved hath no remedy but in Chancery against the feoffees for breach of trust. [The first of these cases is certainly correct in point of law; the second is questionable, and it is apprehended not agreeable to law, as the seisin of the husband supports the contingent use to his wife; and when there is a tenant for life under the uses, it is apprehended his entry will revive the uses, and his right of entry support the contingent remainders.] And if the feoffees in the first case die before *A.* have any son born, the contingent remainder is gone. [This is not accurate; for the feoffees had an estate during the life of *A.* and that estate continued notwithstanding the death of the feoffees.] As [*read*, so] where a feoffment is made to the use of the feoffor for life, and after to the use of the right heirs of *I. S.* in fee, and the feoffor die before *I. S.*; in this case, the remainder is gone, [because the remainder has lost the support of the particular estate;] for a remainder cannot be without a particular estate, no more of a[n] use than of an estate made in possession: and such a remainder must vest during the particular estate, or at least *eo instanti* when the particular estate doth end (31).

Co. 1. 136. If a feoffment be made to the use of *I. S.* and the wife he shall afterwards marry, and of the heirs male of their bodies; and *I. S.* make a feoffment of this land to another before he take a wife; hereby the contingent remainder is destroyed; [for the seisin is divested.]

Hil. 2 Car. Scaccar. adjudged. If *A.* enfeoff *B.* and his heirs, to the use of *C.* and *D.* his wife, and the heirs of the survivor of them, [see *Fearne*, 7th edit. 287, 288; and as to copyholds, see *Ibid.* 65. 308,] and *C.* make a

(31) The doctrine of contingent uses, and the *scintilla juris* which remains in the feoffees to enable them to enter and revest the old uses, is very fully explained in *Chudleigh's case*, 1 *Co.*; in *Wegg* v. *Villers*, 2 *Rol. Abr.* 796, pl. 11; *Gilb. Uses*, 175; and *Hales* v. *Risley*, *Poller.* 369. There are also some very learned and ingenious observations on this subject, in *Fearne's Cont. Rem.* 215 to 227, 3d edit. [See 1 *Prest. Estates*, 169.]

feoffment to *E.* and dieth; this feoffment doth destroy the contingent remainder, [and *A.* may enter by virtue of his resulting use.]

When the estate, out of which the uses do arise, is gone, the uses are gone also; as if a lease be made to *A.* for his life, to the use of *B.* for his life, and *A.* die; hereby the estate of *B.* is gone. [The true point of this case is, that the estate arising from an use cannot be larger than the estate limited to supply the use. 1 *Prest. Est.* 180.] Dyer, 186.

Also uses of lands may be gone by revocation, [provided there is a power for that purpose,] whereof see in the next part.

9. *Where a power to revoke uses of land shall be good, and how they shall be taken; and what revocation by reason of such power shall be good, and what not.*

Provisoes and powers of revocation of uses of lands are very frequent in voluntary conveyances (whether by feoffment or otherwise) that pass land by way of raising of uses, and are executed by the statute of 27 Hen. 8, and the inheritances of many depend thereupon. As if a man seised of land in fee have divers sons, and he covenant to stand seised of that land to the use of himself for life, and after of his eldest son in tail, and, for want of such issue, to the use of his second son in tail, &c. with a proviso, that it shall be lawful for him at any time during his life to revoke any of the said uses, [being one power,] and to limit and appoint other uses, &c. [being another power; and yet every power of appointing uses is, in effect, a power of revocation.] Or if *A.* by indenture between him and *B.* his heir apparent, an infant, covenant with *B.* for the advancement of his blood, &c. to stand seised to the use of himself for life, and after to the use of his said heir apparent and the heirs male of his body, and after to the use of his right heirs, provided that if *A.* by himself or any other during his life shall deliver or offer to *B.* a ring of gold, to the intent to *P. 525. * make void all the same uses, that then the said uses shall be void, and he may limit new uses; or if *A.* by indenture covenant with *B.* to stand seised to the use of himself and his wife and his daughter for their lives, and after, &c. provided that if the said *A.* during his life, and after the debts mentioned in the schedule annexed to the indenture, shall be paid, shall be disposed to determine, disannul, change, alter, enlarge, diminish, or make Co. super Lit. 237. 7. 11, 12. 10. 143. 2. 116. 173. 107. Dyer, 372.

void the uses or estates, or any of them, of the premises, or any part thereof, and by writing indented under his hand and seal subscribed in the presence of three witnesses, shall declare his mind to be so, that then the same uses shall be void; all these, and such like provisoes, being coupled with a[n] use, [or rather owing their effect to the learning of uses,] are allowed to be good, and not repugnant to the former estates. But in case of such a feoffment or other conveyance, whereby the feoffee or grantee is in by the common law, as where *A.* doth enfeoff *B.* and his heirs to the use of *B.* and his heirs, it is said such a proviso is merely repugnant and void. [*Query*, if the insertion of the proviso will not render it necessary that the conveyance should be construed a conveyance to uses. There is not any case, it is believed, that has settled this point. But if a conveyance be made to *B.* in fee, proviso that it shall be lawful for *A.* the grantor, to hold during his life; this will be construed as a conveyance to uses, to let in an estate for *A.* 4 *Term Rep.* 177.] And, as touching these provisoes or revocations, these things are to be known: 1. These revocations are favourably interpreted, because many men's inheritances depend upon it; and therefore he that hath this power may revoke part of the uses at one time, and part at another time; and the revocation of the old [uses] may be made, by the making of new uses without any express revocation; and by the same conveyance, whereby the old uses be revoked, the new uses, [provided there be a power for the purpose,] may be created and limited, and then the former uses do cease *ipso facto* by this revocation, without any entry or claim; [for the new uses operate under the learning of conditional limitations:] (32) as, if one covenant to stand seised to the use of himself and his wife, for their lives, and after to the use of *A.* his daughter, for life, and after to the use of *B.* his daughter in tail, &c. provided that if he shall be minded, &c. he may by writing, &c. make void.

(32) A power of revocation, if executed of the *whole* estate, can be executed but once, and not *toties quoties*. But if the person to whom the power of revoking the old uses and of limiting new ones is reserved, does, in the deed of revocation, annex a power of revoking the uses thereby declared, it will be good, and he may afterwards execute that power accordingly. *Hele* v. *Bond*, *Prec. in Canc.* 474. A person who has a power of revocation, may revoke *part* at one time and *part* at another, but not the *same part twice*, unless he reserves a *new* power of revocation. 1 *Co.* 173, b.; 2 *Burr.* 1148.

the same uses, and declare the uses to others, and he doth make void the use to his wife at one time and no more, and after by a deed doth limit and appoint new uses of the whole by a new covenant to stand seised to other uses; these are good revocations; for there needs no real and express revocation of former uses, but the creating of new uses is in law an actual revocation of the old uses, as the making of a latter is *ipso facto* a revocation of a former will. 2. The proviso must, for the substance of it, be pursued in the revocation, and all incident circumstances thereof must be observed, as sealing, subscription of names, witnesses, [proper form of attestation,] and the like; otherwise the revocation will not be good [at law, whatever may be the effect in equity, which, in some cases, will supply defects in an attempt to execute a power.] And therefore if the proviso be, that if the covenantor shall be minded to revoke, and shall declare his mind by writing indented under his hand and seal, delivered before three witnesses, the uses shall be void; in this case a revocation by word without writing, or by a writing and not indented, or by writing indented and not under hand

*P. 526. and seal, or under hand and seal, and * before two witnesses only, is not good (33). And yet if a proviso be, that if the covenantor shall, at any time during his life, by writing under his hand and seal, delivered before two witnesses, revoke the same, &c. the old uses shall be void; and the covenantor by his last will and testament in writing, under his hand and seal, before two witnesses, doth give the land to another, and make no express revocation of the former uses; this is a good revocation in law. [But a

Trin. 18 Jac. Co. B. Tibbet [read, Kibbet] and Lee's case.

(33) But in various cases, where all the circumstances requisite to a revocation are not strictly pursued according to the power, *equity* will give relief. Where a man made a settlement, with power of revocation by any writing under his hand and seal in the presence of three witnesses, and afterwards made his will under his hand and seal, reciting his power, and declaring that he revoked the settlement; there were only two subscribing witnesses, though a third was present, who died; the Chancellor declared this to be "an execution of "the power in strictness, though the third witness did not subscribe; and that, if there had "not, equity should help it in such a little circumstance, where the owner had fully declared "his intention; where a man has power to make leases, &c. which shall charge and incumber a third person's estate, such powers are to have a rigid construction; but where "the power is to dispose of a man's own estate, it is to have all the favour imaginable." 2 *Vent.* 350. Equity will relieve, where a man is prevented by the fraud of any one from pursuing all the circumstances in the power, or where he is prevented by accident, or by the act of God, or by necessity; and equity will aid a defective execution of a power, in many instances, pointed out in *Com. Dig. Chancery* (4 O.); *Poiar*, (C.); *Vin. Abr. Powers* (A. 17.) (C.) [This note must be read with many qualifications.]

power to revoke by deed will not be well exercised by will. *Pulteney* v. *Ld. Darlington, Comp.* 260. So a power to revoke by will cannot be exercised by a deed.] If the proviso be, that if the covenantor be minded, at any time during his life, to revoke the same uses, &c. and shall pay or tender to *A. B.* 20*s.* in such a place; in this case, tender of this 20*s.* in that place, at any time, is not good, unless he happen to meet with *A. B.* at the place, for then tender at any time is good; but otherwise the covenantor must give notice to *A. B.* what time he will tender the 20*s.* in that place, otherwise the revocation is not good. [Also the tender would have been effectual, if a certain time had been appointed by the power.] If one be to marry his daughter to the son of another man, and they do mutually covenant to stand seised of their lands to the use of their son and daughter, with proviso to revoke the uses with the consent of the mothers, if they or either of them be then living, and one of them die; in this case, a revocation by the consent of the surviving mother is, [by reason of the context and the words *or either*,] sufficient. [Had the words *or either* been omitted, the power would have been gone. *Powell on Powers*, 296; see *Townsend et al.* v. *Wilson*, 1 *Barn. & Ald.* 608, as to powers to three and their heirs.] 3. When the covenantor doth make void such uses by virtue of such a revocation, [without an appointment of new uses, under a power to appoint new uses,] he is seised again of the land in fee simple, as he was at first, without any entry or claim; [and therefore, unless there be a power to limit new uses, there must be a new conveyance, bargain and sale, &c. to raise new uses.] 4. This power of revocation, whether it be present, as those before and most are, or future, as when they are upon a contingent, as if the covenantor overlive *I. S.* or the like, when it is reserved to the party himself that made the uses, may by his fine, or feoffment, be utterly extinguished; [because it is an interest or a benefit in him:] as if he make a feoffment, or levy a fine of the land whereunto the uses and proviso are annexed; by this the proviso [unless exercised (see *Herring* v. *Brown*, 1 *Ventr.* 368, on the ground that the fine, and the deed of uses, are several parts of the same

Co. 8. 92 1.

Trin. 18 Ja. B. R. Savil and Sterling's case.

Co. 1. 111, 112, 113. super Lit. 237.

assurance; and that instead of extinguishing the powers, the fine was, in fact, the means of exercising the power,)] is extinct; and yet so, as if he make a feoffment, or levy a fine of part of the land only, this shall extinguish his power but to that part only (34); but if the power be reserved to a stranger, [and is a mere authority, not coupled with any interest,] it seems the fine or feoffment of him that made it, will not extinguish it (35). [But even powers that confer an interest on a stranger, as to raise money, &c. may be extinguished, released, &c.] This power also, when it is present, may be extinguished by a release, made by him that hath the power, [by way of interest,] to any one that hath any estate of frank-tenement in the land in possession, reversion, or remainder; or it may be avoided, [or modified, or suspended] by defeasance, whether it be present or future (36).

Defeasance.

10. Other trusts and confidences of lands and of chattels real and personal, the nature of such trusts, the duty of them that are trusted, and the remedy to be had against them for breach of their trust.

If one convey his lands to certain friends in trust, to the intent that they shall convey it to such persons as he shall set down in his last will and testament; or if a man deliver money to a friend in trust to purchase land for him and his heirs, to the end that he may have the profits thereof for his life, and to the end * it may be conveyed to them afterwards (37); or if a man deliver money to his friend, to buy land for him that doth deliver the money in his own name; or if a man enfeoff his friend, and his heirs, of land, to the intent that he shall alien the land to whom *I. S.* shall appoint; or if land be conveyed to me in mortgage, and I pay all the mortgage money, but I, to prevent the

Cromp. Jur. 48. 59. 58. 54. Dyer, 160. Fitz. Account, 122.

*P. 527.

(34) *A.* being seised in fee, made a conveyance to himself for life, remainder to his first and other sons in tail, remainder over, remainder to his own right heirs, with a power by deed, sealed in the presence of two witnesses, to revoke these uses, and to limit new ones. After this *A.* levied a fine, and a week after the fine levied, by deed declared, that the intent of the parties at the time of levying the fine was, that the fine should be to the use of *A.* and his heirs, and to no other use; and the question was, whether this fine had extinguished the power of revocation, so that the declaration of uses came too late. Adjudged, that the power of revocation was extinct; but this judgment in C. B. was reversed in the Exchequer Chamber by six judges against two. *Herring* v. *Brown*, *Skin.* 185.

(35) See accordingly in the case of *Willis* v. *Skorral*, in 1 *Atk.* 474.

(36) See more amply as to the nature of powers of revocation: how they should be framed, in what manner they are to be executed, and how they may be extinguished or destroyed, in *Bac. Abr. Uses and Trusts* (G.); 2 *Bl. Com.* 335; *Com. Dig. Uses* (L. 2.); *Vin. Abr. Powers* (E.); and the opinion of *Booth* at the end of this chapter.

(37) Where money is agreed or directed to be laid out in the purchase of lands to be settled to such and such uses, every person interested shall have the same benefit, if the parties die without a settlement, as he would have had if the lands had been settled. 2 *P. Wms.* 174.

jointure of my wife, or for some such like cause, name a friend joint purchaser with me, and so the conveyance is made to us both; if in any of these cases, or in any other such like case, the friends trusted prove false, and do not perform the trust, but turn the profits of the land to their own use, or refuse to settle it according to the trust, or the like, the party grieved must have his remedy in Chancery, [*i. e.* a court of equity;] for these are not trusts or uses within the statute, nor such for which there is any remedy at the common law; and in that case where the land is settled, to the intent that the friends trusted shall settle it where *I. S.* shall appoint, if *I. S.* do not appoint how it shall be settled, it seems the feoffees shall have it to their own use (38); [*read*, in trust for *I. S.* and his heirs. The general rule is, that when trustees are to do an act, as to pay rent, convey, &c. the use will remain with them, that they may perform the trusts.]

Cromp. Jur. 65. Dyer, 369. Bro. Feoffment al. Use, 60. Cromp. Jur. 62. 45. 11 Ed. 4. 2.

And if a man give or grant his goods or chattels, as leases for years, or the like, [or copyhold lands,] to friends in trust to the use of himself for life, and after to perform his will, or the like; these are such uses and trusts as are not within the statute of Uses, and for the breach of which there is no[t any] remedy at the common law, but in Chancery only, [*i. e.* equity.] So if an obligation or statute be made to *A. B.* to the use of *C. D.* this is a trust of the same nature; and if *A. B.* release the obligation without the consent of *C. D.* or get the money into his own hands, *C. D.* shall have relief in Chancery, [*i. e.* equity;] and in all these and such like cases, the general rules, by which uses were governed at the common law, are still in force, and to take place as those by which uses and trusts are now for the most part governed.

7 Ed. 4. 29.

As first, if there be any cause to sue for or about the lands or goods wherewith the parties are trusted, as if they deny or delay to perform the trust, they must be compelled thereunto by suit in Chancery, [*i. e.* equity.] Secondly, the *cestui que use*, or party for whom the trust is, cannot of himself [legally] dispose of the lands or goods, for the property and interest in law is in the trustees; [but

Ibid. Cromp. Jur. 62, 63. 65. 11 Ed. 4. 24 Ed. 4. 37.

(38) But in equity, in this case, the feoffees would be trustees for *I. S.* See the note to fo. 482, before.

the *cestui que trust* may release his beneficial ownership, or transfer it, or give it by will;] and if it be an obligation or statute that is made to the use of another, *cestui que use* cannot release it, [so that the release may be pleaded in bar at law;] but the trustee must release it. [But if the *cestui que trust* release, this release will confer a right to have a release from the trustee; and any suit by the trustees after the release by the *cestui que trust*, would be enjoined in a court of equity.] Thirdly, if the party trusted so with lands, goods, or chattels, give, grant, or sell the same lands, goods, or chattels, to one that hath knowledge of the same uses or trusts; (as it is always presumed he hath, where the trusts are expressed upon the same deed, by which the lands, goods, or chattels are given or granted; [and the deed is essential to the deduction of the title;]) or if the thing, so given or granted, be granted upon the same trusts, or to the same uses, or without any consideration at all; in these * cases, he to whom the thing whereabout the trust is, shall have the same thing upon the same trust and to the same use, as he that did give or grant the same had it. [Whenever a deed is necessary to the deduction of a title, the contents of the deed are implied notice of the trust.] But in case, where no trust or use is expressed upon the deed, and the purchaser or buyer hath no notice or knowledge of the use or trust, [or implied notice from possession,] and he gives a valuable consideration for the thing, there, for the most part, the sale is good, and the party grieved thereby hath no remedy but against the party first trusted in Chancery; and the purchaser shall have and enjoy the thing so bought to his own use for ever; but he that is the party trusted, will be forced in Chancery to make the party grieved an amends in damages for this breach of trust; and if there be any practice, packing, or combination between the buyer and the seller in the matter, there perhaps the suit may hold them both, and the buyer may be forced to restore the thing itself, [certainly.] And yet if *A.* enter into a statute to *B.* and *C.* to the use of *B.* and *A.* having notice of this use doth get a release from *C.*; in this case, it seems, *B.* must have his whole remedy against *C.* and shall have no remedy against *A.*

*P. 528.

11 Ed. 4.

[In a case with these circumstances, the duty would, it is apprehended, be considered as subsisting in equity.] 4. If the trustor, or *cestui que use*, in these cases, commit felony, &c. so that the things, if he had the property of them, were forfeit; in this case, it seems, that neither they nor their heirs, executors, &c. nor yet the lord, &c. shall have them, but the trustees shall keep them for ever. [The trust of goods and *choses en action* are forfeited. *Com. Dig. Forfeiture*, (B. 3.) Forfeiture and escheat stand on grounds quite distinct.] 5. If the *cestui que use* or trustors die and appoint how the same thing shall be disposed of, the trustees are bound to see it done; as if the testator appoint it shall pay his debts, or provide legacies, the parties trusted must take care it be so employed; [personal goods, leases, &c. must be accounted for to the personal representatives, unless there be special trusts to be performed;] and in this case, the debtees and legatees also may compel the trustees in Chancery, [unless they are objects of the trust, or specific legatees; they must, it is apprehended, look to the executors or administrators, not to the trustees.] 6. In all these cases regularly the thing whereof the trust is, is in equity at the disposing of him that is the *cestui que use*, unless he do otherwise appoint it; and if at his death he make no disposition thereof, it shall go to his heir, executor, &c. 7. In all these cases, the trustees shall have their reasonable allowance in Chancery for whatsoever they have laid out about the land, &c. in suits or otherwise, for the profit of the trustor. Out of all which may appear how dangerous it is for a man to meddle with any lands, goods, or chattels so conveyed or settled in trust; for the *cestui que use* or trustors have no [legal] property in the thing, and therefore they cannot sell or give it [at law,] and the trustee hath it but to another's use; and it is not safe therefore to deal with either of them alone, nor yet indeed safe to deal at all in these cases, unless the buyer may have the consent, sale, and assurance, or the release, &c. of the trustors and trustees * altogether; and if there be any woman covert, or infant, within the trust, it is most of all dangerous, [unless she be qualified to act as a feme sole, by virtue of a power, or a

Bro. Feoffment, al. Use, 34.

15 H. 7. 12. Cromp. Jur. 54.

Dyer, 49.

8 H. 7. 11.

*P. 529.

separate estate, &c.] And if goods or chattels be given to, or to the use of, a feme covert, or infant, and certain friends are trusted therewith, if they do sell or give away these goods or chattels contrary to the trust, they must be sure to answer it: if therefore they sell them, let them see that the money made thereof be as beneficial, and be bestowed for the wife or children; for it seems it is not sufficient, in this case, that the money made thereof be paid to them, [unless the trust be to change the property into money, &c.]

7 Ed. 6. 14. Fitz. Subpœna, 5.

[11 June 1821.]

The Editor* thinks he cannot conclude the few notes he has ventured to add to this very excellent and concise treatise on Uses, in any manner more acceptable to the reader, than by subjoining a copy of an elaborate opinion of the late Mr. *Booth* on the operation of the statutes of uses, the doctrine of executory fees, and powers of revocation.

CASE.

A. tenant in tail, and her husband, by articles previous to their marriage, agree to settle an estate to uses. *A.* and her husband join in making a tenant to the *præcipe* and suffering a recovery, and declare the same to such uses, as they, or the survivor of them, should by deed or will appoint. Then, in pursuance of the articles, they make a settlement, and appoint the premises, to the use of the intended husband for life, remainder to his wife for life, remainder to trustees to preserve the contingent remainders, remainder to the use of the articles; reserving a power to the two trustees to preserve remainders, in whom no estate was then vested but by way of remainder, to sell and convey, so as the money be laid out in the purchase of other lands to be settled to the same uses.

Can such trustees convey a good estate in fee to a purchaser under the power, having no estate vested in them?

By the old law no fee simple could be limited upon or after a fee simple; but since the statute of Uses, executory fees, by way of use, have not only been allowed, but are become frequent in all conveyances, operating by way of transmutation of possession, the uses are served out of the seisin of the feoffees, grantees, releasees, &c. In *all future* or executory uses, there is, in the instant they come *in esse*, a sufficient degree of seisin supposed to be left in the feoffees, grantees, &c. to knit itself to, and support those uses; so as that it may be truly said, the feoffees or grantees stand seised to those uses, and then, by the force of the statute, the *cestui que use* is immediately put into the actual possession [*i. e.* seisin.] It is wholly immaterial how, or by what means, the future use comes *in esse*; whether by means of some event provided for, in case it happened, in the creation of the uses, which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made, in the creation of the uses, which may be called the act of man; in either case, the statute operates the same way; for the instant the future use comes *in esse*, either by the act of God, or by the act of man, the statute executes the possession [seisin or estate] to the use, and the *cestui que use* is deemed to have the same estate in the lands as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called, a[n] use arising from the execution of a *power*. [An use may arise by the act of man, without any power; as to the use of *A.* and his heirs, and if *B.* should pay a sum of money, &c. then to the use of *B.*

* Mr. *Hilliard*.

and his heirs; this is a future, or a secondary and contingent use. It is to arise by the act of man, but it arises without and independent of any power In truth, both are future or contingent uses till the act is done; and afterwards they are, by the operation of the statute, actual estates. But till done they are in suspense; the one depending on the will of heaven whether the event shall happen or not, the other on the will of man.

Whilst these last are in suspense, [and given by way of power or authority,] they are called *powers*. It is absolutely immaterial to the creation of the powers, whether they are reserved to the parties that created the uses, or to any one having any actual use or estate under any limitation in the deed of uses, or to the feoffees, grantees, or releasees, or to an absolute stranger. They all operate the same way; indeed they have different names according as they are reserved to the persons aforesaid, and different rules are established for their interpretation, as they are of one kind, or another. Some are powers appendant, [as to lease;] some are powers in gross, [as to sell and exchange;] some are powers collateral, [as to raise a sum of money, &c. or powers which will not affect the estate of the donee of the power;] but still the statute executes the possession [*viz.* seisin or estate] to the use that arises on their execution, in the same manner, and by the same method of operation. *How* v. *Wingfield*, *Sir Thomas Jones*, 110.

Every settlement, made with skill for these last hundred years, can furnish something by way of example to illustrate these principles. Take a settlement made before the statute of king William 3d, to enable posthumous children to take as if born in the life of the father; you will find it perhaps thus: To the use of the intended husband and his heirs till the intended marriage; after the marriage, to the use of the said husband for life, remainder to trustees for his life to preserve contingencies, remainder to the use of such husband's first and other sons born in his lifetime in tail, remainder to the intended wife *enceint* at his death, and her assigns till the birth of one or more posthumous sons, and from and after the birth of any such posthumous sons, to every of them successively in tail; and for default of such issue, to the use of all and every the daughters of the husband, as tenants in common in tail, with remainders over; and with powers for the husband during his life to make leases, and powers for the guardians of the infant son, when their estates take effect in possession, in like manner to make such leases, &c.

Here, under the limitations of these, and such like settlements, you will find the uses continually to vary, and all to arise out of the seisin of the releasees; before marriage the intended husband is seised in fee; then upon the marriage his estate in fee ceases, and a new use springs up, under which he is tenant for life, with the further uses in contingency; then on the birth of a son, that son becomes tenant in tail, and also on the birth of every other son a new use or estate in remainder springs up to every such son in tail; on the birth of a daughter, she becomes entitled by way of use to a remainder in tail; on the birth of another daughter, that last remainder in tail ceases, [as to an aliquot part of the lands,] and both daughters become entitled by way of use to a tenancy in common in remainder in tail. Then if the husband dies leaving a child in *ventre matris*, a[n] use vests in the mother till the birth of that child, and then that use devests [ceases,] and the same event carries an estate tail to that child. So where the father makes a lease under his power, a[n] use vests in the lessee for such estate as the lease gives, and such lessee's use or estate takes place before and settles itself over all the uses; it is the same as a lease made by a guardian to any of the infant children, (which guardian is a perfect stranger to the parties at the time of the original settlement,) there the use or estate, given by the lease made under the power, overreaches all the other uses, and takes place before them; and this is done by the operation of the statute, just in the same way as any other use would arise, under any of the limitations contained in the settlement; [and the power of the father is a power appendant, and the power of the guardians is a power in gross.]

Feoffment to *A.* and his heirs, and if *B.* pays 100*l.* to *I. S.* then to the use of *B.* and his heirs; here on the payment of the money the estate of *A.* ceases, and the use executes in *B.* and his heirs. This case is cited in many books, and the case of *Lloyd* v. *Carew*, in *Show. P. C.* 137, 138, is to the same effect.

A. levies a fine of the manors of *D.* and *S.* and declares the use by deed, as to the manor of *D.* to the use of *B.* and his heirs, and as to the manor of *S.* to the use of *A.* and his heirs, till *B.* or his heirs are evicted by the wife of *A.* of the said manor of *D.* and after such eviction, to the use of *B.* and his heirs: this is a contingent use of the manor of *S.*; so that a[n] use will vest in *B.* whenever any eviction happens, and then the use in *A.* ceases. 2 *Rol. Abr.*

792. [This use is free from the objection of being too remote, as the eviction is to be by a particular person.] In settlements on younger sons of peers or of dignified persons, there are frequently provisions that if such a dignity, or such a family estate, descends on them, then the use to them to cease as if they were dead without issue, and then the premises to go over to the next in remainder; this is an actual revocation, [or rather shifting of use,] when the contingency happens.

It remains only to show, that not only the happening of an event by the act of God, but also the performance of any particular act by a stranger, will devest an old use, and give birth to and establish a new one.

Now powers of revocation [and of new appointment, or powers of new appointment singly, without any power of revocation,] do in their execution operate this way, and do devest or repeal and determine the old uses, and set up and establish new ones. The execution of these new uses is by force of the statute, just as the execution of contingent or future uses. The books say, that when a power is executed it becomes a limitation; but as these powers of revocation are in fact generally reserved to the grantors as first owners of the estate, it may be proper to show that the books make no distinction, but allow all kinds of powers to be limited to strangers; and nothing suits this purpose better than to cite the words of Lord *Hale*, in the case of *Edwards* v. *Slater*, in *Hardres*, 410. 415. Powers to raise estates are either *simply collateral*, as where a party that hath such powers has not even had any estate in the land, as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is but a bare nomination; or *not simply collateral*, which are of several sorts, not material to this purpose.

Here you see Lord *Hale* takes it for granted that a power to raise uses may be reserved or limited to a perfect stranger.

Lord *Coke*'s opinion, in *Co. Lit.* 237, is the same; he tells you that powers in voluntary settlements are founded on the statute which executes them as uses; then he explains the *nature of powers of revocation of uses*, and what consequences are incident thereto, as that they may be released or extinguished when reserved to the original grantor, or to any one claiming any estate or interest in the deed, [*read*, land;] but he saith, if he that hath power of revocation *hath no present* interest in the land, nor by the cesser of the estate *shall have nothing*, then his feoffment, fine, &c. of the land is no extinguishment of his power, because it is merely *collateral to the land*. If a power to revoke uses may be reserved to a stranger, a power to raise or appoint future uses for a particular purpose may surely be reserved to a stranger too.

The reserving of powers of revocation to the grantors or original owners of the land, though checked by requiring the consent of the trustees, hath of late been disused in settlements, because doubts have arisen whether such settlements are not fraudulent within the statute of 27 Eliz. See *Buller* v. *Waterhouse*, *Sir Thomas Jones*, 94, 95. [In this case, from its particular circumstances at least, it was held, that the settlement, though made subject to a power of revocation, was not within the statute.]

Powers to enable grantors or owners to revoke, or to sell or convey in exchange, *first settling other lands of equal value to the same uses*, have been found inconvenient; because, though it may be easy to sell an estate and lay out the money in the purchase of a new one, yet it is by no means easy to settle a new estate, before you have sold the old one. Few people are in circumstances to buy new estates, till they have sold their old ones.

But the vesting a power in the releasees (who themselves have a *scintilla juris* [the doctrine of *scintilla juris* is questionable, 1 *Prest. on Est.* 169,] to serve and feed the uses when they arise) to sell and convey, and *adding that when they receive the purchase-money, and sign a receipt for the same under their hands, the releasees shall stand seised, and the conveyances shall enure to the use of the purchasers in fee*, with proper trusts concerning the laying out the purchase-money; this answers every purpose, I found this method used and practised by Mr. *Ward* and others long before my being in business, and I always use this method to this day.

J. BOOTH, Lincoln's-Inn, 23d June 1761.

APPENDIX.

Appendix, No. I.

I. B. suffered three recoveries:—

The first recovery was suffered while he was tenant in tail in remainder, expectant on an estate for life, without the concurrence of the tenant for life.

The second recovery was also open to objection.

The third recovery was suffered after the death of the tenant for life, but without the concurrence of the person who was named tenant in the first recovery.

The following argument was offered on the case:—

It is conceded by those who object to the title, that the third recovery was valid, if there was a good tenant to the first recovery; and it is doubted only whether there was a good tenant to the first recovery. It is objected (and it must be admitted) that if the first recovery was invalid, the second recovery was equally invalid. Thus the objection against the third recovery pre-supposes the first and second recoveries to be invalid, and that *I. B.* conveyed his estate (being then a remainder in tail) to *S.* the tenant in the original recovery; and that this estate remained in *S.* and became, in event, the immediate freehold at the period when *I. B.* conveyed to *T.* to make him tenant for the third recovery.

In answer to this objection, it is insisted, that *S.* suffered a common recovery; that the demandant obtained the seisin of his estate; and that, under the uses declared of the seisin of the demandant, *I. B.* had, at and prior to the third recovery deed, regained the immediate freehold.

The objection first assumes, that the second recovery was void, or at least was a recovery only by estoppel; and, in the next place, assumes, as a general proposition, that recoveries by estoppel are not binding on the issue in tail, and persons in remainder and reversion; while, in support of the title, it is contended, that this rule is applicable only when a recovery is pleaded, as a bar to the issue, and to the persons in reversion or remainder, and not when the recovery is used for a collateral purpose, merely and simply as a conveyance between the parties,

or even as an estoppel, in respect of the title to the freehold, independently of a bar by its own operation to the issue and the persons in reversion and remainder.

A recovery may operate as a conveyance; it may operate also as an estoppel; and it may partake partly of the nature of a conveyance, and partly of the nature of an estoppel. It may, in the first place, be an estoppel, and eventually a conveyance. In some cases, it may be merely and simply an estoppel, as in the instance of a recovery suffered by a person who has not any estate; and is to become binding (as it may) on an estate subsequently acquired. This was the mode of operation and the effect of the fine in *Helps* v. *Hereford*, 2 *Barn. & Ald.* 242; and in this respect a fine and recovery stand on the same ground. But when a tenant in tail, having an estate in remainder, suffers a common recovery under a writ brought against him, as tenant; then, although he has a remainder in tail only, and not the immediate freehold, and therefore is not tenant in fact, the recovery operates as a conveyance; and a tenant in tail may convey while tenant in law only, either by being vouched and suffering a recovery, or by vouching over with judgment against the second or common vouchee.

It may be admitted, in conformity with the language of the books, that such recovery against him, as tenant in tail in remainder, when he is named tenant, is a recovery by estoppel; that is, he is estopped from denying that judgment was obtained against him: in other words, he is precluded after the judgment, indeed after he has pleaded or vouched, from asserting the fact of non-tenure. *Tilburne* v. *Rag*, cited 2 *Ld. Raym.* 1051; *Vin. Abr. Estoppel*, (T.) pl. 11. He might have taken this defence, but he lost the opportunity; and he was estopped during his life, and so are all persons claiming under him and bound by his acts, from denying the validity of the recovery, by the plea of non-tenure.

Estoppels, operating on interests, are originally or become conveyances. 6 *Mod.* 258; 2 *Ld. Raym.* 1051; *Helps* v. *Hereford*, 2 *Barn. & Ald.* 242. But strangers, issue in tail, and persons in remainder, might, if this recovery were pleaded against them as a bar, alledge the fact of non-tenure, and avoid the recovery. In the case under consideration, *I. B.* conveyed to *S.* and *S.* had a base fee, and suffered a recovery; and it is contended, in support of the title, that the recovery drew the base fee out of *S.* and transferred it to the demandant in the recovery, and the demandant became seised to the uses declared of his estate by the recovery deed.

It is clear that *S.* had the estate, and that neither he nor his heirs could deny that the seisin was recovered by the demandant;

and if the demandant obtained the seisin, then the uses declared of his estate must have been executed by the statute of 27 Hen. 8, c. 10, for transferring uses into possession. Nay, more; it is confidently advanced, that the estate of *I. B.* was as against all mankind (including issue, strangers and remaindermen) in the demandant, and through him in the *cestui que use*, (see the authorities already cited), subject only to the right of the issue in tail, and the persons in reversion or remainder, to establish their title by entry or action, or to defend themselves against the recovery, as a bar, distinguished from its operation, as a conveyance, by a plea, in avoidance of the recovery as a bar.

For the purposes of the argument it might be supposed that some other person than *I. B.*; *viz.* a purchaser, was the *cestui que use:* now the estate of *I. B.* must have been in *S.* the grantee of *I. B.* or in the demandant, or in the purchaser (the *cestui que use*). It was once beyond all doubt in *S.* the grantee of *I. B.* and it must have remained in him as a base fee, unless or until it was drawn out of him. He suffered a recovery, and there was a judgment that the demandant in the recovery should recover seisin. Now, as between *S.* and the demandant, the seisin was either in *S.* or in the demandant; and could *S.* or his heirs have ever entered on the lands, or maintained any action to have recovered the lands? Certainly not; for, as between them, the demandant had recovered the seisin or estate, which was of *I. B.* and the demandant was in the seisin by title; and it is immaterial to the argument whether that title was by conveyance, properly so called; or by estoppel, operating as a conveyance: for an estoppel operating to change the seisin between two persons is, as between them, to all intents and purposes of law, a conveyance.

No proposition can be more clear than that the estoppel changed the seisin from *S.* to the demandant; for one had it, and the other recovered it from him, and from the time it was recovered, it ceased to be in *S.* and passed by operation of law to the demandant. It is conceded, that if no estate had been in *S.* then the recovery would not have transferred the seisin or estate until the estoppel had taken effect; in other terms, until *S.* had, as in the case of *Helps* v. *Hereford*, acquired the seisin or estate: for till the estoppel was fed or supplied by a seisin, the seisin would have remained in the owner, since he would not have been affected by this transaction; being an estoppel between other parties, except so far as the sheriff might have changed the seisin by delivering it to the demandant. *Barker* v. *Keate*, 2 *Mod.* 249.

Now no point is more clear, than that a sole seisin cannot be in two distinct persons at one and the same time. 1 *Inst.* 368;

2 *Prest. Abstr.* 286. By whatever means one man acquires a seisin, be it by judgment, disseisin, conveyance or estoppel, another man must be deprived of it. One of these two persons only can in law have the seisin or estate. If one of them has it in law, the other cannot have it in fact; for it is by the law only that seisin can be acquired, altered, or transferred; and an estoppel is of no avail, in reference to the seisin, or further than as a lien or charge, till it produces the effect of changing or transferring the seisin.

It is absurd to say, that as between *S.* and the demandant the estate is really and truly in the demandant, and not in *S.* and that the demandant is the person who can, when the prior estates are determined, enter or retain the possession in point of title; that he is the tenant to the lord (for he is tenant to the lord); that he is the person whom the law recognizes as owner; and that he has a freehold as against the person who was the rightful owner; that he is the person against whom, at least during the life of the tenant in tail, all writs of *præcipe* must be brought after he acquires the immediate freehold by virtue of the conveyance or estoppel: and at the same time to deny that he is not the person who has the freehold for the purpose, and to the intent, that the third recovery might be suffered by the tenant in tail, or his alienee. Had the third recovery been suffered against the person named, as tenant in the second recovery, it might with reason have been objected (and on behalf of a purchaser it may unquestionably be objected), that his freehold was drawn out of him, and that he no longer retained it, and that the recovery was defective for want of a good tenant in that recovery; and yet the argument pre-supposes that *S.* remained tenant after the second recovery, and consequently was the person who ought to have been named tenant for the third recovery.

The opinion thus advanced against the third recovery, seems to confound the operation of the second recovery, as a conveyance; with its operation or effect as a bar. Besides, if an adverse action had, at the date of the third recovery, been brought against *I. B.*, could *I. B.* have pleaded non-tenure? It is apprehended he could not. And if he was the proper tenant to an adverse action, there is an absurdity in denying that he was not capable of making a tenant for another recovery, which assimilates itself in its form to a real adverse action.

If the second recovery were pleaded in bar to the issue or remainder-men, its effect might be avoided by showing that the immediate freehold was not, at the date of that recovery, in *S.* the person named as tenant to that recovery; but it is the

third recovery, and not the second recovery, which is to be pleaded in bar to the remainder-men or to the issue, if there had been any issue.

To avoid the third recovery, it must be shown that at the date of the third recovery the freehold was not in the person named tenant for that recovery. For this purpose the demandant would, by his replication, show the conveyance to *S.* (the person named as tenant in the second recovery), first taking up the title; so as to establish the fact, that the freehold was, at the date of the second recovery, in the testator who created the estates tail. The tenant would rejoin, and state the second recovery and the uses, and make title to the freehold and base fee, by way of conveyance under that recovery, and the uses declared thereof; and the sole point to be decided would be, whether the judgment did or did not take the estate out of *S.*?

It will not be denied that the estate was taken out of him; but then it will be urged that it was taken out of him by estoppel, and that estoppels do not bind the issue or remainder-men. In short, the demandant would demur to the replication, either specially or generally, and thus refer to the court the point of law: or these points might be raised by ejectment, or by a special case, or by a special verdict, or by a bill of exceptions to the opinion of the judge who might try the cause.

The material point for discussion would be, whether in point of law the freehold did or did not pass to the demandant in the second recovery? for if it did pass to the demandant, the validity of the third recovery would be established as a necessary consequence.

Suppose *I. B.* to have been seised of an estate in fee, instead of an estate tail, would not the conveyance from *I. B.* to *S.* and the common recovery, and the declaration of the uses thereof, have made the *cestui que use* the legal owner, by way of title or conveyance?

It is not denied that the conveyance, recovery and uses would have had that effect as between those parties; the point is too clearly decided to allow of objection or doubt. See *Webb* v. *Neet, Hill. Cro. Eliz.* 21; *Shelley's case*, 1 *Rep.* 96.

All these cases prove, in the most distinct and satisfactory manner, that the ownership, freehold or seisin, is, in point of title, changed from the tenant in fee, to the person who can derive a title under this recovery, and the declaration of its uses. All the gentlemen who maintain the objection, admit that this would be the effect of such a recovery against tenant in fee. But then it is added, that in this case the conveyance and the recovery proceeded from a tenant in tail, and not from a tenant in fee. The answer is, that for this purpose it is not of the least consequence whether the acts proceeded from a tenant in

tail, or from a tenant in fee simple. The sole and single inquiry is, whether *I. B.* conveyed his estate to uses? and it is not of any consequence (and this is the only material point of investigation during the life of *I. B.*) whether he was seised in tail, or seised in fee: for whatever would be the effect or operation of a conveyance, and a recovery and deed of uses proceeding from *I. B.* being tenant in fee simple in remainder, would be their operation as against *I. B.* himself, though he was tenant in tail in remainder. It does not make any difference, that the heirs in tail or remainder-men might, after the death of *I. B.* avoid his conveyance executed while tenant in tail, conceded, as it must be, that his general heirs could not avoid his conveyance if he were tenant in fee simple: for the simple inquiry is, whether *I. B.* conveyed to uses? and he does convey to uses as effectually when he is tenant in tail, as when he is tenant in fee simple. The only difference is, that in one case his conveyance may be avoided after his death, while in the other case it is absolute, and not voidable. The statute *de donis* is the ground-work of the objection; and that statute, when it converted fees conditional into fees tail, did not make any alteration whatever in the mode of conveyance by tenant in tail. *Walsingham's case, Plowd.* 547; *Machel* v. *Clarke,* 2 *Lord Raym.* 778.

All acts proceeding from tenant in tail, and saving the right of his issue, and the persons in reversion and remainder, have the same effect since the statute as they would have had prior to the statute. *Machel* v. *Clarke,* 2 *Lord Raym.* 778. And prior to the statute, alienation by tenant of a conditional fee, was, as to himself, as effectual as a conveyance by tenant in fee simple was as against him. It follows, if tenant in fee simple in remainder could convey to uses by a grant to *A. B.* and a recovery suffered by *A. B.* then a tenant in tail in remainder may make a like conveyance, to be effectual as against himself, by his grant to *A. B.* and by a recovery suffered to *A. B.* to uses.

No lawyer, who might consider the case in all its bearings, and during the life of the tenant in tail, could distinguish one case from the other, when it arises on a conveyance proceeding from, and operating against, the tenant in tail himself. And if there was a conveyance to uses for the life of *I. B.* these uses must, during the life of *I. B.* have governed the title; and then the third recovery is free from the objection urged against it.

The cases in which, under similar circumstances, a recovery by a tenant in tail in remainder has been treated as a recovery operating by estoppel, and at the same time, as it is submitted as an efficient conveyance, are not cited; because those cases

are already collected in 1 *Prest. Convey.* 85. But the language in the case of *Lincoln College*, 3 *Rep.* 59, and the case itself, are important authorities to support the third recovery.

In the first place, unless there had been a continuing estate, and by estoppel, by force of the recovery, though a recovery from a remainder-man, there would not, in *Lincoln College case*, have been any estate to which the warranty could have been knit; and secondly, the language of the report (applicable, it must be admitted, to a certain extent to the construction of the statute of 11 Hen. 7, but equally relevant to every alienation by tenant in tail,) is, "But the discontinuance, alienation, or warranty, shall not be void between the parties, but shall stand in force between themselves and against all others, but only such to whom the interest, title, or inheritance, after the death of such woman, doth appertain; and they only may make it void and of no effect by their entry." And so before that time have other statutes been expounded by the ancient judges and sages of the law. *Doe* v. *Whichelo*, 8 *Term Rep.* 214, followed the same principle, that a conveyance by tenant in tail will be good against the issue in tail, till avoided by entry.

Finally, it may be added, that the gentlemen, who urge the objection arising from the learning of estoppels, and insist that a conveyance by estoppel is altogether void, as against issue in tail, &c. are opposed by an express decision; for in *Lloyd* v. *Evelin*, 2 *Salk.* 568, it was decided that a recovery was good under a tenant to a writ of entry made by fine, although this fine was erroneous, and was afterwards reversed by writ of error.

In this case the estate was by estoppel, that is, by a fine which had its effect only by estoppel, and which was defeated when the estoppel was avoided, by showing the error, *viz.* the want of an original writ. So in this case, as the recovery was good for a time, because there was at the period of judgment a good tenant, the recovery could not be impeached.

This case, and *Lacy* v. *Williams*, 2 *Salk.* 568, decided all that is necessary to support this title; namely, that if the tenant had the freehold at the date of the third recovery, the recovery would be operative and remain in force, notwithstanding this freehold was held under a conveyance which was voidable as between the parties, or as between the parties and any stranger who might be interested in avoiding the effect of the fine or other defective conveyance, keeping always in mind the difference between a conveyance which is actually void, and therefore does not pass any estate, and a conveyance which is voidable, and therefore passes an estate till the conveyance is avoided by entry, action, error, &c. These observations were written as

the outline of an argument in support of the title, rather than an opinion on the title. The editor's opinion is clearly and definitively in favour of the title.

Appendix, No. II.—p. 413.

A WILL, though revoked or cancelled, may be revived by republication; and such republication may bring the operation of the will down to the date of the republication; *i. e.* the language of the will may be read as if used at the period of republication, so as to pass after-purchased lands, &c. if the terms of the will are sufficiently large to comprehend them: and such republication may be of the will itself, or it may be by means of another testamentary instrument, as a codicil, duly attested and annexed to the will; or by terms of reference, embodying the will; or a codicil duly attested may, it is apprehended, be a virtual republication and attestation of a will or codicil not duly attested, *per* Lord *Hardwicke*, in *Fuller* v. *Hooper*, 2 *Ves.* sen. 242.; *per* Lord *Eldon*, in *Smart* v. *Prujean*, 6 *Ves.* 560; provided it adopt such will or codicil. But see *Wilkinson* v. *Adams*, 1 *Ves. & Bea.* 442. The earlier authorities (*Powell on Devises*, 680.) are of a contrary tendency.

Appendix, No. III.

A FEW general observations will open the mind of the reader to enter on this subject.

1st. Every gift of real estate must be founded on ownership; *i. e.* on having an estate or interest.

This rule, as a general one, extends to freehold and copyhold lands, and to lands held for lives.

But a contingent, or future or executory interest, is devisable; while a mere possibility without an interest, as the possibility of an heir, a contingent interest to a person not ascertained, a right or title of entry or of action, the right to enter for a

condition, or by reason of the warranty annexed to an exchange, is not devisable.

However, the right to sue in equity by reason of a trust, or an equity of redemption, &c. or of a conveyance obtained by fraud or against conscience, is devisable; and the trust is devisable, although the legal estate of the trustee may be turned into a right of entry or of action. 1 *Leon.* 237. So a will may operate by express words on a term of years, and possibly, in equity at least, on an estate for lives to be afterwards purchased, so as the lease for lives be limited to the executors, or so as no special occupant be named. Also copyhold lands purchased after a will may, by the express language of a surrender to the use of a will be subjected to the dispositions of a will. *Heyley* v. *Heyley, Cowp.* 130; 3 *Prest. Abstr.* 177. And even freehold lands may, by express uses, be subjected in like manner to the dispositions of a prior will, or rather to the like dispositions. *Moore*, 789. But see *Doe* v. *Dilnot*, 2 *New Rep.* 401, that the words "shall appoint, &c." will not give effect to an existing will.

And in equity, under the doctrine of election, the heir at law may be bound to give effect to the dispositions of his ancestor's will, even as to after-purchased lands. *Woodford* v. *Thellusson*, 13 *Ves.* 209.

2dly, A disposition, after a will has been executed of a partial estate, will be a revocation *pro tanto* only: thus, a lease for years, a gift for life, or in tail, will be a revocation of the will, or annul it *pro tanto* only; the ulterior interest will be subject to the dispositions of the will.

And as to copyhold lands, a surrender to uses, although the ultimate fee be limited to the surrenderor in fee, or to his right heirs, being his old ownership or dominion, will remain, subject to the dispositions of the will. *Thrustout* v. *Cunningham*, 2 *J. Black.* 1046; *Vawser* v. *Jeffery*, 3 *Barn. & Ald.* 462. So a conveyance in fee, by way of mortgage, or on trust for sale, merely for the particular purpose of securing money, would, in equity, be a revocation *pro tanto* only. But a conveyance in fee of freehold lands to uses will be a total alteration of the estate, and a revocation, although the party take back the fee as part of his old use. *Earl Lincoln's case*, 2 *Freem.* 202. So articles to settle the fee to uses, although the ultimate fee is to remain with the settlor, will, in equity, be a total revocation of the will.

Most of these revocations are by alteration or new modification of estate; others are rather by reason of change of intention than alteration of estate.

Thus a grant of the fee, void for want of livery, enrol-

ment, &c. will be a revocation, although the estate be not altered.

The change of a legal fee into an equitable fee, will be a revocation. But the change of an equitable fee into a legal estate will leave the will in full operation; *i. e.* it will be good in equity, and the heir at law will be a trustee for the devisee.

But any new modification of this beneficial ownership, as by creating limitations in strict settlement, uses to prevent dower, &c. altering the nature of the uses, &c. existing at the date of the will, will amount to a revocation.

If a man who has contracted to purchase, and devised his equitable fee, take a conveyance to uses to prevent dower, this modification of his ownership will effect a revocation. A mere partition, and this is an anomaly, will not be a revocation of a will; but any new modification of the uses will be a revocation.

And a contract to sell, exchange, &c. settle, &c. will be a revocation in equity, though the will may remain in operation at law; and in these cases the devisees will be trustees for the persons entitled to the benefit of the contract, &c.

As a general rule, every act which would be a revocation at law, will be a revocation in equity; with the exception, that a conveyance obtained by fraud, or by way of mortgage, though a revocation in law will not be a revocation; or will be only a partial revocation, or as it is termed, *pro tanto*, in equity. And a will which has been revoked, may be brought into operative force by republication. The cases are collected by *Powell on Devises*, p. 532; *Appendix*, 540. The note on attestation is embodied into the text at p. 434.

INDEX.

ABATEMENT of seisin, 196.
of legatees, 480. see *Legacy.*

Abandonment, amounting to a surrender, 306.

Abeyance, 102. see *Freehold.*

Acceptance of rent, 229. 280. 287.
without sealing, 177, 178.
performance of a condition, 384.
attornment, 262.
of office, by executor, 466, 467, 468.
surrender, (301, n. 3.) 307.

Account, 357. (358, n. 6.) see *Executor.*

Acquittance, 347, 348.

Acre, how computed, (12, n. 58 & 59.) 96.

Action. see *Executor.*
cause of, arising in several counties, 213.
of covenant, 482. 511.
arising in lifetime of testator, 472.

Ademption, (453, n. 11.)

Administration. see *Administrator.*
letters of, 408. 453.
by whom granted, 462, 463, 464.
to whom granted, 463, 464, 465. 481.
when granted, 462. 474.
void or voidable, 462, 463. 492.
in case of specialties, 463.
to persons working in the king's dock yards (463, n. 32).
when revoked, 401. 474. 491. 492, 493.
how enforced, 474.
how granted, 464.
limited to a particular time, 460. (490, n. 83).
on condition, 491. 493.
suspended, 492.
de bonis non, 461, 462. 465.

Administrator. see *Executor.*
his authority, 233.
his power, 474. 490. 493.
his power limited, 491. (n. 85.) 493.
his liability, 492.

Administratrix, infant, who marries, 491.

Admittance to copyholds, (300, n. 1.)

Adverse possession, 34. see *Fine. Entry. Non-claim.*

Advowson, 230. 238. 332.
appendant, 76. 83. 208. 252. 503.
grant, 249.
by tenant in tail, 510.
after avoidance, (90, n. 88.) 241.
owner's power over, 96.
suspension of, 90.
in a fine, 12.

Agreement for a lease, 271.
instrument sealed by mistake, 50.
agreement, or lease, 70. 284.

Alien, (7, n. 42.) 204. (232, n. 12.) (235, n. 21.) 403.
grant by, 56.

Alteration, 68, 69.
how tried, 69.

Ambiguity, 13. 251. see *Name. Deed.*

Ancient demesne. see *Fine. Recovery.*

Annuity, release of, 322.
fine of, 11.
conditional, 285, 286.
whether usurious or not, 62. 91.
grant of, 238.
no entail of, 41.
devise of, for what time, 448.

Apparel, livery, &c. 242.

Appearance, evidence of, before the court, must be recorded, 388.

Appendant, 76. 83. 89. 208. 252. 503.

Application of money, 449.

Apportionment of rent and services, 151, 152. 241. 472. see *Rent.*
of a condition, 152. 157. 159.

Apprentice, 50.

Appurtenances, 89, 90. 94. 246.

Arable, 94.

Arrears of rent, 469. 482.

Assent to legacy, by an executor or administrator, 119. 455, 456. 459.
what amounts to, 456, 457.
on condition, 456.
necessity of, 402.

Assets, (108, n. 24.) 496. see *Executor*.
what are, (449, n. 5.) 463. 496, 497, 498.
a presentation, when assets, 496.
equity interfering in collecting, 497.
in several provinces, 499, 500.
equitable, 475. (477, n. 56.) (480, n. 62.)

Assignments, 266. 268. 274. 276. see *Lease*.
of term *in futuro*, 251.
fraudulent, 64.

Assignee. see *Warranty*. *Covenant*.
may be a releasee, 326.
of bankrupt, may maintain a real action, 321.
of choses in action or of mortgage, 70. 79.
who may take advantage of a condition, 150.
in exchanges, 290.

Assigns, 170.
how bound by a statute, (263, n. 8.)

Assurance. see *Conveyance*.
how it shall enure, 205. see *Construction*.
fine and recovery, common assurance, 38.
as counsel shall devise, 167.
covenant for further assurance, 172, 173.

Astutia of judges, 89.

Attainder, 187. 192. 202.

Attainted person, 204. (231, n. 13.) 235. see *Treason*. *Felony*. *Escheat*.

Attestation, of deeds, 55.
of wills, 431.

Attorney, 211. 217, 218.
letter of, to enable one to execute, in the name of another, 57.

Attornment, definition of, 253.
superseded, and notice substituted in its place, 253.
actual or implied, 253. 262, 263, 264.
effect of, 254.
necessary for what purposes, 254, 255, 256. 258.
tenant compelled to attorn, 254, 255. 265.
no estate passed till attornment, 255. 261. 264. 266.
privity, 256. 258, 259.
unnecessary, 257, 258.
by whom made, 258, 259, 260.
to whom made, 259, 260. 264.
void for uncertainty, 260. 262.
at what time, 260.
requisites, and what a good attornment or not, 261, 262, 263, 264.

Attornment, by acceptance, 262.
construction of attornment, 265, 266.
how it enures, and to what time it relates, 266.

Authority, 239. see *Executor*.
must be strictly pursued, (218, n. 34.) 219. (269, n. 11.)
suspended, 217.
revoked by death, 209. 212.
in case of a corporation, 212.
may be given to do an act after death (218, n. 35.)
cannot be released, 71. 139. 322. 329.
not barred by fine, 22, 23.
cannot without authority be delegated, 449.

Averment, 51. see *Uses*.
of consideration, 223.
in a fine, 20. 40.

Avoidance, (90, n. 88.) 230, 231. 241. see *Advowson*.

Award, 119. 378.

Bankruptcy, conveyance in contemplation of, 66, 67.
what, 67.

Baptismal name, 237.

Bargain and sale. see *Grant*.
definition, 221.
consideration in, (221, n. 1.) 222. (223, n. 9.)
indenture necessary, 221, (222, n. 7.) 223.
of what, 221, 222. 224.
rent or condition reserved, 221.
innocent conveyance, (221, n. 2,) (222, n. 3.)
must be enrolled within six months, 222, (223, n. 10.) 224. 226.
sufficient words, (228, n. 8.)
of a term, 223, 224.
enrolment, where and when, and on what to be made (223, n. 11.) 224. (225, n. 16.)
copy of, (224, n. 12.)
death of parties before enrolment, 224.
may enure as a grant, 224.
may enure as a covenant to stand seised, 224.
of personal property, what alters the property, 224, 225.
construction of a bargain and sale, 106. 225, 226, 227.
enrolment relates to date of deed, (226, n. 17.)
difference between estate passing by bargain and sale, under an authority requiring enrolment, and in the common cases of bargains and sales under the statute as to enrolment and use, 227.

Bargain and sale in fee, rent may be reserved in, 227.
condition, 227.

Bargainee, takes the use, 507. 509, 510.
cannot stand seised to uses, 509.
general doctrine, 221. 223.
taking estate for life only, 522.

Bastard, 200. 233. 236. (237, n. 24.) 511.
devise to. see *Devise*.

Bequest. see *Executor*. *Assent*.
of goods and chattels held in *autre droit*, 431, 432.
to parish, 446.
of one-third of goods, 446.
of all plate, 446. see *Plate*.
of all plate in a particular place, 446, 447.
of goods and chattels, 447.
of moveables, 447.
of leaseholds, 430, 431.
for so many years as *I. S.* shall name, 420.
of debt, 430.
of personalty, (406, n. 21.)
of term, 448.
specific, 447.

Bishop, 237.
of London, his jurisdiction, 463.

Bona notabilia, 462. (463, n. 32.) 492. 499. (500, n. 95.)
in London, (463, n. 31,) 499.

Bond, void, 71.
consideration of, 71.
condition, 71.
made abroad, 74.
for resignation, (122, n. 36.) 132.
in what language (369, n. 2.)
for performance of covenants, 379.
to save harmless, 390.
release of, 335.
for quiet enjoying, 167.

Bushel measure, 225.

Cancellation of a deed, 69, 70.
of a will, 411.

Castle, 11. 92.

Cessavit, 34.

Cesser, effect of proviso, 130. 139.

Cestui que use, who may be, 501, 502. 509.
conveyance by, its operation and effect, (107, n. 8.)
trustee for vendee, 522.
his interest, 527.
his release, 527.
his power of disposition, 528.

Chamber, 206. 214.

Chapel, 12.

Charity, 415.

Charters, 469, 470. see *Deeds*.

Chattels. see *Bequest*. *Term*.
what pass by, 97, 98. 231. 244.
personal, limitation of, 116.

Child, joint-tenant with its parent, 235. 415.
in *ventre sa mere*, (235, n. 20.) 237.
after-born, entitled to a remainder, 20.

Chose in action devisable, 97. 240. 430.

Civiliter mortuus, 201.

Claim, different periods of, 21, 22, (23, n. 11.) 29, 30, 31. 35.
under different titles, 34.

Clover, 469.

Codicil, 399. 411.
its effect and operation, (401, n. 3.)

Collusion, purged by *bona fide* sale, 67.

Colonies, fine in, 74.

Commencement of estate, (108, n. 25.) 109. see *Lease*.

Common, right of, 230, 231. 238, 239. 243. 245, 246.
fine by tenant in common, 14.
of pasture, 79. 87. 96. 105.
recovery by. see *Recovery*.

Commote, 92.

Composition of debts, 498.

Concord, 3.
form of, 15, 16. 18.
of what, 15, 16.
substantial part of a fine, 15.
may contain an exception, 15.
must be warranted by the writ, 16.
error in, 16.
must acknowledge the right in one, 15.
exception in case of king's tenant, 15.
right acknowledged to two and their heirs, 15.
must be sensible, 17.
grant and render, how construed, 19.

Concurrent lease, 304.

Condition. see *Re-entry*. *Limitation*.
may be inserted in the concord of a fine, 17. 22.
how it differs from a limitation, 117.
to re-enter, 117, 118.
how divided, 117, 118.
precedent, (117, n. 2.)
subsequent, (118, n. 3.)
to the grant of an office, 118.
implied, (118, n. 5.)
to what annexed, 118, 119.
by what means made, 120.
may be annexed to an estate arising by use, 120. 126.

Condition, who must take advantage of, 120. 127.
distinguished from a conditional limitation, 121. 134. 146. 150, 151. 450.
may be released, 120.
who bound by the condition, 120. 417.
condition in fact and in law; distinction between them, 120, 121.
condition defeated by limitation of a remainder, 17. 120, 121. 130. 153. 157. 450.
difference between the destruction of the particular estate at common law, and under the doctrine of uses, 120.
difference between a condition defeating the estate, and giving a right of re-entry, 120.
condition may avoid a remainder, without avoiding the particular estate, 120, 121.
condition may be suspended by confirmation, 121. 159.
entry or claim necessary to avoid an estate on condition, 121; *contra*, 130. 139.
on limitation of uses, 121.
condition must defeat the entire estate, 121. 127.
what words make a condition, 121, 122, 123, 124, 125. 127. 129. 132.
difference between a condition and a covenant, 122.
express words of condition intended as a limitation, (124, n. 16.)
in law, 126. 285.
when to be made, and by what instrument, (126, n. 22.)
what may be granted on a condition, 127.
condition, when nugatory, 127.
or void, 17. 127. 131, 132.
possible in part, 148. 157.
impossible, 133.
condition defeating an estate, 129.
against the prerogative of the crown, 129.
condition not good, 129.
in restraint of alienation, when good, 129, 130, 131. 159.
difference between a feoffment and bond, on an unlawful condition, 132.
different effect between a condition precedent and subsequent, 133.
how construed, and difference, whether to defeat or create an estate, 133, 134.
of the time and place of performance, and what amounts to, 134. 136.
of the necessity, or not, of request of performance, 134, 135, 136, 137, 138.
condition to pay money, (136, n. 49.)
what a sufficient performance of a condition, 137 to 147.
conditions, their different acceptation, 137, 138.

Conditions, difference between copulative or disjunctive, 139. 143, (157, n. 85.) (133, n. 38.)
who may require performance of the condition, 140.
condition entire, 141.
condition, for the benefit of a stranger, 143, 144.
when the heir may perform a condition, 144.
breach of a condition not to alien, 144.
difference between disablement of feoffor and feoffee to perform condition, 146.
dispensation with a condition, 146.
concealment or ignorance of a condition, 148.
election to take advantage of a condition, 148.
conditions in law producing forfeitures, 148, 149.
annexed to what estate, and at what time, 149.
to whom reserved, 149.
who may take advantage of, 149, 150, 151.
right of taking advantage of, is merely personal, 150, 151. 155.
anomaly, 180.
grantee of reversion may take advantage of a condition, when, 150, 151, 152.
gift in tail on condition, 151.
grantee of part of the estate, as distinguished from part of the land, 151, 152. 158.
apportionment of a condition, 152. 157, 158, 159.
condition and power of revocation, their difference, 152.
condition gone by merger, 152.
query, whether a condition may operate as a contract in equity to surrender to the assignee of a reversion, 153.
heir taking advantage of, 153.
waiver of condition, 153. 159.
annexed to a remainder, 155.
condition discharged, 157, 158, 159, 160.
fine, except for further assurance, discharges a condition, 158.
suspended, 158, 159.
revival of condition, 159.
legacies on, 450, 451. 453.

Confirmation, definition of, 311.
how made, 311, (314, n. 3.) 315, 316.
express, 287. 289. 311.
implied, 311.
different operations, 311 to 320.
none of a void estate, 312, 313, 314.
does not change the *descent*, except it enlarge the *estate*, 312.
by corporations, (312, n. 2.)
by bishop, (312, n. 2.)
by parson, 312.
by king, 312.

Confirmation, by king, 312.
by heir apparent, 313.
requisites to a good confirmation, and of what, 313.
differs from a release, 313. 317.
of rent, 313. 315, 316. 320.
by whom made, 313, 314.
operating as a grant, 314, 315.
words of limitation, when necessary, 316. 319.
of part of an estate, 317. 319.
of the *estate* of one of two joint-tenants, as distinguished from the *land*, 319.

Consideration, to raise an use, 510, 511, 512.
averment, 510. 512.
of marriage, without marriage taking place, 512.
valuable, 64. 66.
what necessary to a bargain and sale, or covenant to stand seised to an use, 510, 511. 513.

Construction of a deed,
deed operating in two ways, 82.
how it shall enure, 82, 83.
intent to be observed, 83. 88.
when tenant for life and remainder-man join, 83, 84.
operating as grantee shall elect, 83. 85. 91.
general rules, 82. 85, 86, 87, 88. 514.
different, between a deed poll and indenture, 88.
different, between a deed and will, 88.
of disseisor and disseisee, 85.
of charge by person having several estates, 85.
difference between rules of law and rules of construction, 88.
difference between grants of interest and of an easement, 90.

Contingent remainder. see *Remainder*.
use. see *Use*.
can an estate, enlarged on one contingency, be again enlarged, 129.

Contract, relief in equity, 508.

Contribution, 365.

Conusance. see *Fine*.

Conusee, justice, 9.
may maintain an assize, 358.

Conveyance, different sorts of, 1.
how made, and their enumeration, 1.
different operations of, 2.
when fraudulent against purchasers, 64.
creditors, 65.

Coparceners, fine of, 14.
their release, 205. 326.

Copyholds. see *Surrender*. *Recovery*. *Admittance*.
fine of, 22.

Copyholds, not devisable, 422.
do not pass under a general description, 88.
tenure extinguished, 156.
whether extendible, 333. 360.

Corn growing, 468.

Corody, 286.

Corporation, their fine, 7. 14, 15. 22.
sole or aggregate, difference in limiting estates to, (101, n. 5.)
of conveyance by or to, 220. 228.
head of, 233, 234.
surrender by, 302.

Costs, executors own property when liable, 495.
by whom paid, 382. 484.

Cottage, 94.

Counterpart. see *Deed*, 50. 53.

Counterplea, 183.

Covenant, rasure of, 71.
what, (160, n. 1.)
express or implied, (160, n. 2.) (165, n. 16.) 175.
real or personal, (161, n. 3.)
inherent, 161.
collateral, (161, n. 4.)
executory, 161.
action of covenant, (161, n. 6.) 511.
breach, 161. 174.
amounting to a lease, 161. 163. 497.
land recovered on a writ of covenant, 162.
what amounts to a, (162, n. 9.) 163.
amounting to a gift, 162. 165.
warranty construed a covenant, 163. 165.
grant construed a covenant, 163.
will operate as a release, when, or not, 85. 163, 164.
what are good covenants, or not, 163, 164.
how expounded, 166.
joint or several, (166, n. 20.) 180.
for quiet enjoyment, 165, 166, 167. 170, 171, 172.
heir, when bound, 167. 177, (178, n. 45.)
heir may take advantage of, 175.
against incumbrances, 167, 172.
for further assurance, 167.
to levy a fine, 168.
to convey lands of a certain value, 169. (180, n. 52.)
free from incumbrances, 172, 173.
that lessee shall lease, 169.
on condition, 169, (170, n. 29.)
that lessee shall have the fee, 170.
for seisin, 170.
broken by act of the covenantor, 172, 173.
to pay money on several days, (174, n. 37.)

Covenant, who may take advantage of, 152. 175, 176.
grantee of reversion, 176, 177. 179, (180, n. 53.)
assignee, what covenant he may have advantage of, or be bound by, 176, 177. (179, n. 50.) (180, n. 53.)
of covenant, as distinct from condition, 179.
on whom binding, 177.
executor or administrator, how bound by covenants, 177, (178, n. 46, n. 49.)
lessee liable to covenants, notwithstanding assignment, (180, n. 53.)
action of debt gone, covenant may be maintained, (180, n. 53.)
assignee, from what time liable, 180.
of bankrupt, 180.
covenant, when discharged, 180, 181.
release of covenant, 180.
not to revoke a will, 401.
Covenant to stand seised to uses, 161. 165. see *Grant*.
of lands a person has not, 509.
how made, 508.
by tenant in tail, 509.
consideration in, 510, 511, 512.
deed operating as, or as a bargain and sale, 511. 513, 514.
remainder to a stranger, 512.
with a power of revocation, 515. 524, 525.
in favour of a person to be named, 515.
Covin, fine void, 19.
deed void, 64. 67, 68.
Creditors, fraud against, 66.
suing executor, their priority, 478.
Croft, 95.
Crops growing, 238. 241. 430. see *Executor. Emblements.*
Crown. see *King. Debts. Obligation.*
could not be barred by adverse possession, 15.
Curtesy of a trust, (507, n. 8.)
Cy pres, 89. 237.

Damages, 163.
arising in lifetime of testator, 472, 473.
Date. see *Deeds.*
impossible, 109.
delivery, 398.
Deaf, dumb and blind, 204. 233.
Debtor executor, 201. 335. see *Executor.*
Debts, 106.
release in law, by appointing debtor executor, 201.
given by will, 459.
in what order to be paid, 477.
Debts, personal estate discharged from payment of, (448, n. 97.)
barred by statute and revived, (448, n. 98.)
Dedi, 181.
Dedimus potestatem, 5. 9. 39.
Deeds, how written, 50. see *Construction. Escrow.*
different kinds, 50.
indenture, when necessary, 50.
indenting a deed, when a crime, 50.
indenture, what, 50.
poll, what, 50.
parties to an indenture, 50.
principal and counterparts, 50. 53.
each part of indenture executed by all parties, 50.
different forms, effect, and operation, 50.
deed, what amounts to, 51.
what granted or done by deed, 51.
parts of a deed, 52. 55. 74.
different offices of the different parts, 52.
different construction between an indenture and a deed poll, 52, 53.
indenture in the first or third person, 52, 53. 55.
sealed by one party only, (53, n. 16.)
error and variance between original and counterpart, 53.
deed poll may be available against more than one party, 53.
deeds void and voidable, 53, 54.
name, uncertainty in, 53.
requisites to a good deed, 54.
ineffectual for want of the due observance of proper ceremonies, 54, 55.
not admissible on evidence till duly stamped, 54.
of the writing, 54.
on what, 55.
in what manner, 55.
execution of deed, what a sufficient proof of, 55.
of the date, 52. (55, n. 21.) 72.
two deeds of the same date, 72.
by whom, and to whom, made, 56.
deed lost, (73, n. 59.)
delivery, and how made, 57. 72.
execution of a deed, by one for another, how made, 57.
deed delivered as an *escrow*, 57.
in what manner, 58, 59.
second delivery, when necessary, and effect of, 59. (61, n. 33.)
second delivery, having relation to the first, 59. (72, n. 57.)
escrow, evidence of agreement, 60.
delivery to a stranger, 58.
delivery, at what time, (58, n. 27.) 72.
delivery, what sufficient, 58.

Deed, executed and retained by the grantor, 59.
void for menace or duress, 61, 62.
how confirmed, 62.
fraudulent, 64. 68.
how avoided, 70.
relief in equity, 70.
void in part only, 70.
void altogether, 70.
strangers to, 73.
in court, are kept by the *custos brevium*, 73.
exhibited in court, 73.
different terms, explanation of, and what pass by, 95.

Deer, (241, n. 33.)

Defeasance, 323. 364. 370. 373. 386. see *Obligation*.
definition of, (396, n. 1.)
differs from a condition, (396, n. 1.)
operates on what, and at what time, 396, 397.
requisites to a good defeasance, 397.
operating as a release, 373. 398.
covenant, when a release or defeasance, 398.
actions prior to defeasance, not discharged by the defeasance, 398.
may be several, and the last avails, 398.
rasure, 71.

Delivery. see *Deed*.
averment of, 73, 74.

Demand, for rent, when necessary, (148, n. 66.)

Demesnes, 99. 245.

Denization, on condition, 119.

Denizen, devise to, 417.

Deputy, 239.

Derivative interests, when defeated by forfeiture, 155. 160.
how affected, 285, 286, 287.

Descent. see *Heir*. *Title*.
changed, (19, n. 93.)
cast, 160.

Devastavit, 478. 494. 495. see *Executors*.
against one of two or several executors, 496.
what amounts to, 486.
by administrator, under void letters of administration, 486.

Devise. see *Will*. *Heir*.
requisites to a good devise, 406, 407. 413.
by custom, 414.
lapse, 410. 416. 452. 454.
in favour of kindred, 415.
in favour of relations, 415.
charity, 415.
the right heirs of a person in *esse*, 415.
in mortmain, (416, n. 48.)

Devise, to universities, 416.
to a corporation not in existence, 416.
latter clause operating as an exception to a former general devise, 418.
two devises of the same thing to different persons, 419.
devises consistent, 419.
of a term, 431. 443. 448.
of term to one with remainder, (419, n. 52.)
of term to one with remainder, mode of accomplishing this object by deed, 419.
of possibility, 419. (428, n. 58.) 429. 431.
quasi in tail of term, (419, n. 52.) (445, n. 90.) 446.
bequest of chattel, or personalty, to one for life with limitation over, 419.
void for uncertainty, 433.
by tenant in tail, 430.
of one of two joint-tenants of copyholds, (431, n. 66.)
of joint-tenant of a *personal chattel*, 431, (431, n. 66.)
by disseisor, 428.
by disseisee, 428.
on condition 400. 402. 417.
on condition precedent, 453.
of rent, and giving a power of distress, 418.
too remote, 252.
creating estates tail, 434. 440, 441, 442, 443.
qualified estates tail, 442.
to common law heir of gavelkind lands, 434.
to next heir male, requisites to his taking, 434.
of interest a person shall have in a particular tenement at the time of his death, 431.
to a *bastard* or *denizen* and his heirs, conferring an estate tail or fee, 417.
by the common law, 420.
by the statute law, 420, 421.
who capable of making a devise, 421.
of copyholds, 406. 408. (421, n. 54.) (428, n. 57.) (437, n. 72.) (438, n. 73.) 480.
of estates *pour autre vie*, (421, n. 55.) (429, n. 63.) 430.
what the subject of devise, 421. 428. 431.
of all lands, what passes, 88.
remainder accelerated by lapse of particular estate, (452, n. 10.)
to *executors* to sell, (448, n. 101. 2.) 449, 450. 455. 458.
executory, when void as too remote, (417, n. 51.) 418. 435. 444. 450, 451.
to two persons, who might not intermarry, in tail, 435. 446.
to two persons in tail, who may lawfully intermarry, 442, 446.

Devise, to infant in *ventra sa mere*, 414. 435.
failing for want of persons answering description, 436.
to children of a person living, 436. 444.
to heir of whole blood, 436.
to next of blood, 436, 437.
by what words the land will pass by a devise, 432. 437.
leaseholds do not pass, under a general devise, 437, 438.
fee passing by, 439, 440. 443, 444.
to persons as tenants in common or joint-tenants, 445, 446.
to a person generally, 439.
conferring a life estate, 439. 445.
of life estate, with a power of disposing of the fee, 439.
item in a devise, 440, 441.
to heir, in singular number, (440, n. 80.)
to persons and their children, 440.
to a person who is heir to the first devisee, may make the first devisee tenant in tail, 441.
of fee on a fee, 441.
to one paying a sum of money, otherwise it shall remain to the house, passing an estate tail, 442.
specific, as distinguished from a gift of quantity, 447.
whether the executors have an authority or an interest, 448, 449.
when heir may prevent a sale, 449.
heir presumptive, 451.
whether heir shall take by devise or descent, 444. 451, 452.
by married woman, 451.
by infant, 451.
two devises of the same thing to different persons, 451.
repugnancy in devises, 451, 452.
waiver of estate devised, 452.
by a woman sole, who afterwards marries, 452.
will may not be questioned at any time after thirty years, as to personalty, 499.
to wife, and the heirs of her late husband begotten on her, 443.
conferring a life estate, 443, 444.
to daughter, and the heirs *female* of the body of her father, a son being alive, 444.
of profits, 445.
operating by exception, 445.
for years, 445.
during minority, determines by death of infant, when, 445.
till debts are paid, (445, n. 89.)
to be equally divided, 445.
Devisee, description of, 453.
of real estate, 455. 458.
a trustee, 450.
Devisee, who may be, and by what name, 414, 415, 416.
Disability and non-claim, 31, 32, 33.
to perform a condition, 146.
to perform a covenant, 169. 172, 173.
Disagreement, 56. 70. 235.
when and how made, 285.
Disceit, writ of, barred by non-claim on a second fine, 23. 30.
Disclaimer, 452.
by one of two joint-tenants, 285.
on record, 70.
Discontinuance. see *Husband. Lease.*
how it operates with respect to a fine, 15. 23. 26. 29. 32, (33, n. 41.) 521.
to a recovery, 45.
on a warranty, 186.
Disposession, 244.
Disseisin, 14. 29. 156. 159. 160. 194. 205. 244, 259. 264. 287. 321. 334.
may cease, 105.
at election, 187.
Disseisor and disseisee, devise by, 428.
fine by, 14. 22. 26.
disseisee barred by fine of disseisor and non-claim, 29. 32.
voucher of disseisee, 42.
feoffment by disseisee on condition, 156.
warranty, 187.
confirmation, 317.
release, 326. 329.
Distress, 241.
difference between it and right of re-entry, (148, n. 66.)
for each rent, 81. see *Rent. Reservation.*
for rent devised, 439.
Distribution of intestate's effects, 463.
Divorce, 287.
Dower, (125, n. 18.) 131. 185. none of a trust, (507, n. 8.) } see *Jointure.*
Dumb man, 333.
Duress, grant by, 233. 288.
fine not voidable for, at law, 19.
what, 62.
Ecclesiastic, grant to, 101. 237.
lease by, 281.
exchange by, 297. see *Exchange.*
Ejectment may be maintained, notwithstanding a fine, if brought before all the proclamations are made, 25.
when maintainable, 90. 96. 153, 154.
Election, 13. 83. 242. 429–432. 448. 454 455. see *Exchange. Devise.*
in construction of deeds. see *Construction.*

Election, of remedy, 180.
as to operation of a deed, 83.
does away uncertainty of parcels, 250–252.
Elegit, 362. see *Statute*.
Emblements, what are, and how devisable, 431.
who entitled to, 471, 472.
how given, or granted, by tenant in tail, (244, n. 38.)
Entry. see *Re-entry*.
right of entry barred by adverse possession, 34.
right of, not grantable, 90.
to defeat a devise on condition, 417.
of lessee, restoring the seisin of the reversioner, 160. 205.
of tenant does not restore the seisin of those in remainder, when the remedy is reduced to a right of action, 304.
by attorney, 205.
or claim, when necessary, 153, 154.
tolled, 331. 334.
as a pledge, 157.
for condition broken, its effect, and whether the condition be by deed or in law, 155.
to *avoid* a fine, 25. 29. 33. 35, 36.
by issue, to avoid a fine, 26.
Enumeration of parcels restrictive, 100.
Equity. see *Contract*.
of redemption devisable, 428, 429, 430.
arising from contract, devisable, 429.
personal, 239. 243.
relief in, 7. 9. 155. (372, n. 6.) 373.
on defective conveyance, (209, n. 18.)
fine avoided in, 36.
by what consideration changed, 503.
fee in, by contract, 522.
Error. see *Recovery*.
release of a writ of, 3.
writ of, discharged, 10.
in *parcels*, 13.
fine avoided for error, 17.
writ of, must be prosecuted within twenty years, (35, n. 46.) 49.
Escape of debtor, 358.
Escheat. see *Trust*.
doctrine of, 90. 159. 232. 257. 259. 412.
lord by, 157. 159.
Escrow. see *Deed*.
what a delivery of a deed as, 58. 323.
manner, and to whom delivery made, 58.
relation to first delivery, 59.
Estate. see *Fee*. *Tail*. *Habendum*. *Limitation*. *Use*.
of what estate fine may be levied, 13, 14.
in concord of a fine, 16.
Estate pour autre vie devisable, and unless devised is assets, 108. 468. 470.
what interest passes by the word *estate*, 98.
Estoppel. see *Appendix*, *No.* 1.
doctrine of, as to parties, 6. 14. 26. 35. 239. 243, 244. 313, 314. 333.
recovery operating by, 14. 48. 53.
by indenture, 53. 81.
difference between estoppel in evidence, and in point of estate, 53.
record, to jury, 74.
none, where an interest passes, 84.
Estovers, grant of, what passes, 12. 87. 96. 105. 222. 238. 250.
Evidence. see *Deed*.
of a fine, what, 3.
parol, when admissible, 412. 414, 415.
Exception. see *Deeds*.
what, 77.
by election, 79.
difference between exception in grant by a general or specific description, 79.
may be qualified, 79.
of profits, 79.
out of an exception, 77.
what is necessary, to make it good, 77, 78.
inconsistent with grant, 78, 79.
on a grant for years, or for an estate of freehold, 78.
examples of good exceptions, and those void or repugnant, 78, 79.
restrictive, 100.
of mines, 79.
certainty of, 78.
in a release. see *Release*.
Exchange, mutual, 69. 289.
necessary word, (289, n. 3.) 294, 295.
effect of, 290.
warranty annexed to, does not extend to an assignee, (290, n. 4.) 300.
conditional, while privity continues, 125, 126. 185. 198.
under inclosure acts, 290.
who may exchange, 291. 296.
by king, 291.
by parson, 205. 233. 291. 293. (295, n. 13.) (297, n. 17.) 300.
can be only between two parties, 292, (295, n. 12.) 296.
power to exchange, 292. 300.
of what things, 292, 293, 294, 295.
of equal qualities, 292. 295, 296.
election in exchange, 293.
how made, 294, 295.
livery not necessary in exchanges, 295.
without mentioning for how long a time, 295.

Exchange cannot be of freehold for copyhold lands, 296
entry in the lifetime of the parties necessary, 297.
deed void, as an exchange may operate as a grant, 297, 298.
how an exchange shall enure, 295, 296. 298.
how and by whom it may be defeated or determined, 298, 299.
voidable, how confirmed, 299.
revokes a will, 300.
Excommunicate person, 204.
Execution. see *Deed. Fine.*
of deed, 55.
revived, 364, 365.
against what, 359, 360, 361.
against trust estates, 504.
Executor, who may make an executor, 459.
how made, 460, 461.
who may be, and by what name, 460.
husband, executor of his wife, liable to her debts, 460.
by implication, 461.
no testament without an executor, 399, 406.
debtor or creditor, 395. 485. 498.
effect of his assignment, 303.
surrender to, 309.
of a void will, 492, 493.
his *power* over the *personalty*, 454, (455, n. 14.) (459, n. 22.)
of executor, represents first testator, 461, 462. 464, 465.
of administrator, 465, 466.
renunciation of some, 461. 464, 465, 466, 467.
of all, 467.
death of executor intestate, 467.
what acceptance of office of, 466, 467, 468.
intestacy, by refusal of all to act, 467.
what he shall take, 468, 469–473.
his recovery of the will, goods, &c. 481, 482.
what acts he may do before probate, 416. 474, 475. 477. 499.
his power over the assets, 475.
retaining his own debts, 475.
infant, 460. 475, 476. 490.
married woman executrix, 476.
his duty, 476, 477.
in order of paying debts, (477, n. 53.) 478, 479, 480.
in application of testator's property, (477, n. 51.) 478, 479.
how charged, to pay legacies, 480.
Executor, account of, 480.
actions maintainable by or against him, and by what name, 481–484.
against each other, 485.
when charged with *devastavit*, 482, 483. 485, 486.
one of several, when charged, (484, n. 75.) 485, 486.
account and payment of tithes by executor, 483.
individual authority of executors and administrators, (233, n. 18.) 484, 485. 487.
plea of one of several executors, 485.
legatee, 454. 456.
legatee, who refuses to act, 453. 456.
may be entitled to a legacy given to his testator, 452, 453, (454, n. 13.)
residuary legatee, 485. 487.
own property liable, by *devastavit*, 486. 494–496.
proceedings in, 495.
de son tort, or not, 487, 488–490.
obtaining letters of administration, 498.
creditor executor *de son tort*, 489.
purchaser by covin of testator's goods, 487, 488.
specialty debts, what notice of, 494.
his authority may be limited, 401.
office of, 401.
Extendi facias, 356, 357.
Extent of crown, 357.
Extinguishment. see *Rent.*
none of rent, by fine, operating as a further assurance, 35.
or grant, 6. 85.
by surrender, 286.
of rent, by release, 325.
of uses, 523.
of power, 525.

Farm, what passes by this word, 93. 437, 438.
Fee simple, passing by fine, (4, n. 15.)
remaining in the conusee of a fine, 17.
subject to a condition or executory devise, 22.
cannot pass in a deed without the word heirs, 86. 101, 102, 103.
qualified, 101.
commencing immediately, or not, 102. 154. see *Livery.*
what words will create, in a will, 440, 441.
on a fee, 417.
alternate fees, 417.
determinable, as distinguished from an estate tail, 418.
Fee Tail. see *Tail.*
created by will, 440, 441.

Felony, differs from treason, 159. 412.

Feme Covert. see *Husband*.
fine by, 7.
as if sole, 7.
her examination, 9. (39, n. 65.)
what acts by her valid, 41. 205. 232. 235.
executrix, 460. 476.
her appointment of an executor, 459. 473.
feoffment by, 289.

Feoffees. see *Use*.

Feoffment. see *Livery*.
definition of, 2. 203.
how and of what made, 203. 208.
effect of this assurance, its peculiar efficacy, and how it differs from a fine, &c. 203, 204. 210.
persons capable of making or taking advantage of a feoffment, 204.
of what things, 206. 214.
with consent of *lessee*, or not, 206, (207, n. 15.) 213, 214. 221.
working a forfeiture, 207. 210. 213. 220.
by husband seised in right of his wife, 208.
enuring as a grant, 309.
by feme covert, 289.
to two with livery to one, 289.
by tenant for life, 188.
and remainder-man, 84.
without livery, 283.
operating as a covenant to stand seised, 514.

Feræ natura animals, (241, n. 33.)

Ferm, 93.

Fine, import of the word, 2.
definition of a fine, 2.
suit supposed, 2.
fiction of a fine, 3.
writ of fine, 3.
voidable, 3. 18, 19.
operating as a conveyance, 3. 6. 21. 30. 35.
avoided for error, 3.
is a common assurance, 3. 6.
the parts of a fine, 3.
engrossing of the fine, 3.
evidence of fine, what, 3.
different sorts of fines, 3. 17.
fine with proclamations, the best sort, 3, 4.
how made, 5, 6.
fine executed or executory, 4.
heir may have a fine proclaimed, (3, n. 13.) (6, n. 31.)
Fine, may pass a fee without the word heirs, (4, n. 15.) 19.
changing the course of descent, 4, 5.
operating as a surrender, 4. 18.
grant, 4. 18.
different forms of fines, 4.
mode and order of levying a fine, 5.
different writs for levying a fine, 5, 6.
person to take conusance of a fine, and his office, 5.
how taken and returned, 5. 9.
composition for licence, 5.
enrolment of, 5.
nature and antiquity of fine, 6.
effect of a fine, 6.
different operations of a fine, 6. 20.
who may, and who may not levy a fine, 6, 7.
forfeiture and subsequent fine, 6.
who may take or not by fine, 7, 8.
before whom to be levied, 8.
whose rights are saved, 23.
in Westminster, of lands in the colonies, 74.
by whom to be recorded, 9.
where to be levied, 10.
in court of *ancient* demesne, 10. 23. 30.
in county palatine, 10.
in Wales, 10.
void, 9, 10. 18. 19.
of what parcels, and by *what* description, 10, 11, 12, 13. see *Rent*.
names by which things may pass in fines, 11, 12, 13.
what estate the party to a fine must have, 13.
of tenant for life, 14.
of disseisee or disseisor, 14. 244.
of joint-tenant, &c. (14, n. 73.)
of head of corporation, 14.
of husband of his wife's lands, 15. (28, n. 29.)
by donee of king for services performed, 15, 28.
of wife of lands *ex prov. viri*, 15. (28, n. 26.)
of lands limited by act of parliament, without a power of alienation, 15.
by several vendors, 19.
by one of several co-heirs, 26.
tenants in tail, with cross-remainders in tail, 28.
by feme covert, 232. see *Feme*.
concord of a fine. see *Concord*.
the estate must be limited to the heirs of him only to whom the right is acknowledged, 15. 35.
warranties may be contained in fines, 18.
fine good in part, and void in part, 18.
void limitations in fines, 18.
order of levying a fine, 18.
death of party to a fine, 18.

Fine of lands in several counties, 19.
uses of fines. see *Uses.*
different operation between fines at the common law, and under the statute, 20. 30.
good against wife to bar dower, 22. 28. 32.
of lands subject to a condition, 22.
bars what estates, (22, n. 7, 8.) 23. 25.
when a fine divests the seisin, 23, 24. 29. 35.
when effectual against heirs or privies in tail, 24. 26. 27.
by husband alone, when he and his wife are tenants in special tail, 24, 25. 28, 29.
by husband alone, after he is disseised, 24.
how avoided, and by whom, 25. 33. 35, 36.
does not bar remainders, except by non-claim, 27. 33, 34.
conveying a base fee, 29.
in Westminster, of lands in ancient demesne, 10. 23. 30.
by felon or traitor, good against issue, 30.
time of *claim* on a fine with proclamations, 30. 32, 33.
against mortgagor, 32.
operating as a confirmation, 35.
a release, 35.
without a precedent agreement, how it enures, 35.
sur release does not extinguish rent or condition, 35.
fine and deed of uses operating as an execution of a *power*, 35.
reversal of fine, (35, n. 45.)
Fish, (89, n. 86.)
Fishing, 12. 96. 100.
Fixtures, 469, 470.
Foldage, 12.
Foldcourse, 93.
Foot of fine, and form of, 3. 5.
Forest, 96.
Forfeiture, by fine of tenant for life, 14.
to - by his acceptance, 14.
none of equitable estate, (14, n. 66.)
none, without divesting the seisin, 14. 19.
of entail, by treason, 28.
by recovery, 44. 84.
remainder-man barred of his right of entry, arising from, 34.
by condition, 148.
of goods and chattels by suicide, (404, n. 16.)
effect on derivative estates, (147, n. 64.) 149. 155.
Formedon, when and where maintainable, (32, n. 34. 39.) (33, n. 41.)
Formedon, by remainder-man, 34.
Franchise, (126, n. 21.) 231. 240.
Frankalmoign, (428, n. 57.)
Frank-marriage, (103, n. 12.) 237. 287.
Frank pledge, 11.
Fraud, 223.
fine by, (23, n. 13.) 36.
in obtaining a will, 405.
Fraudulent deed against purchaser, 63, (67, n. 51.) 68.
against creditors, 66.
lord, 67.
Freehold. see *Livery.*
before entry, or not, 26. 117. 329.
limited *in futuro*, void, 79. 219. 251. 288.
release to person having, 328.
of right to person having, 329.
how passed, 105.
cannot cease and revive, 288.
From, how construed, (108, n. 25.)
Funeral. see *Executor.*
expences, (476, n. 48.)

Gavelkind, will of lands in, (403, n. 11.) (406, n. 21.) (414, n. 42.)
fines of, and limitation in the concord of fines of, 15.
common law heir taking lands in, by gift, 434.
Gift, 203. 227. see *Bequest.*
of what, 227.
amounting to a release, 244.
void, 129.
Goods. see *Grant.*
Good-will, 143.
Grange, grant of, 93.
Grant of estate reserving a portion of it, 79.
by or to several, some of whom are incapable, 82.
may operate as a release, 82. 85, 86.
varies from a release, 85, 86.
by disseisor, and confirmation by disseisee, 85.
of wood, with licence to cut, 86.
when conditional by construction, 87. 124, 125, 126.
of all lands, 88. 99. 100.
or devise to several as a class of persons, 71. 82.
as tenants in common, 71. 82.
of profits with livery, 97.
of deeds, 97.
of goods, 90. 97, 98.
in particular place, 98.
of rent by two, seised severally, 98.
during two lives, 98.
of rent generally, 107. 110.

Grant of reversion by release, 323.
by tenant for life, 107.
mis-recital in, 77.
of office, 231. 282. 312.
of advowson, 282.
incidents not grantable without their principal, 240.
of all estate 98.
how made, 228.
of what, 228. 238. 240, 241.
its operation, (228, n. 1.) 229. 243.
requisites to a grant, 229.
of what and how made, 229, 230, 231, and by whom, 231, 232.
remainder cannot be granted without deed, 229, 230.
things not grantable except in equity, 231. 240, 241, 242, 243, 244.
declared necessary to what things, 228. 231.
what may be contained in a grant, 231.
by tenant in tail of advowson in gross, 509.
by what words, (232, n. 11.) 514.
what estate is necessary for the grant, 242, 243.
grant, how it shall enure, 252.
of several, how it enures, 243.
grant of distinct or entire estates, 243.
of goods of master, 243, 244.
by disseisee, 244.
two grants of the same thing, 245.
name by which things will pass, 246, 247.
superadded description, 247, 248, 249, 250.
void grant, 252. 285.
operating as a discharge or release, 253.
construction of, (253, n. 47.)
difference between the grant of the services and of a rent, 258.
of residue of a term, 162.
good, 286.

Grantee, bound by acceptance, 53.
name of, supplied, 88.
of king, 105.
some incapable, 237.
who may be, or not, 209. 235, 236.
of tenant in tail, 320.
two persons grantees of the same thing, 220.
of reversion taking advantage of condition, 176.

Grantor, his name omitted, 53.
what grants he may avoid, 287.
who may be, 232.

Guardian, 241.

Habendum explained, 74, 75.
its office, 74.

Habendum, restrictive, 102, 103.
repugnant and void, or not, 108. 113, 114.
passing fee in a deed, 101.
term from a future day, 114.
and premises varying, 74. 76. 101. 102. 106. 113. 510.
name omitted in, 75.
to person not named in the premises, (74, n. 61.) 237.
qualifying the premises, 220.
for years generally, 76.
parcels in, 74.

Habere facias seisinam, to a fine, 4.
recovery, 40.

Hamlets, 438.

Hawks, 226.

Heir, barred by non-claim of his ancestor, 22.
bound by fine, though an infant, 25.
in tail, may be barred by non-claim, though not affected as heir in tail for want of privity, 24. 26. 33.
may take as general heir, though barred as heir in tail, 24. 28, 29.
heir in second degree, when entitled to his five years, 33.
heir, his time for claim, 33.
one heir in tail barred, all are barred, 33.
heir in tail bound by estoppel, *contra* to the general rule, 48. 53.
right heirs, 102.
heirs of body of son's father, 103.
in singular number, 104. 106.
incapable of taking, 105.
trustee for devisee, (123, n. 12.)
when purchasers, 16. 46. 68, 69. 103. 105, 106. 188. 189. 192.
cannot take chattel in succession, (446, n. 92.)
qualified to heirs of the body, 417.
disseisor of devisee, 455. 458.
disseisor of his father, 428.
disseised by devisee, 455.
when bound by his ancestor's obligation or deed, 80. 178. 482.
when entitled to the benefit of a covenant, 511. 514.
devise to next heir male, must be both a male and general heir, 434.
of person living, 235.
claiming under an entail, 171. 178.
when entitled to condition, 150.
covenant, 175.

Heir-looms, 76. 432.

Hereditament, in fine, 11. 91.

Hermaphrodite, 236.

His, this word supplied, 101.

Homage, ancestral, 196.

Honor, 92.

House, passes by grant of land, 99.
limitation to person's house conferring an estate tail. see *Tail. Devise.*

Houseboot, grant of, 164. 169.

Hundred, 231.

Husband. see *Feme.*
and wife, tenants in tail by entireties, 112.
effect of fine or recovery of husband, 112.
in special tail, 112.
what acts and deeds, by one or both, good, 180.
conveyance to his wife, (205, n. 10.)
his power over his wife's chattels, (432, n. 67, 68.) 454. 473.
purchaser of his wife's property by settlement, (402, n. 8.)
of rent to husband and wife, 81.
leases by wife, &c. 280.
release of, 333.

Idiot, as to the validity of his acts, 7. 56. 204.

Impediments. see *Fine. Non-claim.*
to operation of a fine by non-claim. 33.

Implication, fee arising by, 79. 439.
fee tail, 435. 441. 443, 444. 516.
life estate by, 144. (444, n. 86.)

Incident. see *Manor.*
what, 79. 89. 230. 240.
what pass, as to a manor, 421.
not devisable without the principal, 432.

Indenture. see *Deed.*

Indorsement, 69.

Infancy, how tried, 54.

Infant. see *Recovery. Heir.*
acts of, 217. 232. (233, n. 16.) 235.
fine by, 7.
when mortgagee, 7.
grant by or to, (56. n. 23.) 232.
exchange by, 291.
deed by, 60.
en ventre sa mere devisee, 414.
executor, 475.
will of, 403.
lease of, 268.

Inrolment. see *Bargain and Sale.*
freehold passing by or not, 54. 168. 507.
within what time, 223.
relates to what time, 226. 511.
of deeds, 270.
when necessary, 513.

Insane, 217. 233. 235.

Institution to a benefice on condition, 119.

Instrument, sealed and delivered, amounting to a deed, 224.

Intent, 83. 88. see *Construction.*

Interesse termini. see *Term.*

Interlining, 68. 285.

Interest. see *Annuity. Usury.*

Intestacy. see *Administration.*
when, 399.
by refusal of all the executors of a will to act, 467.

Intrusion, 196.

Inventory, (476, n. 49.) 480.

Isle, 92.

Issue. see *Heir. Estoppel.*
in tail, bound by fine, with proclamations, 16. 25. 27.
recovery suffered by issue in tail, after a fine levied, 26.
may have plea on a fine of *sur* release only, 36.
limitation, (103, n. 13.)
not bound by release of tenant in tail, 202.

Item, this word in a devise, 440, 441.

Joint. see *Covenant.*
obligees, 376.

Joint-tenant, as distinguished from tenant in common, 473.
effect of their conveyance, 84. 205. 208.
fines by, 14.
cannot surrender but may release to each other, 304. 326.
feoffment by one of several, 208.
confirmation by one to another, 314.
no devisable interest, except in personal chattels. see *Devise.*

Joint estate, how severed or merged, 14.
for lives with several inheritances, 107. 112.
under a devise, 440.

Jointure, created by fine, 16.
bar to dower, 29.

Judgment, creditor gaining priority by, 478–480.
cannot be confessed for creditors generally, 480.
must be docketted, 479.
on a formedon, 192. 198.

Kindred, devise to, 415.

King. see *Crown.*
doctrine, relating to, 205. 210. 228. 286.
fine by, 28.
fraudulent conveyance to him, 65.

King, silver to, in fine, 3.
gift to, 101.
grantee of, 105.
demise of, 387.
debt to, 447.
prerogative, 208.
cannot be disseised, 336.
Knight's fee, 92.
Knight's service *in capite*, the restraint it imposed on the devise of lands of socage tenure, 420. 422, 423.
abolished, 423.

Land, in fines, confined to arable lands, 13.
what passes by this word, 12. 90. 92.
grant of. see *Grant*.
in possession, 12.
in reversion, 12.
security for money, 101. see *Mortgage*.
money to be laid out in, (526, n. 37.)
in devise, 420. (428, n. 57.)
contracted for, paid out of personal estate, 429, 437.
Lease. see *Term*.
may be by the *concord* of a fine, 16.
with loan of money, 63.
forged, 65.
limited to heirs or successors, 76. 86. 271. 469, 470.
by two several tenants, 84.
commencement of, 72.
power to, 72.
when leases pass under denomination of lands, 92.
what pass by word leases, 98.
with collateral determination, 107, 108. 110. 111.
concurrent, 109.
from three years to three years, during a life, 111.
for more than three years, without writing, void, 114.
how made, (267, n. 1.)
at will, 105. 267. (283, n. 33.)
requisites to a good lease, 267.
of the certainty of the commencement, continuance, and determination, 267. 270. 272, 273, 274, 275.
acceptance, 267, 268.
rent reserved on, 268.
who may lease, 268, 269.
of what, 268. 278.
by tenant in tail, (32, n. 40.) 268, 269. 277, 278. 284.
being a discontinuance, 268. 280.
under power, 268, (269, n. 10 & 11.) 270. 278.
livery not necessary to, 279.
forfeiture, 268.
Lease, infant's, (268, n. 7.)
surrender of, 227. (267, n. 7.) 269. (275, n. 20.)
in wife as executrix, (269, n. 9.)
by attorney, 270.
limitation of, 270.
reversionary, 270, 271. 274. 276.
residue of to one after death of another, 271. 274.
covenant, amounting to a lease, 271, (272, n. 15.)
what amounts to a lease or contract, and what a good lease, 271, 272, 273, 274, 275.
for so many years as a person shall name, (273, n. 18.) 274.
may cease for a time, and revive again, when for years, 275. 288.
operating by estoppel, (276, n. 21.)
by coparceners in tail, on partition, 279.
affirmed by acceptance of rent, 280; not, 284.
confirmed by recovery, 280. 284.
by husband seised in right of his wife, 280, 281.
by parson, 281, 282, 283, 284.
by ecclesiastical persons, (278, n. 23.) (279, n. 23.) 281, 282.
by bishop, 281, 282.
successor bound by, 282, 283.
of office, 282.
good against lessor, though void as to successors, &c. 283, 284.
by colleges, 283.
running, 271. (283, n. 33.)
void or voidable, 284, 285, 286.
entry, where necessary to avoid a lease, 284.
of personal chattel, 419.
of sheep, 245.
by bargainee, before enrolment, 227.
in remainder, 252.
by husband, of wife's lands, 153.
conveyance by lease and release, (221, n. 36.)
Legacy. see *Bequest*. *Assent*.
what, 400.
charged on land, 453.
on mixed fund, 453.
void, 453.
vested and transmissible, 452, 453, 454 (454, n. 12.)
by assent, 459.
for uncertain period, 420.
time of payment, 480. (488, n. 96.)
interest on, (488, n. 96.)
how paid, 475.
executor taking legacy of his testator. see *Executor*.
of quantity, 430, 433.
lapsed, 454.

Legatee, abatement of, 477.
remedy of, against executor, 449. 458, (459, n. 21.)
his mode of recovering his legacy, 430. 459.
claiming under the will of a married woman, 403.
witness to a will, (409, n. 29.)
specific, 480.
Lessee. see *Feoffment*.
grant by, to one of two joint lessors, 84. 105. 110.
livery by him, 105. 110.
restrained from assigning, (123, n. 14.)
before entry, 269.
when and how barred by fine, 22.
Lessor. see *Lease*.
Life. see *Estate*.
estate for life of another, (108, n. 24.)
Limitation. see *Entry*. *Release*. *Confirmation*.
void. 71.
conditional, 71. 81. 117. 121. 146. 150, 151.
conditional on an use, 227.
by reference, 101. 104.
to a person not a party to the deed, 108. 112.
examples of words of limitation, 102.
to husband and wife, and their heirs, 102. 112.
effect of fine or recovery of either, 112.
to husband and wife, and a third person, 111.
to two who may not intermarry, and the heirs of their bodies, 111, (112, n. 28.)
to four, viz. to two husbands and their wives, 112.
to a man and two women, and the heirs of their bodies, 112.
of fee tail, (102, n. 10.) 103. 106.
of fee tail to husband and wife, 102, 103. see *Husband* and *Tail*.
to a man and woman before marriage, 103.
passing life estate, 105. 107. 110.
words of, 125.
estate, once determined under a limitation, cannot revive, 140.
Lis pendens, 478.
Livery. see *Feoffment*.
freehold does not pass till livery, 54. 76. 110, 111. 128. 148. 209.
by infant, 57.
presumed, 82. 229.
how it shall enure, 84. 218. 220. 270. 273.
defeated, 111.
Livery, repugnant and void, 113.
when to be made, 212. 217.
in what place, 212, 213.
when necessary, or not, 210, 211.
sufficient, 213. 215. 218.
insufficient, 215, 216.
in view, 216, 217.
in deed, 217.
several, when necessary, 207.
form of, 209, 210. 214, 215.
operation of, 210.
how made, 211, 212. 219.
by and to whom made, 211–221.
Living, then, 382.
London, bishop of, his jurisdiction, 463.
lands in, how bargained and sold, 222.
Lunatic, his acts voidable, 232, 233.

Madman, 204.
Maintenance, 164.
Manor, passing in a deed, 90. 92.
in a fine, 11. 13.
comprehends what, 90. 92.
doctrine relating to, (213, n. 25.) 245. (246, n. 42.) 248, 249.
escheated lands, part of, 439.
extending into different parishes, 13.
severance of wood from, 100.
Marriage. see *Condition*.
settlement, 67.
condition, in restraint of, 132.
Meadow, 12. 94.
Menace, 61.
Merger of terms, (347, n. 31.)
doctrine of, 109. 112. 301. 309. 497.
temporary, 172.
not prevented by an *interesse termini*, 276.
Merchant, statute. see *Statute*.
Messuage, grant of, 12. 94.
Mill, 164.
Mines, 79. 89, 90. 96.
ejectment lies for, 90; *quære*, 96.
trespass lies in, 96.
licence to work, 96.
Minority, 35. see *Administrator*.
Misnomer, in fine, 8.
in a deed, 233. 245. 373.
in a will, 416.
Mis-reading deed, 56. 71.
Mis-recital, 109. 397.
Mistake, in sealing, 50.
in name of a parish, 438.
Mitter l'estate, release on condition, 323. 327.

Modus, 79.
Moiety, in fine, 12.
moieties, 438.
Money. see *Obligation*.
to be laid out in land, (10, n. 52.) (526, n. 37.)
to be laid out in land and settled in tail; tenant in tail when entitled to the money, (10, n. 52.)
procuration, (63, n. 44.)
current, what, (136, n. 49.)
time of day for payment, 136.
on mortgage, (140, n. 55.) 141. 144.
Monk, 71. 304. 435.
grant to, 101.
Mordancestor, assize of, 33.
Mortgage. see *Money*. *Equity*.
what, (429, n. 62.)
by husband and wife of wife's lands without fine, (15, n. 76.)
cannot be usurious, 62.
Mortgagor, when bound by fine, 32.
his possession of personal chattels, fraudulent, 67.
Mortmain, 126. (416, n. 48.)
Mute, standing persons, (404, n. 15.)

Name, mistake in name of grantor or grantee, 8, 9. 233, 234. 237.
uncertainty in name or description, 237. 248. 252. 460.
fine in name of another, (7, n. 42.)
Naturalization, 235.
Non-claim. see *Proclamation*. *Heir*.
different periods of claim on a fine (13, n. 64.) 15. 19. 21, 22, 23. 29–33.
none on a recovery, 48.
Non est factum, plea of, general, 71.
special, 73.
Note of a fine, 3.
form of note, 5.
Notice. see *Possession*.
what, 65. 383. 504. (507, n. 8.)
of specialty. see *Executor* and *Specialty*.
to tenant of the title of the reversioner, 152.
Nuncupative will, 399. (407, n. 22.) (408, n. 25.)

Obligation, definition of, 367.
different sorts of, 367.
how made, 367, 368. 375.
in the third person, 55.
to one in trust for another, 369. 394.
money when payable, 369. (376, n. 13.) 377. (385, n. 19.) 386. 388.
heir when bound by, 369. 376.
Obligation, void for uncertainty, 369, 370.
of its date, (370, n. 4.)
void as against law, &c. 370, 371, 372, (373, n. 10.) 374, 375. 395.
condition of a bond how made, and whether good or not, 370, 371, (372, n. 5.) 373.
not to sell land, 371.
good, and condition void, 372, 373.
where both obligation and condition void, 372.
sureties, 369. 398.
to sheriff for appearance of a prisoner, 374, 375.
obligation, construction of, 375, 376, 377.
joint and several, 375, and proceedings in, 375, 376.
executors bound without being named, 376.
executors take advantage of, 376.
to whom, and at what place, to be performed, 378, 379.
for performance of covenants, 379. 392. 394.
of performance or breach of a condition of an obligation, or not, 379 to 391.
who bound to do the first act, 381, 382.
condition to do one of two things, one of which becomes impossible, 382. 384. 393.
condition in the copulative, 383, 384.
acceptance, dispensation of an obligation, or not, 383, 384, 385, 386, 387.
when broken, 388, 389, 390, 391, 392. 394.
how discharged, 393, 394, 395.
Obligees, joint, 376.
Occupant, special, 108.
Occupancy, 108. 329.
Office, 90. 211. 331. 239. 469. see *Lease*.
on condition, 118. 126. 132.
Option of purchase, 169.
Or construed *and*, or not, 105. 114. 415. 443.
Ordinary, his duty in granting probate, &c. 480. 481.
Outlawry, 232. 235.
fine, by person, after outlawry, 7.
feoffment, 208.
Oxgang, 93.

Papist, 230.
Paraphernalia, 402. (432, n. 68.) (469, n. 42.)
Parcels, in fines amended, if erroneous, 13.
mistake in description of, 77.
certainty in description, 77.
restrictive words in, 99, 100.
exception in, 100.
by election, 250. 252.
Parishioners, 237. see *Devise*.

Park, 88. 97.
Parson, 233. 288. see *Exchange.*
Parsonage, 12. 94. see *Rectory.*
Pasture, 12. 94.
Partition. see *Coparceners.*
how made, 185. 198. 206. 230.
Partners, (431, n. 66.)
Patentee, 177. 180.
Payment, in bad coin, 142.
covenous, 143.
in what money, (387, n. 20.)
of mortgage or other money, and by whom, (140, n. 55.) 141. 144.
Permutatio, 295.
Perpetuities, 414. 417. see *Devise. Limitation.*
personal act cannot be a perpetuity, 516.
Plate, 419. 447.
Plea, to avoid a fine, 26. 36.
who may have it, (36, n. 51.)
of outlawry, 498.
of *plene administravit*, 489.
ne unques executor, 466, 467. 493.
by or against an executor, 493, 494, 495.
of release, 338.
in abatement, 376.
non est factum, 74.
special, 74.
Poll. see *Deed.*
Possession, 245.
notice of title, 504. (507, n. 81.)
Possibilities, grant of, void, 239.
fine of, 14.
devisable, 428. 431.
of a term, mode of avoiding, 239.
release of, (321, 322, n. 4.) 328.
of reverter, 101.
Posthumous. see *Child.*
child, entitled to remainder, 235.
Pour autre vie, estate, 455. 458. see *Life. Devise.*
Power of leasing, 126. 269.
in covenant to stand seised to uses, void, unless, &c. 270. 530.
of revocation may be released, 321. 323. 530, 531.
Præcipe, what, 189.
tenant to, &c. (42, n. 80.) 189. see *Recovery. Appendix, No.* 1.
Premises. see *Deed. Habendum.*
office of, 74.
Prerogative, 235. see *King. Crown. Recovery.*
Prerogative, grant of tithes, reserving rent, 80.
condition void against, 129. 152.
reversion of office grantable by, 239.
in obligation, 337. 342. 354. see *Obligation.*
Presentation. see *Advowson. Rectory.*
who entitled to, 432. 469. 471.
next, grantable before *vacancy*, 241. 245.
when assets, 496.
Prisoner, not bailable, 374, 375.
Privilege, gone by merger or enlargement, 315. 317.
Privity, in blood and estate, 21. 26. 30.
necessary in a release, 330.
Pro, 125.
Probate. see *Executor.*
what, 477. 408, 409. 413. 416. 498, 499.
per testes, 499.
necessary to what acts, 499.
two probates sometimes necessary, 500.
by custom, 500.
of nuncupative will, (500, n. 96.)
Proclamations of a fine, how proved, and necessity of proof, 3.
issue in tail bound by, 16.
may be made after death of tenant in tail, 25. 27.
their object, 204.
Procreation, words of, omitted, 102. 104.
Profits, 97. (457, n. 17.) 458.
till sale, (450, n. 7.)
Proviso, 122, 123.
Purchase, void as fraudulent, 64.
Purchaser. see *Heir.*
may avoid a fraudulent deed, 66.
trustee, or not, 527.
of trust estate, 528, 529.

Queen, fine by, (7, n. 41.)
her privilege, (232, n. 14.)

Rasure, 55. 68. 71. 285.
Reading, 56.
Rebuild, covenant to, 179.
Rebutter, (181, n. 2.) (182, n. 6.) 199. 202. 290. 331. see *Warranty.*
Recital, what, 74. 76.
when evidence, (76, n. 62.)
material, in exposition of deeds, 76.
when necessary in the grant of the king, 76.
necessity of accuracy, (77, n. 64.)
grant good, notwithstanding mis-recital, 77.

Recital.—Mis-recital, and relief in equity, 77.
lease to commence after the determination of a former lease, mis-recited, 77.
grant of reversion on a lease mis-recited, 77.
effect of mis-recital, in case of the king, 77.
when immaterial, 246. 248, 249.
Recognizance. see *Statute.*
Recovery of land does not bar entail in rent, *contra* by fine, 11, 12. 25.
may be suffered by issue, after a fine levied, 26. 48.
by wife, surviving her husband, who was special tenant in tail with her, 29.
operative, although the fine making the tenant to the writ of entry be reversed, 35. *Appendix, No.* 1.
what, 37.
different sorts of, 37.
origin of, (37, n. 55.)
parties to, 37.
voucher on, and different kinds of, 37, 38, 39.
proceedings in a recovery, 37, 38.
of appearance in person, or by attorney, 37.
imparlance, 38.
default, 38.
recompense, 38, 39.
common assurance, 38.
recoveror, what estate he acquires, 38.
why a bar to those in remainder, (39, n. 61.)
in lands of ancient demesne, and copyholds by attorney, 39.
warrants of attorney for suffering a recovery, how acknowledged and taken, (39, n. 63.)
returns on, 40.
entry on record, 40.
superior to a fine, 41.
requisites to a good recovery, 41.
good, as a conveyance, though not as a bar, 41. 48, (49, n. 4.)
avoided, for covin, 40.
of special use, in barring remainders, (40, n. 70. 72.) 41.
by whom suffered, 41. (n. 76, 77.)
of copyholds, and equitable estates, (41, n. 79.)
will bar a contingent remainder, (40, n. 71.) 45.
remainders not barred by recovery, 41.
tenant to the *præcipe*, (42, n. 80, 81.) see *Appendix, No.* 1.
equitable recovery, 42.
recovery of reversion, how suffered, (42, n. 82.
Recovery, statutory provisions for the better suffering recoveries, (42, n. 82.)
mode of preserving powers, contingent remainders, &c. annexed to life-estate on suffering a recovery, 42.
by tenant in tail in possession, 42.
entail, for services performed of the gift of the crown, not barrable, 42, 43.
entail of the gift of a subject, remainder to the *king*, the entail may be barred, though the king's remainder will be saved, 43.
by woman *ex provisione viri*, 43.
with consent of tenant in tail, 189.
by tenant for life, and remainder-man, 44.
tenant in possession and tenant in remainder joint-tenants to the *præcipe*, recovery would be void, 44.
by ecclesiastical persons, 44.
entail discontinued, barred by voucher on recovery, 44.
effect of recovery, and what estates are barred by it, 41. 45.
operates as a confirmation, 41. 47. 287.
examples of recoveries, with single and double voucher, and their different effects, 45, 46, 47.
by husband, tenant in tail, by entireties, 46, (47, n. 98.)
by husband, seised as joint-tenant with his wife, 46.
wife bound by voucher, 46, 47.
by one of two joint-tenants for life, remainder in tail to one of them, 47.
divers entails, one may be barred and another not, 47.
by mortgagee, 47.
by tenant in fee, 47.
effect of, as to executory devise, 47, 48.
by tenant of determinable fee, 47.
by mortgagee in tail, 47.
by one in the name of another, 48, (49, n. 4.)
recoverors, their remedies for rent, &c. 48.
falsified or avoided, on what account, 40. 48, 49.
may be avoided in part only, 49.
by whom to be avoided, 49.
may be avoided by a party, when, (49, n. 7.)
who cannot *falsify*, 49.
how falsified, 49.
party having the right may sometimes enter, 49.
Rectory. see *Advowson. Presentation.*
fine of, 12.
grant of, what passes, 93. 213. 230.
lies in livery, 94.
lease of, 94.

Redemption. see *Equity*.
Re-entry. see *Condition*.
condition of good, 72. 117, 118. 121. 125. 130. 137. 139.
difference between condition of, and distress, (148, n. 66.)
waived by acceptance of rent, 139. 147.
Re-extent, 257. 362, 363.
Reference, limitation by, 101. 104.
Refusal and tender, and refusal to perform and performance in due time afterwards, difference between, 147.
Registration, (116, n. 34.)
Relations, 415.
power to appoint amongst, 415.
Release of demands, 72.
presumed, 73.
on condition, 119.
definition of, 320.
operates on what, (320, n. 1.) 321, 322. 328. (334, n. 10, 11.)
how made, (320, n. 2.) 323, 324. 327.
express, 320.
implied, 320.
different operations of, 321. 346, 347.
does not operate on future rights, 321, 322.
how effected, 323.
when condition or defeasance may be annexed to a release, 323.
of a condition, 323.
of personal action, 323.
may be of part, 323.
of right or action, 323.
may operate as a surrender, 324, 325. 327.
may operate as a grant, 325, 326, 327.
may operate as a lease and release, 324.
requisites to the operation of a release in enlargement, 324, 325, 326.
privity, 324, 325, 326.
words of limitation, when necessary to a release, 327.
joint-tenants, their conveyance to each other is by release, (327, n. 5.) 328. 346.
by tenants in common, 327.
feoffment without livery operates as a release, 327.
to particular tenant enures to him in remainder, 328.
of person not having any right, ineffectual: *contra*, person having a possibility coupled with an interest, 328. 331. 333.
of right, and of the estate of the releasee, 329, 330, 331.
of right, privity not necessary to, 330. 332.
of right, by what words, 331.
seigniory extinguished by, 331. 334.
profit *apprendre*, what necessary to a release of, 332.
Release and confirmation, difference between, 332, 333.
of a condition, 332.
of warranty, 333. see *Warranty*.
of infant, 333.
of releases in law, 334.
by executor, 334, 335.
of debt or promise, 334, 335.
by one of two obligees, &c. 335.
to one of two obligees, 71.
how it enures, 335, 336.
to one of two disseisors, and distinctions, 336, 337, 338.
of disseisee to bargainor, 227.
by termor to disseisors, 336.
operating as an extinguishment, 328. 337, 338. 340. 344, 345.
to one of two tenants in common, 337. 344.
to one of two joint and several obligees, 71. 337. 344.
of actions, (334, n. 15.) 336. 338, 339, 340, 341. 345.
of right, 102. 307. 339, 340.
cannot be on a condition subsequent, 397, 398.
of fealty, 340.
of entry, 340.
of debts, 341.
of duties, 342.
of suits, 342.
of covenants, (342, n. 25.)
of statutes, 342. 345.
of errors, 342, 343.
of warranties, 342, 343.
of legacies, &c. 342, 343.
by husband, of wife's future legacy or debt, 322. (334, n. 10, 11.)
of promise, (343, n. 26.) 344, 345.
of different causes of action, &c. 343, 344.
exception in, 345.
of personal actions, 341 to 345.
of right or personal action for what time, 346.
of seigniory, 346, 347.
of rent, 347.
of tenant in tail, 347.
Remainder. see *Feoffment*. *Fine*.
destroyed by fine or recovery, 28. 43,
devisable, 419.
accelerated, 17. 435.
by death, (452, n. 10.)
void, the particular estate not arising, 435.
limited, on a condition to defeat a particular estate, 137.
in a bargain and sale, 227.
to a stranger, in a covenant to stand seised, 514. 523.
cross, arising by implication, 88. 435. 443.

Remainder, contingent, 211. 217. 235–239.
see *Use*.
in tail, 105.
as distinguished from estates to be enlarged on condition, 128.
supported by right of entry, 128. see *Use*.
void for uncertainty, 129.
Remainder-man, his acts operate to the benefit of the particular tenant, and *vice versâ*, 29.
Remitter, issue remitted, (156, n. 82.)
doctrine of, 286. 402.
Render. see *Fine*.
in a fine, when good, 17.
the first render must be to a party to the fine, 17.
rent may be rendered to a party to the fine, 17.
what necessary to bar an entail in rent, 25.
to limit a good rent, 25.
and concord, how construed, 19.
changing course of descent, 19.
Renewal, 303.
Rent, fine of, 11. 13.
entail in, how barred, 11, 12. 25. 92. 105.
fine of *land*, bars rent, 25. 92.
in gross, 78.
grant of, by two severally seised, 98. 116.
reservation to two severally seised, 98.
to one of two severally seised, 116.
reserved to one of two joint-lessors by deed-poll, 81. 116.
grant of, during two lives, 98.
granted on partition, 81. 101.
to a stranger, with a condition of re-entry to feoffor on non-payment, 127. 137.
reserved on a lease under a power, 115.
to grantor, without naming his heirs, 114, 115.
when payable, 115.
reserved out of lands held by different tenures, 116.
when it begins, 115, 116.
several in one grant, 81.
different distress for each rent, 81.
reserved on a fine, 81.
on exchange, 81.
reserved on assignment, by husband and wife, 81.
on lease, by husband, of wife's lands, 153.
to executors, when void, 81. 115.
right of re-entry waived by acceptance of, 139. 147.
apportionment of, 472.
whether belonging to the heir or to the executor, 136. 468. 470. 472.
best mode of reserving, 115.
Rent, in *surrender*, 324.
entail in, by implication, 443.
passing to reversioner by deed, 276.
out of a rent, 250, 251.
reserved on lease of tenant in tail, 278, 279.
of ecclesiastical persons, 278, 279.
how and by whom released, 310.
confirmed by recovery, 172.
devisable, 429.
de novo, by devise, 429.
suspended, 238. 241.
Rent-charge, entire, and as to its apportionment, 345.
suspended, 311.
on condition, 154.
doctrine, 229, 253.
Rent-seck, 458.
Renunciation. see *Executor*.
Repair, 169. (173, n. 33.) 174. 179, 180.
Republication, express, when necessary, 413.
after purchased land, 403. 437, 438.
by codicil, 411.
Repugnancy, in *habendum*, (88, n. 82.)
Request of performance, 377. 379. 381. 389.
Reservation. see *Rent*.
what good, 80.
difference between it and covenant, 80.
how made, 80. 115.
to heir void, 80, 81.
in what grants, 81.
whether several or entire, 81.
rent, its continuance under, 114.
to executors, 115.
on a charitable gift, 517.
Resignation, bond for, (132, n. 36.)
Resulting use, 407. see *Use*.
Reversal of a fine for error and act of parliament, difference between, (35, n. 45.)
of recovery, 49.
Reversion, passing by bargain and sale, 23. 83.
in a fine, 12.
lands in, not passing by description of lands in possession, 82. 87. 105.
doctrine relating to, 238. 245, 249.
Reversionary lease, after an estate for life, 129.
Reverter, possibility of, 101. 130.
not devisable, 120.
Revocation, power of, 64. 71. 152.
in part, (411, n. 37.)
by what means, 410, (411, n. 34.) 413. 437.
implied, (410, n. 31.) 412.
by marriage, 409.
by conveyance, 410, (411, n. 34.)

Revocation, by subsequent will or not, (410, n. 32.) 411.
by cancellation, (411, n. 38.)
by alteration of estate, 300. 412.
of circumstances, 412.
by intention, 412.
of letters of administration, 401.
construction of power of, 524, (525, n. 33.) 526. see *Use*.
power of, extinguished or not, and by what means, 526. 531.
ineffectual exercise of power of, and relief in equity, (525, n. 33.) 531.
Right, suspended, 300.
of entry not devisable, 300. see *Entry*.
heirs, 102. see *Heir*.
release of. see *Release*.
Rood of land, 96.

Sale, by consignor, 356.
to trustees, 449.
with consent, 449, (450, n. 6.)
of chattel on condition, 119.
Scintilla juris, 524. 531.
Seal, destroyed, 69.
Sealing, 53, 54. 56, 57.
by one of two partners, 57.
of will, 407.
acceptance without sealing, 177, 178.
Seigniory, 156.
barred, 34.
granted with warranty, 201.
tenancy extinguised in, 439.
released. see *Release*.
Seisin, 106. see *Disseisin*.
Separate estate of a married woman, (402, n. 9.)
Servant, taking goods of master, 482. see *Apparel*. *Service*.
hiring of, 107.
Service, 230.
for a year, 169.
Services. see *Manor*.
pass by grant of reversion, 78, 79. 105. 245, 246. 250.
Settlement, marriage, 67.
before st. Wm. III, 530.
Severance, 100.
Sheep, lease of, 179. 245.
Shelley's case, rule in, (444, n. 85.)
Sheriff, 239. *Obligation*. *Prisoner*. *Statute*.
Signing of will, what sufficient, (407, n. 24.)
doctrine of, (56, n. 24.) 60.
Soil. see *Manor*. *Trees*.
Son, word of purchase, 104.
Specialty debt, 463. see *Executor*.
Special tail. see *Tail*.
Stamp, 54. (306, n. 8.)
Staple. see *Statute*.
Statute, definition of, 353.
merchant, 352.
staple, 353.
recognizance, and how acknowledged, 353. 354, 355.
obligations to the king, 354.
double or single, 354.
requisites to a good statute, 355.
sealing, 354, 355.
wanting sealing, it may operate as an obligation, 355. 368.
money, time of payment on, 355.
what time to be entered by the clerk, &c. 355.
how executed, 356. 359.
difference between a statute merchant and staple, 358.
how discharged, 363, 364.
release of, 322.
of uses, 505.
savings in statutes, 23.
Stock, lease of, 469.
what, 179.
bequest of, 431.
Substitution of estate, 129.
Successors, 101. 443. 472. see *Corporation*. *Lease*. *Limitation*.
Suicide, forfeiture from, (404, n. 16.)
Summoneas ad warrantizandum in recovery, 40.
Supervisor, 461.
Surety, 71. 359. 374. 376.
Surrender. see *Lease*.
definition of, 300.
division of, 300.
difference between an express and implied surrender, 300.
effect of, 301.
as distinguished from *merger*, 301. 309.
does not affect derivative estates, 285, 286. 301–309.
breach of covenant, notwithstanding surrender, 301.
rent reserved to an under-lessor who surrendes, 301.
virtual by acceptance, (301, n. 3.) 307.
implied, 301. (302, n. 4.) 308.
by one of two joint-tenants, 302, 303. 305.
to one of two joint-tenants, 308, 309.
by corporation, 302, 303.
requisites to a good surrender in deed, 303, 304, 305, 306, 307, 308, 309.

Surrender by husband possessed in right of his wife, 303.
by whom and to whom a surrender may be made, 303, 304, 305, 306. 308.
may operate as a release, &c. 300. 304. 308.
livery unnecessary on surrender, 304.
stamp on, (306, n. 8.)
in what place made, (306, n. 8.)
may be of what, 306.
abandonment amounting to a surrender, 306.
subject to a condition, 307, 308.
entry by surrenderee, for what purpose necessary, 308.
how construed to enure, 308, 309.
enuring as a grant, 308, 309, 310.
may it operate as a covenant to stand seised, 91.
made to husband and wife, 306. 309.
no use will arise on a surrender in deed, 310.
of copyholds, its operation, 445.
Survivor construed *other*, 442.
Suspension, 85, 86. 365.

Tail. see *Husband. Devise.*
tenant in tail, can bind his or her share only by fine, 25.
how limited, (102, n. 10.) 103, 104.
to husband and wife, 102, 103.
limited estate in, 103, 104, 105, 106.
grant of tenant in, 106, 107.
contingent remainder in, 105.
of rent, 105.
tenant in tail, *ex provisione viri*, 279.
no merger of, 315.
Tenancy, by what words severed, 522.
Tenant, and very tenant, 331.
Tender. see *Condition.*
and refusal, 383. 385. 388. 392.
when a sufficient payment, 142.
of conveyance, 167, 168. 173. 175.
and notice, 526.
Tenement, in fines, (11. n. 55.)
in grants, 92.
in devise, 437, 438.
Tenendum, 79; 80.
Terms. see *Lease. Possibility.*
grant of, during existence of another term, 109.
to one for life with remainder, 116.
grant from a future day, 114.
what pass by, 98.
of years, 229.
Terms, as distinguished from *time*, 170.
Termini, interesse, as distinguished from the grant of the reversion, 276, 277.
what, 109. 244. 267. 269. 275. 302, 303, 304.
Tillage, 164.
Timber. see *Trees.*
sold by tenant in tail, 238. 244.
Time. see *Limitation.*
of performance of a condition, 377, 378, 379. 382. 389.
Tithes, 12. 78. 79. 89. 99, 100. 213.
pass by what devise, 447.
account and payment by executor, 483.
Title by purchase or descent, (402, n. 4.) see *Heir. Descent. Devise.*
Town or village, 92.
Toft, 95.
Trade, 132. 164. 372.
Trees. see *Wood.*
general doctrine relating to, 87. 89, 90. 94. 110, 111. 114. 211. 224. 250. 469. 471.
inheritance in, 95.
lease of trees, lessee may not cut, 95. 164.
to be taken by assignment, 286.
Treason, 187. 232. see *Felony.*
forfeiture, (28, n. 27.)
Trench, 96.
Trespass, 96. 244.
Trover, 244.
Trusts. see *Use. Cestui que Trust.*
not executed by statute of Uses, 507.
of terms, 501.
felony by *cestui que trust*, 527.
gave a power of disposition by will, 504.
no dower, though curtesy of a trust, 504. (507, n. 8.)
not liable to escheat, (507, n. 8.)
incidents to a trust, 503.
gone or suspended, 503. 506.
notice of, 503.
execution of, 504.
effect of escheat or disseisin of, 503, 504.
are what uses were, (507, n. 8.)
by implication, (507, n. 8.)
construction of, (507, n. 8.)
Trustee, a devisee, 450.
may give discharges for children's shares, when, 449.
remedy against, 527.
purchaser when, 527.
taking estate when *cestui que trust* dies without heirs, 504. 528.

Trustees, their costs, 528.
dower of trustee's wife at law, 504.
cestui que use when a trustee, 522.

Uncertainty, in fine, (11, n. 55.)
in limitation, 101. 104.
in name or description of parcels, 237. 242. 248, 249, (250, n. 44.) 251, 252. 460.
in a will, 414.
Under-lease. see *Assignment*, 266. 274.
Upper chamber, 94.
Use. see *Trusts*.
what uses may arise on a fine, 17. (36, n. 54.)
learning, where to be found, 500.
definition of, 501.
examples of, 501.
or rather trust of personal property, 501.
express, 501.
implied or resulting, 501.
in bargainee, 502. 507.
may be vested or contingent, 502.
as distinguished from a trust, 502. 517. 527.
mischiefs of uses, 504.
possession annexed to use by statute, 504, 505.
giving a rent, 504. 515.
requisites to the operation of the statute of uses, 505.
copyholds not within the statutes of uses, (505, n. 7.)
disseisin of feoffees to uses, 505, 506.
void, 506.
in perpetuity, 506.
feoffees retaining the seisin, 506.
uses on uses, 506, 507. 509, 510.
uses on uses, as distinguished from springing uses, 507. 510.
none of a lease, 506. 510. 513.
on surrender of copyhold, 507.
uses, how raised, 507.
use cannot be larger than the seisin, to supply it, 507. 516. 524.
use on a release operating by *mitter l'estate* between joint-tenants, 507.
use on a release in fee to a copyholder, 507.
no use on a release by extinguishment, 507.
no use on a surrender, 507.
in deed poll, 508.
arising by parol agreement, 508.
of fines already levied, 508.
uses arising by will, 508.
who may be feoffee to uses, 508, 509.
to parishioners, void, 509.
uses on estates tail, 510.
covenant operating as a covenant to stand seised to an use, or not, 514.
covenant operating as a bargain and sale, 511.
Use failing as to some of the limitations, for want of consideration, or not, 513.
examples of good limitations of uses, 515 516, 517.
seisin by the common law, notwithstanding a declaration of uses, 515.
shifting use, 515.
use defeated by revocation, 524, (525, n. 32. and what amounts to, 525, 526.
use defeated by proviso of *cesser*, 516. 524, 525.
express, on entail, 516.
part of limitation of estate, 516.
uses arising in fine or recovery, 20. 40. 516, 517.
contingent, 505. 509. 516. 523. 530.
contingent, by what means destroyed, 523, 524.
supported by right of entry, 524.
charitable, 517.
superstitious, 517.
evidence of uses, 517.
uses arise on what conveyance, 517, 518. 523.
results, and for what estate, 20. 509. 513. 517, 518. 520, 521, 522, 523.
use declared by husband alone of fine of husband and wife, 518.
uses declared by husband and wife, differing from former uses, 518.
resulting, on fine by husband alone of his wife's land, 522.
on fines by joint-tenants, 518.
of fine of infant, 518.
of fine already levied, must be by deed, 20. 517. 519.
how declared, 20. 518, (519, n. 22.) 521.
at what time declared, 517. 519.
declared by two instruments, 520.
uses of fine, and how varied, and at what time, 519, (520, n. 25.)
averment on uses of a fine, &c. 519, (520, n. 26.) 521.
precedent or subsequent to a fine or recovery, 519, 520.
requisites to declaration of uses, 520.
in vendee, without declaration, 521, 522, 523.
arising by reservation of rent, 521, 523.
descent not changed by resulting use, (522. n. 29.)
use never results for the period for which there is a declaration, 522, 523.
construction of uses, 522, 523.
conferring life-estate, 522, 523.
estate for life of another, 522.
estate-tail, 522.
during widowhood, 522. see *Limitations*.

Use, limitation to heir, as purchaser, taking estate for life by, 523.
suspended by disseisin of feoffees, 424.
deed operating as a conveyance at common law, or under doctrine of uses, 525.
Usury, fine void for, 19.
what, 62. see *Annuity. Mortgage. Interest.*
Utensils, 98.

Vacat, fine avoided by, 36.
Valuation of lands, 357.
Vesture, 97. 238.
Void, or voidable, 288, 289. see *Fine. Recovery. Deed. Grant. Devise.*
Voucher, in recovery, 38.
in warranty, 181.
estates barred by, 44. 46, 47. 183.
operating by release or extinguishment, 47, 48.

Wages, 478.
Wardship, 67.
Warranty, several and distinct, 15.
defence to title, 181.
summary of the law, 181.
definition of, 181.
express or implied, (181, n. 3.)
lineal, 181. (190, n. 19.) 191.
collateral, 181. 191, (192, n. 22.) 193, 194.
commencing by disseisin, 181, 182. 189. 194, 195, 196.
effect of, 182, 183.
operates by estoppel, 182.
bar with or without assets in what cases, 182. 192. 194.
title depending on, 182, 183. 192.
as differing from a release and feoffment, 182.
proceedings in, 183.
recovery in value, 183.
warrantia chartæ, what lands bound by it, 183, 184. 198.
what amounts to a warranty, (184, n. 9.) 185.
necessity of the word warrant, 69. 81. 184.
may be annexed and extend to what, (184, n. 10.) 197, 198.
in what assurances, 185.
to bind, must arise from discontinuance, 185. 187.
in law, 185, (186, n. 15.) 187.
in exchange, 185. 196. 198.
in partition, 185. 198.
in dower, 185.
Warranty, binding on issue in tail with assets, 186. 192.
who may create a good warranty, 186.
the requisites to a good warranty, 186, 187, 188.
descends to the heirs at common law, 186, 187. (200, n. 28.)
may amount to a covenant, 186.
heir bound, 185, (186, n. 15.) 187. 197.
entry to avoid bar by warranty, 188.
construed as a covenant, 163. 165.
may be limited, 188. 197.
barring by an estoppel is entire, 188.
of tenant for life, 181. 189. 192. (194, n. 23).
of wife, tenant for life, *ex provisione viri*, 189.
of husband seised in right of his wife, 189. 201.
persons coming in the post cannot take advantage of, 190. 199, 200.
what right bound by it, 190.
issue of issue, when not bound by reason of the alienation of assets, 192.
may be lineal as to one person or estate, and collateral as to another person or estate, 193, 194.
effect of warranty by disseisin, 197.
how expounded, 196.
to whom it extends, 196, 197.
joint or several, 196, 201.
extends to what, 197, 198.
who may take advantage of, or not, 198, 199.
may pass without deed, though it cannot be created without deed, 199.
necessity of privity, 198, 199.
between husband and wife, 199.
how defeated or avoided, or not, 201, 202.
release of warranty, 201, 202, 203.
discharge of warranty, 253.
divided by act of law, not by act of the party, 201, 202.
may be suspended, 202.
can be used but once, 203.
by will void, 187.
Warren, 89. 97. 231. 240.
Waste, 79. (125, n. 20.) 145. 279.
Way, (222, n. 5.)
inclusively granted, (89, n. 84.) 96.
Wife, reputed, 234.
Will and testament. see *Devise. Revocation. Republication.*
definition of, 399.
none, without an executor, 399. 406.

Will, can be but one, 399.
nuncupative, 399. (407, n. 22.) (408, n. 25.)
last will of force, 402.
latter clause in a will effectual, 402.
what estates may be created by will, 402.
of woman after contract, 403.
revoked by marriage, (403, n. 10.) 409. 413.
of married woman, 402. 411. 413, (414, n. 44.)
of infant, 403. 413, 414.
of gavelkind lands, (403, n. 11.) (406, n. 21.) (414, n. 42.)
persons who are capable or not of making a testament, 403, 404. 414.
void, or voidable, 405, 406. 408.
void, for uncertainty, 410. 412. 414, 415.
part excluded, 406.
operation of, (406, n. 19.)
after purchased lands passing by, (406, n. 19.)
proof of, 408, 409. see *Probate*.
by and before whom, 499. (501, n. 96.)
proof of, *per testes*, (409, n. 30.) 413.
testamentary paper, or not, 409.
mistake in, 412.
lost, 412.
parol evidence, when admissible, 412. 414, 415.
two wills of the same date not inconsistent, 412.
a caveat, or exception against, 413.
joint-tenants, no devisable interest, 414. see *Joint-tenant*.
misnomer, 416.
Will must be produced, to prove the title of the devisee, 416.
words passing an estate in fee simple or fee tail, 416, 417.
words passing a life estate in, 417.
use executed by will, 88. 417.
of term, 417.
warranty cannot be in a will, 418.
cancellation of one of two parts of a will, (433, n. 69.)
alteration of draft of will, (433, n. 69.)
caveat on making a will, 433, 434.
attestation of will, 434.
estate by implication, 434.
construction of will, 434.
tenant at will, 105. 267. (283, n. 23.)
Witness to a will, 409.
Wood, grant of, 94, 95. see *Trees*.
in fines, 12.
covenant to leave it in the same plight as found, 173.
Wool, 430.
Writ, execution of writ on a fine, 3. 4.
of covenant in a fine for lands in each county, 19.
of *habere facias seisinam*, 40.
ex gravi querela, 455. 458.
Writing, 76.
Wrong, personal, 452. 484.

Yard-land, 93.
Years. see *Lease*. *Term*.

THE END.

Printed by Luke Hansard & Sons,
near Lincoln's-Inn-Fields.

DL ASL CAt
Sheppard's Touchstone of commo
Stanford Law Library
3 6105 044 274 335